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1938

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	ILR 1938 L	318			40	P L R	136		40	P L R	722		1938 I T R	297	
317	40	P L R	74		176	I C	116	485	40	P L R	777		177	I C	222
	177	I C	672	430	39	Cr L J	698		178	I C	168		ILR 1938 L	477	
318	...			431	178	I C	278	486	40	P L R	233	548	ILR 1938 L	289	
320	40	P L R	12	433	177	I C	399		178	I C	601		40	P L R	69
	174	I C	789		40	P L R	441	487	40	P L R	746		177	I C	778
	39	Cr L J	486	434	177	I C	530		178	I C	289	550	40	P L R	512
321	40	P L R	2		40	P L R	651	488	40	P L R	240		ILR 1938 L	490	
322	40	P L R	32	435	177	I C	351	490	40	P L R	316		178	I C	453
	176	I C	824		40	P L R	269		177	I C	217	551	1938 I T R	385	
323	175	I C	517		ILR 1938 L	411		492	ILR 1938 L	535		40	P L R	821	
	39	Cr L J	603	437	177	I C	445	493	40	P L R	794		ILR 1938 L	551	
324	40	P L R	91	440	40	P L R	768		40	P L R	685	554	40	P L R	153
	176	I C	930	442	40	P L R	693		176	I C	731		ILR 1938 L	271	
325	ILR 1938 L	398			40	P L R	775	496	176	I C	225		178	I C	331
	40	P L R	1060	443	178	I C	292		40	P L R	788	556	40	P L R	854
326	178	I C	202		40	P L R	556		39	Cr L J	714		176	I C	666
328	...			444	ILR 1938 L	729	497		40	P L R	833		39	Cr L J	769
331	40	P L R	100		175	I C	555	499	40	P L R	867	558	40	P L R	848
333	40	P L R	146		40	P L R	650	502	178	I C	821		178	I C	436
334	40	P L R	158	445	39	Cr L J	624	503	40	P L R	193	559	40	P L R	819
336	40	P L R	73	447	40	P L R	655		177	I C	270	561	40	P L R	735
	176	I C	634		40	P L R	690	505	40	P L R	801		ILR 1938 L	542	
337	175	I C	545	448	177	I C	513	507	178	I C	799		178	I C	210
	39	Cr L J	609	451	40	P L R	763	508	40	P L R	201	562	40	P L R	937
338	40	P L R	143		40	P L R	721		177	I C	558		179	I C	171
339	40	P L R	61	452	177	I C	483	509	40	P L R	429	563	40	P L R	456
	175	I C	548		40	P L R	758		177	I C	332		177	I C	918
	39	Cr L J	621	453	177	I C	452	510	40	P L R	133	564	40	P L R	909
341	178	I C	23		40	P L R	220		177	I C	561		179	I C	60
344	ILR 1938 L	352			ILR 1938 L	435	511		40	P L R	231	566	40	P L R	528
	177	I C	539	454	177	I C	439		178	I C	197	568	40	P L R	522
	41	P L R	32	456	40	P L R	750		40	Cr L J	9		177	I C	928
345	40	P L R	20		40	P L R	692	512	40	P L R	245		ILR 1938 L	593	
	176	I C	124	457	177	I C	430	514	176	I C	410	569	40	P L R	463
	39	Cr L J	702		40	P L R	786	FB	39	Cr L J	734		177	I C	187
346	40	P L R	157	458	178	I C	270		40	P L R	813		39	Cr L J	853
	175	I C	520		40	P L R	803		ILR 1938 L	462	570	40	P L R	571	
	39	Cr L J	606	459	177	I C	410	515	40	P L R	857		178	I C	597
347	40	P L R	124		40	P L R	793		179	I C	146	571	40	P L R	591
					178	I C	195	520	40	P L R	863		178	I C	302

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	
574	40 P L R 407 178 I C 128	627	ILR 1938 L 251 177 I C 413	698	40 P L R 235 ILR 1938 L 417	784	40 P L R 631 179 I C 534	
575	40 P L R 411 177 I C 784		39 Cr L J 872 40 P L R 1025	702	ILR 1938 L 720 40 P L R 631	787	40 P L R 697 40 P L R 784	
576	40 P L R 505 177 I C 507 39 Cr L J 888	629	40 P L R 872 177 I C 707 39 Cr L J 930	706	178 I C 507 40 Cr L J 79	789	179 I C 223 40 P L R 796	
577	40 P L R 888 178 I C 504	631	177 I C 298 39 Cr L J 856	707	...	791	179 I C 368 179 I C 523	
579	40 P L R 469 177 I C 847	634	40 P L R 916 177 I C 278 39 Cr L J 851	709	40 P L R 403 179 I C 233	793	40 P L R 621 ILR 1938 L 494	
581	40 P L R 905 179 I C 251		40 P L R 870 177 I C 278 39 Cr L J 851	712	178 I C 1005	794	40 P L R 1054 40 P L R 753	
582	40 P L R 498	635	179 I C 68 40 P L R 886	718	...	795	40 P L R 805 40 P L R 787	
584	40 P L R 514 177 I C 801	638	ILR 1938 L 188 40 P L R 951	721	...	800	179 I C 364 ...	
585	40 P L R 927 178 I C 390	641	178 I C 795 40 P L R 634	723	179 I C 418	801
590	40 P L R 473		ILR 1938 L 667 40 P L R 508	725	40 P L R 712	803	40 P L R 793	
593	40 P L R 530 177 I C 879 ILR 1938 L 624	642	178 I C 551 ILR 1938 L 667	728	...	809
594	40 P L R 890 177 I C 617 39 Cr L J 907	646	ILR 1938 L 676 ...	729	178 I C 572 40 Cr L J 81	811
602	40 P L R 264	647	40 P L R 940 178 I C 939	732	...	814	40 P L R 791 178 I C 990	
604	40 P L R 972	648	40 P L R 948 179 I C 357	734	...	815
606	179 I C 110 ILR 1938 L 598	658	40 P L R 946 179 I C 58	736	...	817	40 P L R 841 179 I C 367	
608	40 P L R 409 177 I C 835	671	40 P L R 494 ILR 1938 L 586	737	178 I C 791	819	40 P L R 772	
609	40 P L R 912 178 I C 316	673	178 I C 995	739	ILR 1938 L 359	820
611	40 P L R 292 177 I C 870	675	40 P L R 959 179 I C 369	741	1938 I T R 370	823	179 I C 284	
613	40 P L R 278 177 I C 763	677	177 I C 938 40 P L R 903		41 P L R 64	824
614	ILR 1938 L 127 177 I C 339 39 Cr L J 870	680	40 P L R 967 40 P L R 567	743	179 I C 490	825
615	40 P L R 1036 178 I C 64 ILR 1938 L 589	684	178 I C 760 40 P L R 954	747	...	827
616	40 P L R 516 177 I C 781	685	ILR 1938 L 704 40 P L R 615	749	178 I C 605 40 Cr L J 84	828	40 P L R 589 179 I C 249	
618	40 P L R 935 177 I C 642 39 Cr L J 927	690	178 I C 594 40 P L R 942		1938 I T R 616	832	40 P L R 289 179 I C 336	
619	40 P L R 477	691	177 I C 975 39 Cr L J 970	751	178 I C 724	833
620	1938 I T R 534 40 P L R 913 178 I C 397	692	40 P L R 618 178 I C 848	752	40 P L R 298	834	40 P L R 399	
622	ILR 1938 L 651 40 P L R 678 ILR 1938 L 655	693	177 I C 942 177 I C 975	753	179 I C 262	836
	179 I C 397	694	39 Cr L J 970 40 P L R 618	754	178 I C 806	838	40 P L R 923	
624	178 I C 524	695	178 I C 848 40 P L R 944	757	179 I C 103	842
625	40 P L R 501 177 I C 894 39 Cr L J 960	697	40 P L R 915 178 I C 985	758	179 I C 376	846	40 P L R 757 178 I C 911	
			179 I C 165 40 P L R 595	759	41 P L R 91	848	179 I C 560 40 P L R 265	
			177 I C 1001 39 Cr L J 982	760	40 P L R 689	849	179 I C 237 1938 I T R 355	
				762	178 I C 754	850	ILR 1938 L 526 41 P L R 58	
				763	40 P L R 753	852
				765	179 I C 720	855
				766	178 I C 144	856
				767	179 I C 682	858	179 I C 320	
				768	40 P L R 716	859
				769	178 I C 632	861	40 P L R 579 ILR 1938 L 640	
				770	40 P L R 718	864	179 I C 353 1938 I T R 474	
				779	ILR 1938 L 716	865	40 P L R 672 179 I C 414	
				780	...	867	1938 I T R 625	
				781	40 P L R 670	869
					179 I C 468	877

Other Journals = All India Reporter

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ILR	AIR	ILR	AIR	ILR	AIR	ILR	AIR	ILR	AIR
1	1937 PC 292	68	1938 PO 73	103	1938 L 184	127	1938 L 614	148	1938 L 188
10	" L 721	84	" L 173	118	" " 105	129	" PC 8	155	1937 " 665
47	" " 905	97	" " 198	120	1937 " 680	140	1937 L 658	164	1938 " 211

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173	1937 L 626	305	1938 L 93	398	1938 L 925	509	1938 L 82	598	1938 L 606
183	" " 408	310	1937 " 565	403	" " 289	511	" " 71	603	" " 543
188	1938 " 641	313	1938 PC 181	411	" " 435	514	" PC 219	611	1939 " 108
193	" " 234	318	" L 313	417	" " 698	526	" L 852	619	" " 122
210	1937 " 880	332	" " 158	426	" " 530	535	" " 490	624	1938 " 598
221	" " 740	336	" " 195	435	" " 453	542	" " 561	628	" PC 266
229	" " 876	341	" " 219	439	" " 73	548	" " 533	640	" L 861
236	1938 " 251	345	" " 312	447	1937 " 805	551	" " 551	651	" " 620
240	" " 275	347	" " 260	450	1939 " 58	558	" " 241	655	" " 622
246	" " 273	352	" " 344	453	1938 PC 195	562	" " 349	652	1939 " 95
251	" " 627	359	" " 741	462	" L 514	567	1939 " 21	667	1938 " 642
258	" " 425	367	1937 " 890	477	" " 545	571	" " 73	676	" " 648
264	" " 126	374	1938 " 72	485	" " 527	582	" " 36	704	" " 686
271	" " 554	377	" " 80	490	" " 550	586	1938 " 678	716	" " 763
277	" " 482	379	" " 81	494	" " 795	589	" " 615	720	" " 702
289	" " 548	383	" PC 184	502	1937 " 859	593	" " 568	729	" " 443
296	" " 88								

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PLR	A I R	PLR	A I R	PLR	A I R	PLR	A I R	PLR	A I R
1	1938 L 216	134	1937 L 800	286	1938 L 86	509	1938 L 198	666	1937 L 780
2	" " 321	136	1938 " 429	289	" " 833	512	" " 550	667	1938 " 767
8	1937 " 782	138	" " 350	291	" " 481	514	" " 217	669	1937 " 790
10	1938 " 273	139	1937 " 804	292	" " 611	516	" " 616	670	1938 " 779
12a	" " 306	143	1938 " 338	295	" " 93	518	" " 220	672	" " 865
12b	" " 320	145	" " 312	298	" " 751	522	" " 568	676	1937 " 769
14	" " 126	146	" " 333	300	" " 99	524	" " 202	678	1938 " 622
20	" " 345	148	" " 425	303	" " 458	528	" " 566	681	" " 784
22	" " 151	153a	" " 308	305	" " 719	530	" " 593	682	" " 760
23	" " 473	153b	" " 554	308	" " 545	533	" " 234	685	" " 493
24	" " 304	157	" " 346	313	" " 463	544b	" " 584	689	" " 757
27	" " 275	158	" " 334	316	" " 490	546	" " 184	690	" " 447
29	" " 309	162	" " 303	319	" " 369	549	" " 168	692	" " 456
32	" " 322	164	" " 18	399	" " 836	556	" " 443	693	" " 440
35	1937 " 798	166	1937 " 581	401	" " 200	558	" " 204	697	" " 787
38	" " 772	179	1938 PC 65	403	" " 709	565	" " 166	709	" " 463
44	" " 562	180	" " 77	407	" " 574	567	" " 685	712	" " 725
46	" " 839	184	" L 470	409	" " 608	569	" " 214	716	" " 762
49	1938 " 807	188	" " 1	411	" " 575	571	" " 570	718	" " 763
52	1937 " 812	193	" " 503	413	" " 361	573	" " 191	720	" " 759
55	" " 842	196	" " 219	419	1937 " 937	578	" " 183	721	" " 451
57	1938 " 354	198	" " 114	422	" " 931	579	" " 861	722	" " 482
58	" " 252	201	" " 508	427	" " 578	585	" " 209	728	" " 467
59	" " 351	202	" " 360	429	1938 " 509	589	" " 832	730	" " 474
61	" " 339	206	1937 " 446	436	1937 " 620	591	" " 571	735	" " 561
64	" " 313	209	1938 " 479	441	1938 " 433	595	" " 697	738	" " 478
69	" " 548	211	1937 " 878	447	1937 " 806	598	" " 226	740	" PC 184
73	" " 836	214	1938 " 292	452	" " 766	600	" " 227	746	" L 487
74	" " 317	218	" " 366	454	" " 781	612	" " 615	746	" " 468
77	1937 " 816	220	" " 453	456	1938 " 563	615	" " 690	748	" " 460
79	1938 Pesh 3	222	" " 428	458	1937 " 828	616	" " 187	749	" " 454
82	1937 L 786	226	" " 529	462	" " 847	618	" " 692	750	" " 477
88	1938 " 311	228	" " 530	465	" " 757	619	" " 177	752	" " 758
90	" Pesh 4	231	" " 511	466	" " 826	621	" " 794	753	" " 472
91	" L 824	233	" " 486	468	1938 " 569	622	" " 173	755	" " 848
92	" " 225	235	" " 698	469	" " 579	626b	" " 163	755	" " 452
93	1937 " 771	239	" " 469	473	" " 590	631	" " 704	757	" " 796
95	1938 " 302	240	" " 488	477	" " 619	633	" " 768	758a	" " 448
97	" " 242	243	" " 525	479	1937 " 811	634	" " 642	758b	" " 34
100	" " 331	245	" " 512	481	1938 " 695	639	" " 194	763	1939 " 437
103	1937 " 794	247	" PC 73	484	" " 176	640	" " 188	767	" " 820
103	1938 " 305	253	" " 71	486	" " 211	643	" " 223	768	" " 442
110	1937 " 805	256	" L 44	490	" " 195	646	" " 161	772	" " 485
112	1938 " 218	264	" " 602	492	" " 523	650	" " 444	775	" PC 183
119	" " 355	265	" " 850	494	" " 678	651	" " 434	777	" L 461
124	" " 347	267	" " 527	498	" " 582	653	" " 465	779	" " 789
126	" " 158	269	" " 435	500	1937 " 755	655	" " 445	781	" " 457
128	" " 232	272	" " 524	501	1938 " 625	658	" " 207	784	" " 800
131	1937 " 760	273	" " 95	505	" " 576	660	" " 193	786	" " 496
133	1938 " 510	278	" " 613	506	" " 180	662	" " 179	787	
138		280	" " 49	508	" " 646	664	" " 766	788	

PLR	A I R		PLR	A I R		PLR	A I R		PLR	A I R		PLR	A I R		PLR	A I R			
789	1937	L	785	841	1938	L	819	909	1938	L	564	948	1938	L	675	1004	1938	L	198
791	1938	"	815	843	"	PC	12	912	"	"	609	951	"	"	641	1007	1937	"	905
793	"	"	459	848	"	L	558	913	"	"	620	954	"	"	686	1016	"	"	880
794	"	"	492	850	"	"	543	915	"	"	694	959	"	"	680	1021	"	PC	292
796	"	"	792	854	"	"	556	916	"	"	631	968	"	"	635	1025	1938	L	627
798	"	"	809	857	"	"	515	919	1939	"	14	972	"	"	604	1029	"	"	251
801	"	"	505	863	"	"	520	921	"	"	17	975	1939	"	18	1036	"	"	614
805	"	"	799	867	"	"	499	923	1938	"	839	976	"	"	9	1037	1937	"	565
806	"	"	534	870	"	"	634	927	"	"	585	980	"	"	38	1039	1938	"	80
818	"	"	514	872	"	"	629	934	1939	"	19	982	1938	"	260	1040	"	PC	219
815	"	"	526	876	"	PC	266	935	1938	"	618	984	"	"	72	1045	"	L	289
817	"	"	533	881	1937	L	795	937	"	"	562	986	"	"	81	1048	1937	"	859
819	"	"	559	883	1938	"	577	938	"	"	647	988	"	PC	181	1054	1938	"	795
821	"	"	551	886	"	"	638	940	"	"	671	990	1939	L	53	1057	1939	"	39
824	"	"	539	890	"	"	594	942	"	"	691	996	"	"	21	1059	"	"	58
829	"	PC	195	903	"	"	684	944	"	"	693	997	1938	"	241	1060	1938	"	325
833	"	L	497	905	"	"	581	946	"	"	677	1000	"	"	73	1064	"	"	349
837	"	PC	202	907	"	"	606												

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1	1938	M	173	92	1937	N	274	207	1938	B	33	299	1938	L	19	413	1938	B	186
2	1937	P	603	100	"	P	633	211	1937	R	528	300	"	R	15	415	"	R	68
4	"	L	104	102	"	A	755	214	1938	B	50	302	"	P	60	416	"	M	213
7	"	S	242	103	"	P	534	217	1937	R	429	308	"	C	6	417	"	O	195
10	"	S	251	105	1938	N	52	219	1938	O	81	312	"	M	172	424	"	B	193
13	"	L	101	107	1937	S	308	221	"	P	24	314	"	P	83	425	"	S	66
14	"	R	370	109	"	N	341	222	"	"	28	321	"	"	55	426	"	L	150
16	"	L	689	113	"	A	768	227	"	A	11	323	"	M	477	427a	"	N	131
18	"	A	735	114	"	R	443	228	"	M	66	325	"	P	108	427b	"	"	325
22	"	M	809	116	1938	N	74	229	1937	R	535	328	"	M	248	428	"	P	308
23	"	L	717	117	1937	R	467	230	1938	M	35	330	"	O	88	435	"	Pesh	21
24	"	M	791	118	1938	N	45	233	"	A	16	332	"	P	52	438	"	C	205
25	"	R	385	119	1937	L	561	234	1937	Pesh	99	335a	"	L	135	439	"	L	216
27	1938	M	192	120	1938	N	39	236	1938	M	29	335b	"	M	396	440	"	B	197
28a	1937	R	391	122	1937	L	802	237	1937	L	867	337	1937	Pesh	88	441	"	A	209
28b	"	L	652	123	"	S	293	239	1938	S	1	338	1938	M	460	442	"	P	185
29	"	R	398	131	"	N	335	244	"	R	17	339	1937	Pesh	86	445	"	Pesh	9
31	"	C	578	133	"	M	825	245	"	C	17	341	1938	O	95	446	"	C	222
33	"	A	664	134	"	R	469	248	"	R	45	342	"	N	316	447	"	M	233
34	"	R	407	135	"	M	808	252	1937	O	710	344	"	M	393	448	"	Pesh	5
35	"	Pesh	92	136	"	P	640	254	1938	P	12	345	"	A	102	452	"	PC	130
38	"	A	714	137	"	R	466	255	1937	R	540	349	1936	N	160	458	"	N	334
47	"	R	439	139	"	M	792	258	"	C	556	352	1938	A	112	460	"	S	63
51	"	M	711	140	"	R	452	259	1938	"	15	353	"	P	99	462	"	"	67
53	"	B	454	141	"	L	793	261	"	M	129	357	"	C	144	465	"	M	315
54	"	M	822	142	"	Pesh	101	262	1937	L	746	368	"	P	145	466	"	O	38
55	1938	N	63	144	"	M	968	264	1938	M	128	360	"	A	120	470	"	R	105
57	1937	S	303	146	"	N	293	265	"	L	31	361	"	P	131	473	"	C	255
58	1938	N	106	147	"	M	975	266	"	M	130	363a	"	A	118	474	"	S	70
59a	1937	S	304	148	"	A	785	268	"	P	1	363b	"	P	133	475	"	L	292
59b	1938	N	37	149	"	M	951	274	"	R	42	364	"	A	91	477	"	S	72
61	1937	C	652	152	"	A	754	275	"	P	66	370	1937	N	122	478	"	R	112
62	1938	N	103	153	"	M	944	277a	"	M	74	371	"	O	321	479	"	C	295
65	"	"	76	154	1938	O	80	277b	1937	R	542	374	1938	P	165	481	"	R	92
66	1937	P	652	156	1937	P	662	278a	1938	P	39	378	"	O	99	483	"	C	274
68	1938	N	110	156	1938	O	56	278b	1937	R	434	379	"	P	105	484	"	R	88
70	1937	R	431	161	"	C	51	281a	1938	M	112	380	"	"	176	486	"	L	320
72	"	N	386	181	"	P	19	281b	"	P	49	381	1937	C	334	487	"	R	114
73	"	R	460	182	1937	O	756	284	"	B	87	382	1938	P	268	488	"	L	200
75	"	N	394	187	"	R	516	285	1937	R	544	334	"	"	153	488	"	"	
78	"	P	646	190	"	C	691	286	1938	L	29	390	1937	M	755	490	"	R	109
79	"	R	401	193	"	R	504	287	"	R	25	395	1938	O	125	491	"	L	252
80	"	N	389	194	"	"	505	288	"	L	60	398	"	M	264	492	"	R	103
81	"	B	481	196	"	"	518	290	"	"	101	399	"	S	57	493	"	O	273
83	"	M	672	197	1938	B	48	292	"	C	22	401	"	Pesh	10	494	"	R	107
85	"	N	396	198	1937	R	512	293	"	L	121	403	"	R	62	495	"	B	225
86	"	L	844	200	"	"	513	294	"	S	9	405	"	N	318	499	"	R	104
88	"	B	480	203	1938	P	17	296	"	L	116	408	"	B	179	500	"	C	237
89	"	O	637	205	1937	R	536	297	"	"	122	410	"	L	176	502	"	L	260
91	"	R	474	206	1938	P	15	298	"	S	46	412	"	R	56	504	"	S	80

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506	1938 L 269	604	1938 C 361	711	1937 M 713	811	1938 P 533	917	1938 N 394
507	" S 79	606a	" L 346	712	1938 " 847	815	" N 288	922	" M 654
508	" L 268	606b	" C 415	714	" L 496	816	" M 615	925	" A 513
509	" S 73	607	" R 138	715	" M 529	818	" N 328	927	" L 618
512	" L 262	609	" L 337	716	" " 551	827	" O 183	928	" B 430
515	" S 86	610	" P 440	718	" L 473	828	" M 742	929	" O 249
517	" P 376	614	" R 181	719a	" M 550	829	" N 406	930	" L 629
518	" S 88	618	" S 97	719b	" " 535	831	" O 195	932	" M 724
523	" P 211	621	" L 339	720	" A 386	835	" C 551	933	" B 427
524	" S 103	623	" R 193	721	" P 455	838	" N 444	935	" M 910
527	" P 238	624	" L 444	723	" C 479	839	" M 567	937	" O 263
529	" R 94	625	" C 364	725	" P 352	840	" A 449	938	" M 758
531a	" P 271	626	" R 180	730	" C 527	842	" C 545	944	" R 298
531b	" R 127	627	" Pesh 18	732	" P 366	844	" L 474	950	1939 P 24
534	" L 288	630a	" O 182	734	" L 514	847	" S 151	951	1938 M 833
535	" R 97	630b	" S 108	735	" M 541	849	" O 247	952	" P 432
537	" C 216	635	" P 290	736	" S 129	851	" L 634	953	" M 710
540	" R 159	642	" R 161	737	" Pesh 24	853a	" O 216	954	" N 529
541a	" " 160	646	" L 469	738	" A 395	853b	" L 569	956a	" M 820
541b	" C 220	647	" C 409	739	" C 525	854	" O 212	956b	" A 532
543	" R 158	651	" N 235	741	" Pesh 25	856	" L 631	958	" M 815
544	" " 96	653	" L 427	743	" R 247	858	" O 218	959	" A 538
545	" S 94	654	1937 C 601	744	" Pesh 33	861	" M 743	960	" L 625
548	" A 252	656	1938 S 127	747	" N 303	862	" O 199	962	" C 692
549	" P 243	658	" L 366	751	" C 475	864a	" M 686	963	1939 O 31
551	" L 251	659	" M 784	754	" R 245	864b	" L 477	964	1938 C 625
553	" A 253	660	" N 56	756	" L 534	865	" M 721	966	" S 192
554	" P 258	663	" R 232	761	" R 281	866	" B 352	967	" L 684
559	" A 227	667	" B 303	762	" L 529	867	" M 712	968	1939 P 28
561	" R 156	668	" S 116	763	" R 278	869	" " 667	969	1938 O 623
563	" P 229	674	" C 460	763	" R 278	870	" L 614	970	" L 691
565	" R 189	677	" A 358	765	" L 526	871	" M 723	971	" A 534
566	" S 100	681	" S 113	767	" R 242	872	" L 627	974	" O 638
569	" C 416	684a	" C 439	768	" P 358	875	" M 595	975	" R 295
570	" A 220	684b	" B 315	769	" L 556	878	" A 517	976	" S 190
571	" R 115	685	" M 536	771	" R 282	879	" M 659	978	" A 536
575	" B 282	686	" S 141	774	" P 543	881	" S 164	980a	1939 P 27
576	" R 198	687a	" M 392	775	" L 523	886	" M 714	980b	1938 M 998
578	" B 279	687b	" C 440	776	" R 257	887	" P 590	981	" N 433
580	" M 464	689	" R 219	778	" P 369	888	" L 576	982	" L 697
581	" R 177	691	" C 451	781	" L 543	889	" O 233	984	" M 879
584	" N 297	692	" R 220	784	" R 243	890	" S 171	985	" R 350
585	" M 490	695	" L 355	785	" P 518	894	" M 675	987	" M 832
587	" R 200	697	" R 228	789	" S 150	895	" N 445	988	" O 613
588	" M 482	698	" L 429	791a	" N 512	895	" M 591	991	" M 821
590	" L 425	700	" N 365	791b	" C 522	898	" M 591	992	" O 583
592	" R 194	701	" R 223	792	" B 338	901	" " 726	993	" M 656
595	" M 448	702	" L 345	795	" M 613	903	" B 419	996	" S 224
596	" C 258	704	" R 209	796	" P 403	905	" M 709	997	1939 P 35
599	" L 428	705	" M 537	805	" S 149	906	" " 653	1002	" O 16
600	" M 508	707a	" R 218	807	" N 465	907a	" " 640	1003	1938 M 705
601	" C 399	707b	" M 524	808	" A 440	907b	" L 594	1005	1939 O 35
603	" L 323	708	" R 229	810	" N 448	916	" M 715	1006	1938 M 806

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6	" P 43	33b	" M 675	65	" C 51	129	" P 37	155	" N 101
7	1937 N 411	36	1938 B 20	85	" N 142	130	" A 22	157	" A 6
10	1938 O 87	40	1937 S 306	87	" R 17	133	" P 8	160	1937 R 477
11	" Pesh 3	42	1938 M 98	90	1937 M 263	135	" R 42	165	" L 644
12	" P 39	44	" N 42	92	" R 540	136	" A 47	169	" M 660
13	" B 87	48	1937 R 437	94	1938 " 45	137	" P 11	175	" L 259
14	" M 129	50	1938 A 14	98	" N 14	138	1937 C 415	180	1938 A 17
15	" PC 67	51	1937 N 305	100	" S 6	140	1938 A 20	183	1937 O 452
19	" " 91	55	" O 521	103	" N 89	143	" M 59	185	" L 404
26	" M 130	57	" L 419	105	1937 L 746	144	1937 R 542	189	1938 P 55
27	1937 R 434	58	1938 Pesh 1	107	1938 P 1	145a	1938 M 128	192	1937 L 397
30	1938 L 31	60	1937 M 237	113	" B 23	145b	" N 185	194	" M 599
31	" M 52	62	" S 317	123	" P 41	147	1937 M 438	198	" L 360
		63	" C 556	124	1937 N 132				

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205	1938	B	44	356	1938	A	62	514	1937	L	668	671	1937	M	785	812	1938	C	171
211	"	L	29	357	1937	L	369	515	"	M	810	672	"	Pesh	88	813	1937	Pesh	81
212	"	R	25	358	"	O	371	516	"	C	730	673	1938	B	155	814	"	L	563
213a	"	M	112	360	1938	A	64	518	"	L	862	676	"	A	1	816	1938	C	166
213b	1937	R	544	361	1937	L	382	519	"	M	791	678	"	S	48	817	"	B	97
214	"	L	639	362	"	R	359	520	"	L	408	679	1937	L	601	828	"	C	1
215	"	N	391	363	"	M	280	522	1938	B	93	680	"	N	281	833	"	P	153
218	"	L	393	365	"	L	380	524	1937	M	945	684	"	L	435	838	"	A	91
219	"	M	112	367	1938	B	63	527	"	L	671	686	"	C	577	844	1937	N	122
220	"	L	386	369	"	N	156	529	"	"	636	687	"	L	698	845	"	L	542
222	1938	S	16	373	"	B	68	530	1938	C	12	689	"	M	961	846	"	C	718
223	"	M	74	375	1937	M	555	531	1937	L	441	690	"	R	459	848	"	L	319
224	1937	R	490	376	1938	B	84	533	"	M	789	693	"	M	878	849	1938	P	76
228	1938	P	10	377	1937	R	363	534	"	"	806	694	"	L	121	853	"	A	69
229	1937	C	422	379	"	L	387	535	1938	S	18	698	"	Pesh	86	857	"	C	34
230	1938	P	49	380	1938	S	37	537	1937	M	846	699	"	M	731	860	"	P	263
233	1937	M	681	381	1937	M	327	539	"	L	703	704	"	Pesh	82	862	1937	S	312
237	1938	P	88	385	1938	A	112	540	"	C	587	705	"	M	823	865	1938	O	107
238	1937	R	455	386	"	O	95	545	1938	B	110	707	"	C	485	868	"	A	66
242	1938	P	40	386	1937	M	362	545	1937	N	268	710	"	L	322	871	"	N	182
244	1937	M	769	389	"	L	383	548	"	M	811	711	"	C	375	873	1937	R	531
249	1938	P	66	391	"	C	478	551	"	C	545	712	"	L	657	875	1938	A	59
251	1937	M	785	394	1938	M	393	553	1938	B	51	714	1938	B	77	877	"	N	281
256	1938	P	42	395	"	B	65	561	"	"	90	718	"	N	49	880	"	O	106
257	1937	N	413	398	1937	C	377	563	"	N	193	719	1937	Pesh	83	881	1937	C	321
259	1938	P	7	401	1938	S	45	565	1937	R	421	721	1938	P	94	884	1938	A	55
260	"	O	77	403	"	B	69	572	1938	N	87	722	1937	M	813	885	1937	C	331
263	1937	C	765	404	1937	C	417	574	"	S	81	724	1938	P	81	887	"	L	409
266	1938	N	144	406	"	R	357	576	1937	L	298	727	"	B	91	888	"	C	327
267	"	O	94	407	1938	S	11	578	"	C	636	729	"	A	98	891	1938	B	132
269	"	L	60	412	"	PC	98	579	"	M	721	731	1937	L	288	894	1937	L	204
271	"	O	90	417	"	M	396	584	"	C	581	732	1938	A	118	895	1938	A	56
272	1937	N	416	418	"	P	60	586	"	M	819	733	1937	L	495	896	1937	O	333
273	"	R	365	424	"	M	402	589	"	L	194	734	1938	A	120	897	1938	A	52
275	"	C	727	425	"	A	74	590	"	C	669	736	"	PC	121	898a	"	P	287
277	"	L	353	427	1937	O	515	591	1938	S	24	738	"	P	145	898b	"	C	20
284	1938	S	36	428	1938	A	89	598	1937	C	631	740	1937	L	464	899	"	N	131
285	1937	M	667	429	1937	C	423	599	1938	P	71	742	1938	P	99	900	1937	C	324
289	1938	O	91	430	1938	B	86	601	1937	L	752	746	1937	N	326	903	"	L	321
292	"	P	44	431	1937	C	381	602	"	C	695	747	1938	P	131	904	1938	P	299
296	"	N	54	432	1938	P	83	604	"	R	408	748	1937	L	680	906	1937	C	336
299	"	R	15	439	1937	O	343	608	"	M	786	750	1938	P	133	909	"	R	400
300	1937	L	368	443	"	R	360	609	1938	P	95	751a	"	"	176	910	1938	B	146
302	"	R	472	444	"	L	389	610	"	O	97	751b	"	B	96	912	1937	L	506
303	1938	O	86	448	1938	M	460	612	"	PC	110	753	1937	L	335	913	1938	A	76
306	1937	"	516	450	"	"	477	615	"	P	79	756	1938	P	105	914	1937	L	289
306	1938	L	121	452a	1937	R	399	616	"	O	98	758	1937	L	570	915	"	C	334
307	1937	M	303	452b	"	M	94	617	1937	R	463	769	1938	P	165	916	1938	A	44
311	"	C	654	453	"	O	313	620	1938	N	316	763	"	PC	118	918	1937	L	618
313	1938	M	70	455	1938	M	248	622	1937	C	645	766	1937	L	410	919	1938	B	89
315	"	L	101	457	"	S	20	625	1938	PC	113	768	"	M	976	920	"	A	119
317	"	M	172	461	"	A	78	631	"	O	101	769	"	R	494	921	1937	C	740
318	"	C	22	463	"	N	13	633	1937	C	565	772	1938	PC	123	922	1938	A	80
319	1937	M	586	464	1937	R	508	634	1936	N	160	779	1937	L	599	924	1937	M	967
321	1938	L	116	468	"	M	84	639	1938	A	29	781	1938	M	30	925	1938	A	126
322	"	S	46	475	1938	O	6	642	"	O	99	783	"	B	75	926	1937	R	473
324	"	L	19	479	"	P	69	643	"	P	97	785	"	C	144	927	1938	L	113
325	"	S	9	481	1937	C	746	644	"	A	63	786a	"	P	272	928	"	P	161
327	1937	L	480	482	1938	B	41	646	1937	Pesh	85	786b	"	S	33	930	"	S	88
329	1938	N	122	484	"	P	96	648	1938	O	100	790	1937	R	475	937	1937	L	324
333	1937	M	282	486	1937	C	319	650	1938	A	65	800	1938	N	202	941	1938	A	132
334	"	C	483	486	1938	P	68	651	"	B	85	801	"	B	111	942	1937	R	524
336	"	R	314	487	1937	L	685	652	"	A	86	802	1937	R	519	943	1938	N	186
337	1938	A	85	488	1938	B	10	653	1937	O	526	804	1938	B	83	945	1937	C	745
339	"	O	88	489	1938	P	52	654	1938	A	53	806	"	"	158	946	"	L	459
341	1937	O	658	497	1937	M	948	655	1937	M	918	807	1937	L	286	950	1938	N	148
344	1938	A	75	498	"	L	347	656	1938	A	102	808	1938	B	159	952	"	L	18
345	1937	R	378	499	1938	P	108	667	"	B	81	809	"	C	169	953	1937	"	755
347	"	M	274	502	"	B	1	669	"	A	49	810	1937	R	526	954	"	R	534

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955	1938 M 246	971	1937 L 492	986	1938 M 834	993	1937 L 468	1001	1937 M 755
956	" O 112	977	" " 477	988	" P 65	996	" C 499	1006	" R 503
963	" B 125	980	1938 O 103	989	1937 M 858	998	1938 M 148	1007	" L 241
970	" M 384	983	" P 301	991	1938 O 110	1000	1937 L 494	1008	1938 M 264

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1	1938 PC 130	147	1938 P 104	304	1938 A 165	452	1938 P 323	597	1938 N 46
7	1937 N 402	148	" N 540	306	1937 L 257	454	" C 205	599	" M 102
12	" C 557	152	" P 137	307	1938 A 163	455	" P 170	603	" R 74
14	" L 764	154	1937 C 535	309	" M 320	459	" M 353	605	" A 39
17	1938 M 145	156	1938 P 383	310	1937 L 268	463	" P 162	607	" O 122
18	1937 R 507	157	" S 49	311	1938 A 147	465	" A 145	612	" C 78
19	" N 410	159	" P 330	314	1937 L 255	466	" B 186	615	" B 173
20	" M 763	161	" R 69	315	1938 A 115	469	1937 L 305	621	" N 24
21	" L 276	163	1937 C 542	316	" B 168	470	1938 A 136	627	" P 118
22	" M 764	166	" M 970	320	1937 L 263	474	" B 196	629	" Pesh 17
24	1938 B 37	168	1938 P 375	321	" N 143	475	" R 38	630	" P 321
28	1937 M 760	169	" R 49	325	1938 M 171	476	" A 129	632	" C 71
31	" C 656	172	" S 50	326	" A 146	478	" B 179	635	" P 185
33	" L 493	176	1937 L 258	327	1937 B 493	480	" M 142	638	" M 157
34	1938 P 130	177	" C 735	328	" L 116	481	" A 124	642	" P 164
35	1937 R 522	179	" N 314	330	1938 A 121	483	1937 C 523	643	" B 137
36	1938 C 125	181	" M 849	332	1937 L 270	485	" L 277	651	" A 182
39	1937 R 525	184	" C 547	334	1938 S 59	488	1938 C 148	657	" C 74
40	1938 P 125	186	1938 R 43	338	" R 56	490	" R 53	658	" B 207
42	1937 N 397	188	" B 115	340	1937 C 753	491	" M 352	659	" A 153
44	1938 M 276	193	" P 92	342	1938 R 59	492	" B 197	663	" R 23
47	" PC 136	195	1937 M 895	344	" Pesh 9	493	" M 357	665	1937 M 840
50	" A 106	197	1938 P 324	345	1937 C 717	497	" S 63	668	" L 297
51	" C 23	199	1937 M 862	347	" L 280	499	" A 151	669	1938 M 253
53	" A 130	200	1938 P 140	351	" N 270	501	1937 C 487	671	" A 195
54	1937 L 310	201	" N 1	355	1933 P 75	503	1938 R 21	673	1937 C 551
55	1938 A 113	207	" P 113	356	1937 L 295	505	" A 158	678	1938 Pesh 18
58	" C 10	211	" N 134	358	1938 P 127	510	" N 334	681	" M 456
60	" A 108	218	" P 335	361	" B 161	511	" C 150	682	1937 L 273
61	1937 N 226	220	1937 C 532	367	" P 116	513	" " 195	685	1938 S 70
62	1938 A 82	223	1938 R 40	369	" O 125	520	" B 198	687	1937 L 292
65	1937 L 316	226	1937 L 665	372	" P 134	521	" S 66	690	" " 445
66	1938 A 128	229	1938 M 180	374	" N 180	522	1937 C 738	691	" R 537
67	" B 148	233	" Pesh 14	376	" M 317	523	1938 N 325	692	" L 313
73	" A 109	234	1937 O 705	378	" O 119	524	" P 308	694	1938 S 67
75	" B 134	239	" L 818	382a	" P 90	531	" Pesh 21	697	1937 L 323
78	" A 57	240	" R 523	382b	1937 N 299	534	" B 199	698	" C 703
80	1937 O 748	241	1938 A 157	385	1938 P 136	540	1937 C 490	700	" L 455
82	1938 A 100	243	" N 191	386	" N 318	542	1938 S 72	702	1938 A 221
84	" N 220	245	" A 167	388	" P 147	543	1937 L 285	708	1937 L 449
86	" A 134	247	1937 L 794	390	1937 R 543	545	1938 PC 159	710	1938 P 73
88	1937 O 763	248	1938 M 213	391	1938 P 143	550	" O 139	712	1937 L 290
90	" N 316	249	" A 131	393	" C 222	551	" PC 165	714	1938 O 127
91	" C 603	250	" M 242	394	" O 135	556	" A 209	722	1937 L 437
106	1938 A 50	254	" A 116	397	" P 149	557	1937 L 266	725	1938 R 26
108	1937 O 619	256	" B 113	398	" N 249	558	1938 R 51	734	1937 L 315
113	1938 " 31	258	1937 L 642	400	" R 68	560	" S 73	736	1938 O 162
116	" B 121	260	1938 R 55	401	1937 N 354	564	" PC 152	738	" A 170
120	1937 L 317	261	1937 L 809	418	1938 P 57	571	1937 L 306	750	1937 L 308
121	" R 506	262	1938 M 1	420	" L 176	572	1938 S 76	751	" " 480
122	" O 559	265	1937 L 758	421	" R 67	574	1937 L 490	752	1938 P 362
125	" M 644	267	" N 310	422	" L 216	576	1938 C 191	756	" O 43
126	" L 311	268	1938 R 68	423	" M 360	577	" M 377	761	1937 L 346
127	1938 M 233	270	" M 117	427	" B 171	580	" P 159	762	1938 N 80
130	" P 326	276	" " 313	428	" M 349	582	1937 N 334	766	" O 154
134	1937 C 492	277	" L 234	431	" L 150	583	1938 P 124	769	" P 120
136	" L 284	283	" P 174	433	" A 144	584	1937 C 671	773	" B 231
137	1938 Pesh 10	285	1937 L 125	434	" M 342	585	1938 P 139	776	" M 315
139	1937 L 401	287	1938 P 91	439	" A 141	587	" M 262	779	" P 180
140	1938 S 54	288	" PC 139	442	" R 62	588	" P 141	780	" B 225
142	1937 L 714	292	" A 188	445	" A 110	589	" C 162	784	" M 226
143	" R 471	295	" Pesh 12	447	" P 319	591	" B 195	785	" O 38
144	1938 P 378	298	" A 150	448	" A 135	592	" P 129	789	" L 320
145	" S 57	299	1937 L 272	449	" Pesh 5	593	" B 182	789	" L 320

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790	1938	C	172	843	1938	O	152	887	1937	C	649	932	1937	L	785	964	1937	R	521
794	"	R	76	845	"	C	273	890	1938	A	197	933	"	"	784	965	"	L	772
799	"	M	146	846	1937	L	609	891	"	N	183	934	1938	M	256	970	"	R	497
801	1937	L	849	847	"	"	580	892	"	A	198	935	1937	L	760	972	1938	C	254
803	1938	C	295	849a	1938	"	252	893	1937	L	761	936	"	C	570	973	"	L	268
804	"	L	292	849b	"	N	7	895	1938	N	162	939	"	L	483	974	"	C	237
806	1937	M	861	855	"	P	177	897	"	A	191	940	1938	O	137	977	"	PC	169
808	1938	C	274	857	1937	L	568	898	1937	L	615	942	1937	L	578	983	"	M	241
809	"	B	188	860	1938	R	103	900	1938	A	206	944	1938	B	215	984	"	P	211
815	"	Pesh	15	861	"	A	220	901	"	O	171	945	1937	L	566	985	"	B	214
817	"	C	241	862	1937	L	592	905	"	B	241	947	1938	R	92	986	"	A	199
820	"	B	206	863	1938	R	11	914	"	A	208	949	"	L	260	989	"	L	262
821	1937	L	350	867	"	PC	183	915	1937	R	499	950	"	C	294	991a	1937	N	195
823	1938	C	255	868	"	"	181	920	1938	S	79	951	"	M	218	991b	1938	M	67
824	"	R	105	870	"	"	184	921a	"	A	212	952	"	R	114	992	"	L	293
827	1937	L	581	878a	"	C	235	921b	1937	L	332	953	1937	L	782	993a	1937	"	564
834	1938	P	179	878b	1937	L	304	925	1938	A	215	954	1938	B	212	993b	1938	O	175
835	"	S	80	879	1938	C	240	926	1937	L	781	956	1937	L	766	1001	1938	P	196
837	1937	L	312	880	"	"	176	928	1938	M	77	958	1938	R	83	1004	"	B	223
838	1938	M	224	891	"	L	200	929	1937	L	769	960	"	M	252	1005	"	P	189
839	"	R	109	892	"	A	201	930	"	"	565	961	"	L	269	1006	1937	C	454
841	"	M	321	885	"	R	107	931	1938	R	104	962	"	N	203	1007	1938	P	204
842	"	R	112	886	"	A	193												

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1	1938	PC 175	91	1938	P 181	176	1938	P 271	291	1938	B 234	416	1938	M 464
7	1937	L 558	92	1937	L 805	177	"	C 187	296	1937	L 549	417	"	" 482
9	1938	S 88	93	1938	B 210	178	"	PC 143	297	1938	A 232	418	"	R 115
15a	1937	L 871	96	"	L 288	188	"	C 18	300	"	P 258	422	"	M 490
15b	"	" 791	97	1937	" 900	190	"	B 228	305	1937	M 864	424	1937	L 940
16	1938	" 96	99	1938	S 94	193	"	C 220	306	1938	P 225	426	1938	M 111
17	1937	" 812	103	1937	R 470	194	"	P 199	309	"	M 214	427	"	B 253
18	"	R 427	104	1938	B 217	196	"	C 298	310	"	A 254	430	"	N 216
20	1938	A 213	105	"	R 86	200	"	B 238	312	1937	L 778	434	"	E 250
21	"	L 301	106	"	L 128	202	"	P 220	313	1938	A 304	437	1937	M 801
22	"	M 176	107	"	N 210	204	"	C 193	314	"	L 71	440	1938	L 30
23	1937	L 777	109	"	L 43	206	"	R 149	315	"	C 234	441	"	M 212
24	1938	M 75	110	"	P 238	208	"	M 232	316	"	P 396	442	"	R 181
26	1937	L 915	112	"	B 224	209	"	C 304	318	1937	L 797	446	"	C 422
27	1938	S 86	113	"	C 225	214	"	S 82	319	"	" 416	447	1937	L 433
29	"	L 248	116	"	S 100	218	"	P 394	320	"	" 500	449	1938	PC 198
32	"	O 140	120	"	P 216	220	"	M 263	324	1938	S 97	454	"	" 202
39	1937	L 790	124	"	R 159	221	"	B 209	327	"	PC 191	457	"	" 223
40	1938	N 239	125	1937	M 960	222	"	R 127	332	"	" 189	459	"	" 195
42	"	L 295	126	1938	R 160	225	"	C 163	334	1937	L 937	461	"	S 127
43	"	B 222	127	"	C 192	227	"	A 293	335	1938	P 229	463	"	P 236
44	1937	L 780	128	"	" 180	231	1937	M 797	337	"	N 18	465	"	R 177
45	1938	P 188	130	"	A 227	233	1938	A 252	342	"	P 215	468	"	P 231
46	1937	L 303	133	"	R 97	234	"	N 297	343	"	M 32	470	"	M 435
47	1938	P 195	136	"	A 210	235	"	A 253	345	"	R 156	473	"	P 194
48	"	R 96	138	1937	L 428	236	1937	M 964	347	"	P 150	474	"	M 189
49	"	P 376	140	1938	A 204	238	1938	A 290	350	"	R 198	475	"	P 391
50	"	O 156	142	"	S 106	241	"	" 297	352	"	B 279	476	"	N 119
56	"	L 294	144	"	C 216	246	1937	M 638	354	"	P 205	480	1937	L 658
57	"	S 103	147	1937	L 669	247	1938	C 206	357	"	R 200	482	1938	P 431
59	1937	L 402	149	1938	N 65	252	"	" 202	358	"	B 282	484	"	M 438
61	1938	P 379	153	1937	L 800	254	"	L 208	360	"	R 189	486	"	P 240
68	"	O 146	154	1938	M 211	255	"	R 90	361	"	B 257	488	"	R 194
68	"	P 377	155	"	L 251	256	"	P 212	382	1937	L 795	491	"	M 448
70	"	B 218	156	"	R 158	259	"	O 182	384	1938	N 253	492	"	L 64
73	1937	O 361	158	1937	M 962	260	"	L 138	385	1937	A 148	493	"	M 174
75	1938	P 202	159	"	N 302	261	"	C 302	394	"	L 942	494	"	N 68
76	1937	L 859	161	1938	O 184	263	"	A 242	397	1938	A 88	498	"	R 202
78	1938	P 880	163	1937	L 395	273	"	P 243	398	"	M 420	501	"	P 235
81	"	L 94	165	1938	P 222	275	"	R 130	400	"	L 16	502	"	M 508
82	1937	" 806	167	"	C 218	279	"	P 189	401	"	M 441	503	"	L 425
86	1938	P 192	169	"	O 169	283	1937	L 872	405	1937	L 425	505	"	P 209
87	"	L 299	172	"	C 297	284	1938	C 287	408	1938	R 204	507	1937	M 940
89	"	P 203	173	"	P 398	287	"	R 151	409	"	C 258	508	1938	B 288
90	1937	L 842	175	"	R 94	290	"	M 151	412	"	L 296	509	"	C 223

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510	1937 L 814	567	1937 L 934	665	1938 A 321	766	1938 M 5	869	1937 R 538
512	1938 R 180	568	" M 953	684	" S 124	767	" " 41	870	" L 839
513	1937 M 848	572	" L 649	686	" L 14	769	" PC 219	872	" C 601
514	1938 C 361	575	1938 M 178	689	" " 33	772	" " 216	875	1938 A 276
515	" R 138	577	1937 L 798	691	" N 398	775	" " 210	889	" M 68
517	" L 323	578	1938 C 308	692	1937 L 892	781	" A 356	890	1937 L 938
518	" B 284	586	" A 308	693	1938 N 195	783	" P 278	891	1938 B 301
520	" L 346	588	" L 99	696	" P 234	786	" R 1	892	1937 C 667
521	" C 416	590	" A 256	697	" C 276	795	" N 365	894	" L 751
522	" L 428	593	" M 132	698	" P 288	797	" L 366	895	" C 407
523	" C 399	594	" A 345	699	" L 361	799a	" C 439	896	1938 M 784
525	" L 95	601	1937 L 738	704	" M 153	799b	" M 143	897	" N 173
526	" N 247	603	1938 A 314	705	1937 L 742	801	" L 123	899	" S 113
528	" B 281	605	1937 L 890	708	1938 O 165	804	" R 185	902	" A 316
529	" C 364	607	1938 A 263	712	" C 157	808	1937 L 849	903	" C 93
531	" P 440	610	" C 284	716	" P 290	811	1938 M 185	911	" N 458
535	1937 C 728	613	" A 302	722	" C 409	814	1937 L 733	912	" C 401
536	1939 N 4	615	" N 235	726	" R 35	818	1938 M 459	913	" M 69
537	1938 C 415	618	" A 229	729	1937 M 973	819	" L 35	915	" R 232
538	1937 L 801	620	" S 108	731	1938 C 281	823	1937 M 876	919	" P 289
540	1938 B 286	625	1937 M 894	732	" S 122	824	1938 L 1	920	" C 290
542	1937 L 710	627	" L 878	734	" L 93	827	" M 144	924	" P 237
543	1938 M 175	629	1938 P 228	735	" M 33	828	" L 49	925	1937 M 804
544	" L 427	630	" L 196	738	" " 209	831	" P 242	927	" L 767
545	" " 337	632	" P 263	739	1937 L 905	832	" L 86	929	" C 625
547	" R 193	634	1937 L 894	745	1938 C 275	834	" S 116	935	1938 N 56
548	" L 339	636	1938 P 280	746	1937 L 626	840	1937 L 931	938	" A 341
550	" R 84	637	1937 L 740	749	" M 872	843	1938 B 289	939	" B 295
552	" A 272	639	1938 R 161	751	" L 828	846	" L 117	943	" P 297
555	" L 444	644	" L 44	753	1938 N 376	846	" " 469	945	" L 369
556	" A 217	649	" N 221	755	1937 L 920	850	" " 96	1001	" B 315
558	" P 401	652	1937 L 753	759	" " 912	851	" M 96	1002	" M 539
561	" N 237	655	1938 P 270	760	1938 M 6	853	1937 L 757	1005	" L 246
563	" P 265	657	" PC 205	761	" N 411	854	1938 P 245	1007	" P 266
564	1937 L 792	662	" O 183	763	" M 239	866	" B 291		
566	1938 P 293	664	1937 L 771	765	" B 303				

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1	1938 PC 228	108	1938 C 440	185	1938 M 535	288	1937 C 680	376	1938 A 377
2	" " 230	110	" A 358	186	" R 223	294	" L 884	380	" O 511
5	" " 225	114	" C 243	187	" B 304	300	1938 M 141	386	" A 382
9	1937 M 835	116	" L 429	191	" C 129	302	1937 L 924	391	" M 551
14	1938 Pesh 30	118	" A 266	199	" R 209	304	" C 593	393	" A 388
15	" PC 232	124	" L 345	200	1937 C 595	306	" L 863	395	" M 847
22	1937 L 897	126	" C 451	206	" L 926	309	1938 M 43	397	" A 386
26	1938 M 92	127	" M 537	209	1938 P 273	312	" Pesh 32	398	" B 316
30	1937 L 816	129	" P 281	212	" C 25	314	1937 L 916	401	" A 390
32	1938 Pesh 27	134	" R 87	217	" R 228	315	1938 N 152	402	" M 100
33	" N 233	135	" A 342	218	1937 M 843	319	" Pesh 38	404	" A 414
35	" P 479	138	" M 536	221	" C 643	320	" M 495	406	" Pesh 25
40	" M 392	139	" A 362	223	1938 Pesh 39	321	" " 19	408	" A 367
41	" C 97	140	" R 176	224	" R 218	325	" A 395	410	" L 514
48	" M 461	141	" A 305	225a	" L 496	326	1937 L 911	412	" A 412
49	" P 315	144	1937 M 713	225b	1937 M 842	327	1938 M 27	415	1937 N 322
54	1937 C 661	145	1938 B 311	226	1938 A 396	329	1937 L 919	418	" C 697
57	1938 N 30	149	" M 524	242	" R 81	330	" C 718	423	" M 852
65	1937 L 370	150	" R 220	245	" B 329	334	1938 A 374	429	" O 537
75	1938 P 467	152	" B 309	247	" M 47	336	1937 C 632	433	1938 PC 243
76	" B 298	155	1937 N 376	252	" L 479	340	1938 Pesh 31	436	" A 482
79	" N 321	158	1938 R 18	254	" B 320	341	1937 C 574	437	" C 182
81	" A 364	161	" B 318	255	" L 225	344	1938 M 115	441	" A 443
84	" M 73	163	" N 504	256	" M 550	346	1937 N 407	444	1937 M 714
85	" A 259	166	" C 236	257	" N 84	348	" C 528	445	1938 N 267
89	" L 355	167	" A 310	260	" P 455	352	" L 851	447	" Pesh 24
91	" A 285	171	1937 L 876	262	1937 L 786	359	" M 718	449	" O 111
98	" S 141	173	1938 M 81	266	1938 R 229	361	" C 732	451	" R 278
99	" A 353	178	1937 L 880	272a	" P 275	365	1938 S 129	453	" B 321
108	" R 219	182	1938 M 529	272b	" M 541	366	" R 141	456	" C 475
104	" C 460	183	1937 C 665	273	" L 473	369	" A 369	459	" L 807
107	" A 363				" P 337	374	" M 57		

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460	1938 R 245	596	1938 L 308	693	1938 N 399	784	1938 N 448	890	1938 PC 250
462	" P 358	597	" R 99	694	" R 257	785	" A 440	892	" P 388
464	" L 303	600	1937 M 717	695	" C 81	787	" P 403	894	1937 L 635
465	" N 303	601	1938 R 260	703	" R 243	797	" A 447	895	1938 M 502
469	" R 205	602	1937 C 686	704	" C 429	799	" R 216	896	" P 385
471	" Pesh 33	607	1938 " 521	705	" S 150	801	" L 55	898	" PC 266
474	1937 C 507	608	" R 258	706	" C 117	806	" M 799	902	" P 390
477	1938 M 13	609	" Pesh 36	709	" S 157	808	" N 288	903	" O 192
483	" A 391	611	" M 199	712	" C 320	809	" M 255	906	" PC 259
486	" Pesh 28	614	" R 261	713	" M 234	810	" C 351	909	" R 71
488	" A 416	616	" C 448	715	" P 369	811	" R 119	913	" C 48
490	" S 130	617	" M 236	719	" C 104	813	" L 69	916	1937 M 767
492	" A 418	619	" A 437	725	" P 543	815	" M 615	919	1938 L 10
497	" L 534	623	" N 442	726	" L 302	816	" C 352	920	1937 M 879
502	" A 431	625	" A 434	728	" N 338	817	" B 350	923	1938 R 65
503	" S 142	628	" M 78	731	" L 493	818	" R 113	925	" L 273
505	" A 426	631	" R 125	733	" M 202	820	" N 465	927	" C 194
508	" R 247	632	" M 283	736	" N 188	821	" M 388	928	" M 645
509	" A 423	634	" L 336	738	" M 206	823	" C 463	929	" R 108
512	" R 140	635	" M 154	740	" P 518	824	" L 322	930	" L 324
514	" A 375	638	" C 477	745	" C 524	825	" M 217	931	1937 M 897
515	1937 C 720	639	" M 133	746	" L 304	826	" S 153	936	" N 338
523	1938 A 429	642	" B 325	747	" M 25	830	" B 344	939	" M 826
525	" C 525	646	" M 55	749	" C 523	832	" C 186	943	1938 A 456
526	" R 207	648	" L 529	750	" M 53	839	" B 338	948	" O 195
528	1937 M 874	649	" M 225	751	" L 306	842	" C 278	952	" N 241
530	1938 P 352	651	" C 447	752	" R 288	846	" L 312	958	" O 190
535	" M 8	652	" M 177	753	" M 113	847	" C 75	960	" A 449
541	" P 368	654	" L 526	755	" N 512	849	" P 533	962	" B 341
542	" M 136	655	" P 532	756	" B 351	853	" N 328	964	" M 215
547	" A 446	657	" PC 270	757	" M 87	862	" P 558	966	" S 145
549	" S 132	668	" N 289	760	" B 278	863	" S 151	970	" B 345
558	" P 366	666	" L 556	761	" C 446	865	" R 280	972	" C 356
560	" C 479	667	" R 242	762	" L 275	866	" N 406	973	" M 590
562	" P 333	669	" L 523	763	" M 567	867	1937 M 957	974	" B 336
564	" M 85	670	" R 281	764	" L 80	870	1938 P 400	976	" M 161
566	" P 372	671	" C 188	765	" R 121	872	" M 280	979	" PC 238
569	" R 111	675	" N 254	767	" S 149	874	" A 451	983	1937 M 799
570	" P 359	677	" C 522	768	" M 613	875	" M 589	985	1938 N 444
572	" C 527	678	" L 543	769	" PC 252	876	" P 395	986	1937 M 869
574	" M 164	681	" C 336	771	" A 464	877	" M 463	986	1938 C 151
580	1937 C 741	682	" S 144	773	" PC 276	879a	" A 466	990	1937 M 922
584	1938 M 90	688	" R 282	774	" A 471	879b	" M 742	995	" " 816
586	" B 331	686	" N 413	777	1937 M 831	881	" PC 248	1003	" " 160
590	1937 M 709	688	" M 190	779	1938 L 21	883	" " 245	1006	1938 C 160
592	1938 " 124	691	" R 273	780	1937 M 865	886	" " 263	1006	" M 23

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1	1938 PC 254	77	1938 O 188	140	1937 M 902	192	1938 C 562	263	1938 P 561
6	" N 385	80	" N 204	152	1938 P 574	193	" O 247	265	" R 224
29	" C 551	85	" A 481	154	" Pesh 48	195	" S 175	267	" A 502
32	" L 477	90	" O 199	155	" R 275	196	" O 227	270	" L 503
33	1937 M 915	91	" M 257	156	" P 421	198	" L 88	272	" P 429
36	" L 721	97	" L 474	157	" Pesh 46	200	" O 212	274	" N 409
48	" O 186	100	" O 210	158	1937 L 811	202	" S 169	278	" L 634
50	1937 M 833	101	" L 218	160	" B 370	204	" L 148	280	" S 164
52	1938 O 214	102	" M 602	162	" Pesh 40	205	" A 485	285	" Pesh 47
53	" C 366	103	" B 347	163	1937 M 787	211	" R 210	286	" B 392
57	1937 M 942	106	" C 459	165	1938 B 383	215	" A 477	288	" M 686
59	1938 O 225	110	" " 390	168	" R 124	217	" L 490	289	" C 341
60	" L 72	114	" A 479	169	" S 162	219	" A 473	290	" B 338
61	" O 204	116	" L 65	171	" C 545	222	" L 545	294	" C 318
63	" R 184	119	" M 604	173	" N 292	225	" M 513	295	" R 190
66	" A 461	123	" A 469	175	" C 442	234	" R 166	298	" L 631
69	" O 213	125	" R 287	177	1937 M 930	236	" M 785	300	" C 168
71	1937 M 965	126	" M 227	184	1938 C 452	248	" M 598	302	" B 377
73	1938 A 450	131	" O 224	185	" M 71	250	" O 218	305	" L 114
74	" O 216	138	" P 392	187	" L 569	253	" P 594	307	" C 257
75	" R 126	135	" L 195	188	" M 796	255	" C 557	308	" L 103
76	" A 467	136	" O 217	191	" O 260	260	" A 452	308	

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310	1938 M 738	440	1938 M 205	582	1938 R 154	710	1938 R 298	879	1938 L 598		
311	" Pesh 50	442	" R 270	584	" M 654	713	1939 P 33	880	" O 358		
312	" R 248	444	" B 352	586	" " 591	715	1933 C 573	881	" P 451		
314	" M 743	445	" L 435	589	" B 419	717	" M 720	885	" O 692		
315	" P 423	447	" B 353	592	1937 M 807	718	" O 238	886	" P 437		
320	" L 272	448	" M 659	593	1938 B 372	727	" B 418	889	" N 464		
321	1937 M 750	450	" A 511	598	" M 724	729	" O 321	890	1939 P 73		
326	1938 P 461	452	" L 452	599	" R 227	731	" R 294	891	1938 R 319		
327	" C 507	453	" M 316	600	" M 640	732	" L 22	893	" C 161		
331	" M 814	454	" A 515	601	" R 145	733	" O 226	894	" L 625		
332	" L 509	456	" M 634	605a	" M 462	734	" B 408	896a	" M 820		
334	" M 721	460	" A 517	605b	" N 394	736	" M 833	896b	1939 P 27		
335	" " 712	461	" M 668	610	1939 P 75	737	" " 910	897	1938 B 424		
336	" O 252	462	" A 513	611	1938 O 230	739	" N 198	898	" C 709		
338	" P 591	464	" M 633	612	" L 12	743	" M 601	902	" N 422		
339	" L 614	467	" B 357	614	" B 381	744	" S 192	904	" M 278		
340	" O 575	468	" A 519	616	" O 263	745	" M 504	906	" Pesh 66		
341	" L 173	469	" L 460	617	" L 594	746	" L 360	907	" S 182		
344	" P 590	470	" B 354	626	" R 289	747	" M 753	911	" B 422		
345	" N 286	473	" C 458	627	" M 489	754	" PC 23	913	" " 413		
346	" S 171	474	" A 522	628	" R 321	756	" M 393	917	" Pesh 67		
350	" P 612	475	" B 358	629	" M 318	758	" C 282	918	" L 563		
351	" L 434	477	" C 541	630	" R 315	759	" M 683	919	" R 363		
352	" O 325	479	" B 360	631	" M 707	760	" N 312	920	" O 606		
354	" L 62	483	" L 451	632	" L 70	762	" M 399	923	" R 318		
355	" C 430	484	" B 364	633	" M 333	763	" L 613	924	" M 710		
362	" O 208	487	" L 126	634	" R 352	764	" C 466	925	" S 185		
364	" R 214	489	" M 595	635	" L 85	766	" R 306	928	" L 568		
366	" O 232	492	" R 168	636	" B 410	775	" L 309	929	" C 625		
368	" Pesh 41	494	" M 675	639	" L 20	777	" C 478	931	" N 314		
373	" A 491	496	" Pesh 52	640	" M 715	778	" L 548	934	" B 431		
379	" R 276	498	" S 189	642	" L 618	780	" S 191	935	" O 610		
381	" M 637	499	" B 367	643	" N 212	781	" L 616	938	" L 684		
382	" R 251	501	" R 254	647	" B 430	783	" S 190	939	" C 623		
385	" L 465	504	" S 176	648	" M 457	784	" L 575	940	" B 425		
386	" O 233	505	" N 322	650	" N 230	785	1939 O 2	942	" R 317		
388	" L 159	507	" L 576	652	" M 339	793	1938 Pesh 58	943	" C 638		
389	" " 83	508	" O 538	653	" A 523	797	1939 P 22	945	" N 441		
390	" M 667	511	" R 241	657	" B 386	798	1938 O 324	946	" R 295		
391	" L 161	512	" M 232	659	" Pesh 54	799	1939 P 30	946	" O 517		
392	" O 206	513	" L 447	663	" A 520	801	1938 L 584	952	" S 177		
395	" L 524	514	" P 604	665	" B 427	802	1939 P 29	957	" M 879		
396	" N 445	516	" N 296	668	" A 503	803	1938 R 345	958	" N 169		
399	" L 431	517	" C 120	670	" O 449	806	" P 433	962	" O 234		
401	" C 547	522	" P 435	672	" L 317	810	" " 427	962	" L '97		
403	" L 461	524	" C 343	673	" N 265	812	" O 316	966	" L 97		
406	" R 173	529	" P 305	674	" L 242	814	" M 815	969	" O 251		
408	" L 219	530	" L 433	676	" P 306	815	" A 504	971	" N 309		
409	" N 272	531	" N 293	678	" N 294	819	" N 529	974	1939 O 31		
410	" L 458	533	" P 585	680	" L 350	821	" A 532	974	1938 L 691		
411	" M 739	538	" N 287	681	" M 503	823	" M 713	975	1939 O 64		
413	" L 627	539	" L 344	682	" P 603	824	" A 497	976	1938 R 356		
416	" S 160	540	" C 248	684	" N 149	829	1939 P 18	977	1938 R 356		
417	" C 437	543	" O 221	686	" L 311	830	1938 " 462	978	" A 536		
420	" L 111	545	" M 726	688	" M 340	831	" N 324	978	" O 259		
422a	" R 213	547	" R 170	689	1939 P 41	833	" O 543	979	1937 M 730		
422b	" L 478	550	" O 201	690	1938 R 333	835	" L 608	980	1938 A 557		
424	" " 527	554	" M 653	693	" M 322	836	" B 394	981	" L 253		
425	" M 649	555	" Pesh 49	695	" A 552	847	" L 579	985	" A 568		
427	" L 84	556	" O 229	697	1939 P 24	849	" A 546	986	" B 405		
428	" M 599	558	" L 508	698	1938 N 251	851	" R 339	989	" P 457		
430	" L 456	559	" O 249	700	" A 544	857	" A 529	992	" O 690		
431	" M 711	560	" M 709	702	1939 P 21	860	" N 163	996	1939 P 28		
432	" " 723	561a	" L 510	703	1938 L 82	866	" O 250	999	1938 C 669		
434	" L 353	561b	" M 250	704	" A 538	867	" A 534	1000	" L 697		
435	" R 250	564	" P 413	705	" Pesh 62	870	" L 611	1001	" O 535		
436	" M 714	573	" R 236	706	" P 432	872	" Pesh 63	1003	" Pesh 68		
437	" R 235	577	" S 187	707	" L 629	875	" A 539	1005	" O 448		
439	" L 453	579	" M 221	709	1939 P 32	876	" C 271	1008			

IC	AIR	IC	AIR	IC	AIR	IC	AIR	IC	AIR
1	1938 A 593	173	1939 O 35	311	1938 B 423	471	1938 M 578	621	1939 O 40
10	" P 545	174	193 B 460	316	" L 609	472	" PC 281	624	1938 P 513
12	" A 577	176	" L 270	318	" A 591	475	" R 416	625	" M 525
20	" R 328	177	" A 564	319	" L 52	476	" PC 290	629	" P 505
23	" L 341	181	" B 448	322	" C 578	478	" M 904	632a	1939 O 36
25	" A 587	182	" Pesh 72	324	" P 497	479	" N 454	632b	1938 L 762
29	" N 492	183	" A 571	330	" B 463	481	" B 438	633	" P 524
30	" R 357	186	" C 261	331	" L 554	485	" N 459	637	" O 658
31	" Pesh 79	187	" A 586	333	" P 511	487	" P 548	649	" P 510
33	" P 444	189	" L 289	335	" O 529	490	" PC 295	644	" R 397
35	" L 169	191	" M 329	341	" M 900	495	" P 514	647	" M 317
40	" M 832	194	1939 P 43	344a	" C 256	499	" M 880	648	" S 209
41	" P 447	195	1938 L 459	344b	" Pesh 73	500	" B 461	652	" R 439
46	" R 324	196	1939 P 156	348	1939 O 33	502	" P 538	653	" S 220
49	" L 267	197	1938 L 511	351	1938 M 509	503	" M 864	656	" N 451
50	" N 266	198	1939 P 47	354	" P 575	504	" L 577	658	1939 O 60
52	" C 583	200	1938 R 293	355	" M 897	505	1939 P 96	659	1938 PC 284
53	" L 259	201	1939 P 45	357	1939 P 168	507	1938 L 706	665	1939 O 38
54	" N 433	202	1938 L 326	359	1938 C 587	508	" R 400	667	1938 M 531
56	" C 613	204	" C 550	362	1939 P 167	509	" M 940	668	" A 606
58	" L 182	205	" M 757	363	1938 C 327	510	" L 81	671	" C 177
59	" M 821	207	" N 275	372	" P 507	511	" M 520	674	" R 392
60	" L 179	208	" M 533	373	" B 449	512	" N 176	677	" L 4
62	" C 533	210	" L 561	376	" P 550	514	" M 491	679	" M 922
64	" L 615	212	" M 771	381	" S 217	515	" L 539	680	" R 359
66	" A 542	215	" N 461	383	" P 484	519	" M 730	682	" B 489
67	" M 656	218	" S 213	386	1939 PC 8	520	" S 202	683	" A 641
70	" A 561	220	" M 889	389	" O 42	523	" M 924	690	" S 198
74	" L 166	224	" L 349	390	1938 L 585	524	" L 624	694	" A 625
75	" A 555	226	" S 193	395	" B 458	525	" M 553	700	" R 369
78	" B 447	232	" R 303	397	" L 620	527	" S 223	704	" A 623
79	" A 540	235	" L 204	398	" R 423	529	" C 402	706	" B 481
81	" L 180	238	" M 560	401	" B 443	532	" M 878	709	" A 635
83	" R 264	240	" L 226	404	" L 194	533	" B 499	711	" N 485
89	" A 548	242	" O 250	405	" C 704	534	" M 483	713	" A 632
93	" L 152	243	" M 774	406	" PC 277	535	" N 480	716	" B 469
95	1939 O 16	248	" O 261	409	" C 701	536	" C 721	717	" M 501
96	1938 M 905	249	" R 349	410	" N 475	538	" R 364	718	" C 211
97	" N 481	250	1939 O 1	412	" C 713	540	" C 113	722	1939 O 37
99	" C 581	252	" " 15	413	" R 441	544	" R 372	724	1938 L 749
101	" N 225	253	1938 C 766	414	" M 522	547	" L 177	725	1939 O 61
106	" O 594	255	" Pesh 80	415	" C 782	549	" R 414	727	1938 C 417
110	" N 320	256	1939 O 14	416	" M 381	551	" L 642	732	" L 719
111	" C 671	257	1938 C 734	419	" B 453	554	" O 641	734	" C 353
113	" R 301	259	" L 264	422	" C 781	562	" R 446	737	" M 898
115	" M 806	262	" O 503	423	" B 451	563	" M 426	739	" R 437
116	" B 464	266	" M 916	425	" PC 292	566	" R 396	740	" A 654
117	" M 998	268	" N 273	428	" M 651	567	" P 509	741	" L 646
118	" R 292	270	" L 457	431	" R 448	568	" N 502	742	" A 653
119	" S 218	271	" N 408	432	" C 615	571	" P 556	744	" C 772
121	" R 350	272	" L 217	434	" A 617	572	" L 731	747	" Pesh 83
123	" M 705	274	1939 P 161	436	" L 558	574	" P 502	748	" A 655
125	" L 254	275	1938 Pesh 77	437	" A 611	576	" C 697	749	" M 323
126a	" S 224	277	" P 573	438	" R 417	578	" A 619	750	" B 478
126b	" M 909	278	" L 430	441	" A 609	581	" N 528	753	" M 923
127	" Pesh 70	279	1939 P 90	443	" L 533	582	" P 527	754	" L 767
128	" L 574	285	1938 L 158	445	" R 384	583	" R 447	755	" N 466
130	1939 P 35	286	1929 P 157	446	" L 155	585	" A 574	759	" P 531
135	1938 M 449	287	1938 M 745	447	" R 415	588	" B 484	760	" L 685
141	1939 P 77	288	" L 368	448	" M 532	592	" R 394	761	" M 918
144	1937 R 413	289	" " 487	449	" A 601	594	" L 690	762	" P 487
150	1939 P 83	290	" M 646	453	" L 550	595	" M 293	772	" R 412
152	1938 C 445	292	" L 442	455	" A 615	597	" L 570	774	" B 510
153	" L 282	293	" N 434	456	" C 783	599	" B 506	776	" Pesh 81
157	" R 290	298	" R 331	458	" A 613	601	" L 486	778	" L 184
159	" M 887	301	" M 454	461	" N 495	602	" N 449	781	" M 390
162	" O 256	302	" L 571	462	" M 523	605	" L 747	783	" A 640
165	" R 322	305	" R 297	463	" B 442	607	" R 389	783	" M 433
167	" O 262	307	" B 459	465	" N 493	609	1939 O 10	784	" L 470
168	" L 485	309	" N 363	467	" M 507	612	1938 N 257	787	" R 360
169	" O 253	309	" A 621	468	" L 693	616	" M 893	789	" L 739
172	" C 638	309	" A 621	469	" S 215	619	" P 529	691	

IC	AIR	IC	AIR	IC	AIR	IC	AIR	IC	AIR
793	1938 S 297	824	1938 M 497	880	1938 M 612	918	1938 R 420	977	1938 C 745
795	" L 641	825	" N 391	882	1939 O 48	920	" N 385	986	1939 O 65
797	" C 755	829	" L 766	838	1938 R 449	923	" O 758	985	1938 L 694
799	" L 507	830	" R 381	886	" L 76	924	" R 387	986	" A 619
800	" C 757	833	" C 471	890	" S 239	926	" B 471	988	" N 308
801	" S 206	837	" P 562	892	" C 646	934	" P 579	989	" R 477
803	1939 P 164	842	" C 699	894	" A 637	939	" L 673	990	" L 815
806	1938 L 752	844	" B 467	896	" R 453	941	" O 609	992	" C 702
807	" P 522	846	" C 689	897	1939 S 13	942	" R 454	994	1929 A 17
808	" M 809	848a	" L 692	899	1938 M 380	944	1939 M 53	995	1933 L 678
810	" C 318	848b	" C 768	900	" C 667	945	1933 P 610	997	1939 A 6
813	" P 537	849	" P 613	903	" M 576	946	" L 187	998	1938 C 767
814	" B 490	854	" B 492	906	1939 PC 1	947	" M 326	1000	1939 A 5
816a	" L 768	861	" C 89	911	1938 L 848	950	1939 O 17	1001	1938 C 750
816b	" B 470	865	" N 431	912	" P 478	971	1938 C 654	1003	1939 A 15
817	" R 404	867	" B 465	913	" C 740	974	" B 508	1005	1938 L 712
821	" L 502	869	" R 401	917	" M 965	976	1939 P 137	1008	" C 792
822	" R 367	873	" O 714						

THE
ALL INDIA REPORTER
1938

Lahore High Court

*** A. I. R. 1938 Lahore 1**

ADDISON AND DIN MOHAMMAD JJ.

Harnam Singh and others —

Defendants — Appellants.

v.

Aziz and others — Plaintiffs —

Respondents.

First Appeals Nos. 246, 247 and 248 of 1936, Decided on 10th March 1937, from order of Addl. Dist. Judge, Ferozepore, D/. 18th July 1936.

*** Limitation—** Major reversioners existing at the time of alienation but omitting to challenge it within period of limitation — Suit to set it aside by other reversioners, minors at the time of alienation, is not barred — Suit is also not barred against reversioners born after alienation.

Where major reversioners existing at the time of alienation by a limited owner and thus competent to challenge alienation fail to do so within period of limitation, a suit by other reversioners, minors at the time of alienation to set aside alienation, is not barred. The suit is also not barred against a reversioner born after alienation. For, as the existence of a reversioner clothes an after-born reversioner with a right to sue, though an after-born reversioner cannot claim the benefit of S. 6, Lim. Act, in his own right, he cannot be deprived of the benefit of the extended period claimable by the reversioner in existence at the time of the alienation: *A I R 1933 Lah 524, Doubtful; Case law discussed.* [P 8 C 1]

Dr. Nand Lal — for Appellants.

Khurshaid Zaman — for Respondents.

Din Mohammad J. — This judgment will dispose of Civil Appeals Nos. 246, 247 and 248 of 1936. Three alienations were effected by one Subhan: one in favour of Harnam Singh, Bhagwan Singh and Sham Singh on 19th June 1922, the second in favour of Gian Singh on 19th January 1926 and the third in favour of Jita Singh, of which the mutation was attested on 19th January 1923. On 2nd April 1935,
1938 L/1 & 2

13 descendants of Subhan instituted three different suits challenging those alienations on the usual grounds of want of consideration and of necessity. In all these cases the alienees raised a preliminary objection that the suits were time-barred on the ground that three of the plaintiffs, who existed at the time of the alienations, though minors, had lost their right on account of the major reversioners then in existence not having instituted any suit within time, and that the other plaintiffs who were not in existence then were even otherwise time-barred. The position regarding the ten plaintiffs who were not in existence at the time of the alienations was conceded by their counsel, and as the Subordinate Judge came to the conclusion that the case of the other three plaintiffs was also barred, he dismissed the three suits. Against this order, all the thirteen plaintiffs appealed. The admission as regards the ten plaintiffs mentioned above was made before the Additional District Judge too. He however did not dismiss their appeals and holding that the suits of the other three plaintiffs were not barred, he accepted the appeals and remanded the suits to the trial Court for decision on the merits. From this order of the Additional District Judge, the alienees have preferred three separate appeals.

The Subordinate Judge based his decision on *A I R 1933 Lah 524*,¹ while the Additional District Judge relied on *32 P L R 831*² and *A I R 1934 Lah 968*.³ Before us the appellants have further referred

1. *Gajendar Singh v. Balwant Kaur*, *A I R 1933 Lah 524=149 I O 696*.

2. *Khushi Ram v. Nand Lal*, *A I R 1932 Lah 140=135 I O 601=32 P L R 831*.

3. *Hari Ram v. Sall*, *A I R 1934 Lah 968=154 I O 675*.

to 41 Mad 659,⁴ 6 Lah 405⁵ and A I R 1927 Mad 216,⁶ while the respondents have in addition to the authorities relied on by the Additional District Judge cited 48 All 152,⁷ 26 P R 1911,⁸ A I R 1932 Lah 39⁹ and A I R 1933 Lah 866¹⁰ in support of their contention. On going through these authorities, I have come to the conclusion that the contention of the respondents is well founded. As stated above, the only authority relevant to the point at issue, which was relied on by the Subordinate Judge and was referred to before the Additional District Judge, is A I R 1933 Lah 524.¹ In that case a Division Bench of this Court observed :

A suit by a reversioner to challenge an alienation by a limited owner is a representative one and it follows that if there is at the date of the alienation a reversioner who is competent to challenge it, but fails to do so within the period of limitation, the result is binding on the whole body of reversioners, whether minors or otherwise.

For the first part of this proposition, the learned Judges relied on 38 Mad 406,¹¹ 41 Mad 659⁴ and A I R 1927 Mad 216,⁶ and for the second part of the proposition they again referred to 41 Mad 659⁴ and A I R 1927 Mad 216⁶ in addition to 6 Lah 405.⁵ So far as the representative nature of the suit by a reversioner is concerned, I am in respectful agreement with the principle enunciated in that judgment, but, with all respect, I consider that the corollary deduced from this principle on the basis of which it was remarked that if a reversioner competent to challenge an alienation fails to do so within the period of limitation, then the minor reversioners in existence at the time of the alienation are also barred is based on an erroneous conception of the law. None of the authorities relied on by the learned Judges in

4. Varamma v. Gopaladasayya, A I R 1919 Mad 911=46 I C 202=41 Mad 659=35 M L J 57 (F B).

5. Chiragh Din v. Abdullah, A I R 1925 Lah 654=90 I C 1022=6 Lah 405=26 P L R 695.

6. Neelakantamier v. Chinnammal, A I R 1927 Mad 216=99 I C 668=52 M L J 13.

7. Jawahir Singh v. Udai Parkash, A I R 1926 P O 16=93 I C 216=53 I A 36=48 All 152 (P O).

8. Sundar v. Salig Ram, (1911) 26 P R 1911=9 I C 300=34 P L R 1911=33 P W R 1911 (F B).

9. Wali Chand v. Punjab Singh, A I R 1932 Lah 39=132 I C 665.

10. Khushi Ram v. Nand Lal, A I R 1933 Lah 866=147 I C 899.

11. Venkata Narayana Pillai v. Subbammal, A I R 1915 P O 124=29 I C 298=42 I A 125=38 Mad 406 (P O).

support of this proposition is relevant to the point at issue. In 41 Mad 659⁴ the rule laid down is that if the existing reversioners by failing to sue within time become barred by limitation, reversioners thereafter born are equally barred. Even 6 Lah 405⁵ deals with an after-born reversioner, and thus these authorities were no safe guide for the determination of the question that awaited decision before the learned Judges. It is true that A I R 1927 Mad 216⁶ relates to the case of an infant, who was existing at the time of the alienation, but apart from the fact that it was a case under Hindu law the learned Judge who was responsible for that decision had taken his support from 41 Mad 659,⁴ which, as remarked above, proceeds on different facts.

On the other hand, the authorities relied on by the respondents are to the point and directly deal with the question now before us. In 48 All 152⁷ their Lordships of the Privy Council held that :

A suit brought by the younger son within three years of attaining majority to avoid the sale is not barred by limitation although the elder son attained his majority more than three years earlier and had taken no steps to question the alienation.

In A I R 1932 Lah 39⁹ Sir Alan Broadway J. in concurrence with Sir Shadi Lal C. J. observed :

While it is true that a suit by one reversioner is for the benefit of the entire body of reversioners, and while it may be that a decision in such a suit would bind the entire body, I do not think it can be said that the omission by the presumptive reversioner to bring a suit to challenge an alienation must be regarded as depriving the other reversioners of their right to attack the transaction In the present case, even if the plaintiff's father and elder brother had formally consented to the alienation, their consent would not deprive the plaintiff of his right, unless indeed it had been proved that the said consent had been given in good faith.

In A I R 1934 Lah 968³ a Division Bench of this Court remarked :

We think, however, that the correct view is that both the father and the son, who at the date of the adoption was in existence and a minor, have separate rights both derived from the common ancestor. The right of the father being barred does not bar the right of the son if he be a minor. The son will have the advantage under the Limitation Act of adding the period of his minority to the limitation period.

In that case too 6 Lah 405⁵ was relied on by the adverse party but was distinguished on the ground that it was no authority for the proposition then at issue. In 32 P L R 831² it was held :

That the nearest reversioner being a minor and the other nearer reversioners having precluded themselves from suing by their failure to take action within the statutory period and there being no evidence of their having given in good faith any express consent, the suit by the plaintiff was maintainable.

It may be noticed that Sir Alan Broadway J. was a party to this judgment as well as to A I R 1932 Lah 39⁹ and 6 Lah 405,⁵ and that would indicate that he fully realized the distinction that existed between the cases of after-born reversioners and reversioners in existence at the time of the alienation. In A I R 1933 Lah 866¹⁰ Tek Chand J. observed :

The property being ancestral, the plaintiff had an independent right to contest the alienation, and as he was a minor at the time when the cause of action arose, he is certainly entitled to extension of time under S. 6, the existence of the nearer reversioners (including his father) notwithstanding. If any authority for this simple and well-settled proposition is required, reference may be made to the recent decision of the Letters Patent Bench in A I R 1932 Lah 89.⁹

The basic principle of all these judgments was enunciated as far back as 1911 by a Full Bench of the Punjab Chief Court when in a case reported in 26 P R 1911⁸ it was observed that the plaintiffs' right to sue for possession was not derived from or through any other reversioner but was derived from the customary rule. The general trend of authority in this province at least being in favour of the respondents, I would hold that the suits of the three reversioners, who were in existence at the time of the alienations, were not time-barred. I may also point out that the suits of those reversioners, who were not in existence at the time of the alienations in question, were also well within time. The rule upon which my decision is based was enunciated in 13 Lah 520,¹² and has very recently been fully discussed and reaffirmed in Civil Appeal No. 498 of 1936.¹³ The relevant part of that judgment may be reproduced for facility of reference :

In determining the period of limitation available to an after-born son, he cannot be deprived of the privileges enjoyed by the person on whose account he derives his right to sue ; in other words, if the existence of a reversioner clothes an after-born reversioner with a right to sue, though an after-born reversioner cannot claim the benefit of S. 6, Lim. Act, in his own right, he cannot be

deprived of the benefit of the extended period claimable by the reversioner in existence at the time of the alienation.

It is well-recognised that an erroneous admission on a question of law made by a counsel does not bind the party whom he represents, and as the appeals of all the thirteen plaintiffs were accepted by the Additional District Judge in spite of their counsel's admission, their cases will also technically be before the trial Court for disposal. It would be for that Court to determine how these cases will be affected by the inactivity of Subhan's sons. As I agree with the Additional District Judge on the point of limitation so far as the three plaintiffs are concerned, I would dismiss these appeals and affirm the order of the lower Appellate Court. In the circumstances of the case, I would leave the parties to bear their own costs before us.

Addison J. — I agree and now think that A I R 1933 Lah 524¹ goes too far. Nevertheless, I think the result is unfortunate. For example, in the present case there were in existence at the time of the alienation five sons of the alienor and three minor grandsons who have now increased to thirteen. The five sons took no step within limitation to get the alienation of their father set aside, although they were the persons immediately affected and still are the only persons entitled to possession on the death of their father under customary law, where there is no joint family and each ascendant excludes the right of his descendants to possession and where each person has his own individual right to succeed the last heir to the extent of his interest. So much so is this the case that there are numerous rulings of this Court to the effect that, if the sons had given their consent to their father's alienation, the grandsons would be estopped from suing. The situation in the present case is not very much different ; for, here five sons have lost their right to sue to set aside the alienation—a circumstance which will certainly have to be taken into account in deciding the case on the merits, as it may well be argued that this amounts to a consent of all the adult members of the family. Even if these cases succeed, the grandsons would not be entitled to possession in the lifetime of their fathers, as, under customary law, the father's right to possession debars the sons from possession in his lifetime. With these remarks I concur in dismissing these

12. Jowala Singh v. Sant Singh, A I R 1932 Lah 605 = 140 I O 375 = 13 Lah 520 = 89 P L R 808.

13. Govind v. Ram Lal, Reported in A I R 1937 Lah 420 = 89 P L R 670.

appeals, parties bearing their own costs in this Court.

P.R./D.S.

Appeals dismissed.

* A. I. R. 1938 Lahore 4

BHIDE J.

*Firm Mitter Sen-Ganeshi Lal —
Decree-holders — Petitioners.*

v.

*Kalyan Rai — Judgment-debtor —
Respondent.*

Civil Revn. Petn. No. 891 of 1936 (formerly F. A. No. 196 of 1936), Decided on 3rd February 1937, from order of Dist. Judge, Ambala, D/- 25th June 1936.

* (a) Civil P. C. (1908), S. 47—Order amending decree passed on separate application, but not in execution — Application does not fall under S. 47 and no appeal is competent from order — Amended decree though appealable, revision from order is entertainable.

Where the order amending a decree for a certain sum is not passed in execution proceedings but on a separate application under Ss. 151/152, the application does not fall under S. 47 and no appeal from the order is competent. But the mere fact that the order amending the decree is not itself appealable and the mere fact that appeal can be presented from the amended decree is no bar to the entertainment of a revision petition of the order in question, if it is passed without jurisdiction : *A I R 1934 All 100, Rel. on.*

[P 501]

* (b) Civil P. C. (1908), Ss. 151 and 152 — Remedy by way of appeal from decree open — Inherent jurisdiction cannot be invoked — No appeal or delay in appeal, though appeal competent — Error in decree — Application under S. 151 is entertainable — Matter is one of discretion with Court, to be exercised with regard to circumstances — Decree of subordinate Court merging in decree sought to be amended — District Judge is competent to proceed under S. 152 to amend same.

A resort to inherent jurisdiction is not permissible where another remedy is open to the person preferring an application under S. 151. Thus where a remedy by way of appeal from a decree is clearly open to a person, he cannot invoke the inherent jurisdiction of the Court : *A I R 1926 Bom 139, Rel. on.*

[P 502]

But the mere fact that there is no appeal or that there is considerable delay in appealing is no bar to the District Judge entertaining an application to amend the decree of the subordinate Court under S. 151, if in fact there is an error in the decree. The District Judge can amend the decree even under S. 152, if the decree of the Subordinate Court has merged in the appellate decree. But this cannot be asked to be done as of right. The matter is one of discretion with the Court and the discretion has to be exercised after duly considering all the circumstances : *A I R 1925 All 187 and A I R 1929 Rang 158, Rel. on; A I R 1929*

Oudh 385; A I R 1932 Oudh 291; A I R 1923 Bom 414; A I R 1932 Cal 563 and (1892) A O 547, Ref.

[P 502; P 601]

Tek Chand — *for Petitioners.*

R. C. Soni — *for Respondent.*

Order. — This is an appeal from the order of the District Judge, Ambala, allowing an amendment of a decree passed by the Senior Subordinate Judge, Ambala. The order purports to have been passed under S. 151, Civil P. C., and the material facts leading to the order are briefly as follows : On 15th June 1921, a firm called Mitter Sen-Ganeshi Lal sued another firm named Manohar Lal-Uggar Sain, on the basis of a bahi account and obtained a decree for Rs. 3,258-13-3 against all the defendants on 28th July 1924. It appears that the decree was executed from time to time against the defendants including the present appellant Kalyan Rai. Kalyan Rai raised an objection in the course of the execution proceedings that he was not personally liable; but his objection was rejected and the order of executing Court was upheld in appeal to this Court : *vide* Civil Appeal No. 1199 of 1934 decided on 29th March 1935. Kalyan Rai had not appealed from the decree of the Senior Subordinate Judge but another defendant named Wazir Singh had appealed and it was held by the learned District Judge in his appeal that Wazir Singh was not personally liable, but only to the extent of his interest in the joint family property : *vide* order of the District Judge dated 8th March 1927.

On 17th December 1935, Kalyan Rai presented an application to the District Judge, Ambala, for amendment of the decree passed by the Senior Subordinate Judge on 28th July 1924 on the ground that the decree was not in accordance with the judgment. It was objected before the learned District Judge that as the decree of the Subordinate Judge merged in that of the District Court by reason of the appellate order dated 8th March 1927, and as the decree of the District Judge of the later date was in conformity with his judgment, no application for amendment of the decree was competent. The learned District Judge however held that he had inherent jurisdiction to amend the decree as Kalyan Rai was prevented from applying to the trial Court for amendment of its decree merely by reason of the 'fortuitous circumstance that another defen-

dant, namely Wazir Singh had appealed from the decree and the decree had thus merged in the decree of the Appellate Court. On merits, he found that the judgment of the Senior Subordinate Judge dated 28th July 1924 showed that the decree was passed against the defendant firm as joint family concern and that the intention was to make the members of the family liable only to the extent of their share in the joint family property. He accordingly directed the decree to be amended by addition of a proviso that Kalyan Rai was liable only to the extent of his interest in the family property. From this decision the decree-holder firm has preferred the present appeal.

A preliminary objection is raised that no appeal is competent from the order in question as it was passed under S. 151, Civil P. C., and that even a revision is not competent as the appellant could have appealed from the amended decree according to S. 96, Civil P. C. The first contention, namely that no appeal is competent appears to be correct. The appeal purports to be filed under S. 47, Civil P. C., but the order in question was not passed in execution proceedings but on a separate application under Ss. 151/152, Civil P. C. The order amends the decree of the Senior Subordinate Judge, Ambala, and cannot in any sense be held to fall under S. 47, Civil P. C. The learned counsel for the decree-holder further prayed that the memorandum of appeal be treated as a petition for revision. As regards the contention of the learned counsel for the respondent that no revision lies as an appeal could have been preferred from the amended decree, the learned counsel urged that the order amending the decree was itself not appealable and that the mere fact that the appeal could have been presented from the amended decree was no bar to the entertainment of a petition for revision of the order in question as it was clearly passed without jurisdiction. In support of this contention, he relied on a Division Bench ruling of the Allahabad High Court reported in A I R 1934 All 100,¹ which appears to be in his favour. The amended decree was merely based upon the order challenged. As at present advised, I hold that a petition for revision is competent.

The next question for consideration is whether the order in question was passed without jurisdiction. The learned District Judge has held that he had inherent jurisdiction to amend the decree because Kalyan Rai was prevented by fortuitous circumstances from applying to the trial Judge for amendment of the decree. Kalyan Rai had however a clear remedy open to him by way of appeal in the first instance which he had not availed of. It has been noted above that Wazir Singh, another defendant, had appealed to the District Judge and had got the decree amended. It is true that under O. 41, R. 33, Civil P. C., it was open to the District Judge to amend the decree in respect of other defendants also, but even then Kalyan Rai did not appear and ask for such a relief and consequently this was not done.

It is an established proposition that resort to 'inherent' jurisdiction is not permissible where another remedy was open to the person preferring an application under S. 151, Civil P. C. In the present instance, a remedy by way of appeal was clearly open to Kalyan Rai and he cannot therefore in my opinion invoke the inherent jurisdiction of the Court: *cf.* A I R 1926 Bom 139.² In my opinion the learned District Judge had no jurisdiction under S. 151, Civil P. C., to amend the decree, as he did. It was urged however for the respondent that the learned District Judge could amend even the decree of a subordinate Court under S. 151, Civil P. C., and the mere fact that there was no appeal or that there was considerable delay was no bar to entertaining such an application, if in fact there was an error in the decree. In support of this contention, reference was made to 47 All 44,³ 4 Luck 562,⁴ 8 Luck 93,⁵ A I R 1923 Bom 414,⁶ 139 I C 528⁷ and (1892) A C 547.⁸

2. Virappa Govindappa v. Basappa Virabadrappa, A I R 1926 Bom 139=92 I C 354=27 Bom L R 1511.

3. Kishori Mohan v. Ohhanga Lal, A I R 1925 All 187=82 I C 1030=47 All 44.

4. Mohammad Raza v. Ram Saroop, A I R 1929 Oudh 385=118 I C 753=4 Luck 562=6 O W N 604 (F B).

5. Parsotam Dass v. Mohammad Hamid Mirza Beg, A I R 1932 Oudh 291=139 I C 367=8 Luck 93=9 O W N 633.

6. Jayavant Rao v. Narsing Sakharan, A I R 1928 Bom 414=80 I C 180.

7. K. O. Mukerjee v. Ainaddin, A I R 1932 Cal 563=139 I C 528=86 O W N 97.

8. H. W. Hatton v. Hugh Harris, (1892) A C 547=62 L J P C 24=1 R 1=67 L T 722.

1. Shujaatmand Khan v. Govind Behari, A I R 1934 All 100=147 I C 638.

After carefully considering these authorities I have come to the conclusion that there is force in this contention. It would appear from 47 All 44³ that the learned District Judge could amend the decree even under S. 152, as the decree of the Subordinate Judge had merged in the appellate decree. The same view receives support from 7 Rang 88.⁹ The learned District Judge was of opinion that he could not act under S. 152, Civil P. C., as the decree of the District Judge was in conformity with the appellate judgment. But this view does not appear to be correct.

Although however the District Judge had jurisdiction to amend the decree under S. 152, Civil P. C., it would appear from the authorities quoted above that the respondent could not ask this to be done as of right. The matter was one of discretion with the Court, and the discretion had to be exercised after duly considering all the circumstances. It has been urged for the petitioner that Kalyan Rai has been guilty of gross negligence and laches, and that the decree has been already executed against him personally more than once. It is further urged that the petitioner has now been deprived of other remedies by lapse of time. On the other hand, it has been urged for Kalyan Rai that he had been pursuing other remedies to get rid of the decree, that he challenged his personal liability from the outset and that the petitioner has gained an advantage to which he was never entitled. The material before me does not appear to be sufficient to arrive at a correct finding on these points, which are relevant for determining the question whether this is a fit case for exercising the discretion conferred on the Court in amending a decree under S. 152, Civil P. C. It seems therefore necessary to remand the case to the learned District Judge for re-decision of the petition with reference to S. 152, Civil P. C., after taking into consideration all the relevant facts bearing on the discretion to be exercised by the Court.

I accordingly set aside the order of the learned District Judge passed under S. 151, Civil P. C., and remand the case for re-decision under S. 152, Civil P. C., in the light of the above remarks. No order as to costs. Parties are directed to appear

⁹ Chettyar Firm v. Ko Yin Gyi, A I R 1929 Rang 158=117 I O 585=7 Rang 88.

before the learned District Judge on 17th February 1937.

V.B.B./A.L.

Case remanded.

A. I. R. 1938 Lahore 6

TEK CHAND J.

Mt. Shanti Devi — Defendant — Appellant.

v.

Mani Singh and others, Plaintiffs and another, Defendant — Respondents.

Second Appeal No. 713 of 1936, Decided on 15th December 1936, from decree of Dist. Judge, Jhelum, D/. 21st May 1936.

(a) **Adverse Possession**—Lessee attorning to S when crop was sown—Entry in khasra made some time later—Suit by another against S for possession—S claiming adverse possession—Possession of S commenced when crops were sown and not when khasra entry was made.

A person was in possession of land as a lessee and attorned to one S when rabi crop was sown. The entry of the attornment was however made in the khasra some time later. A person claiming to be entitled to the land brought a suit against S who contested the suit by claiming adverse possession. The suit was however within 12 years of the date of entry in the khasra but more than 12 years after the sowing of the rabi crop :

Held that the suit was barred and the possession of S through the lessee commenced when the rabi crop was actually sown, although the entry in the khasra was made later on. [P 8 O 1]

(b) **Adverse Possession** — Possession need not be to the knowledge of real owner—Possession which is overt and without attempt to conceal is sufficient.

In order to establish adverse possession, it is not necessary that the claimant must not only hold openly and as of right for the requisite period but he must also prove that he did so to the knowledge of the owner. It is sufficient that the possession of the trespasser should be overt and without any attempt at concealment so that the person against whom time is running ought, if he exercises due vigilance, to be aware of what is happening : A I R 1934 P C 23, *Foll.*; 10 I O 841 and A I R 1915 Lah 119, *Rel. on.*

[P 8 O 1, 2]

Ram Lal Anand I — for Appellant.

Ram Chand Manchanda —

for Respondents.

Judgment.—One Ishar Singh Khatri, governed by the Mitakshara School of Hindu Law, died childless on 10th February 1923. He left no widow, and his surviving relations were his sister, Mt. Shanti Devi, defendant-appellant, and certain collaterals in the fifth degree. The

present suit was instituted on 8th October 1935 by some of his collaterals for possession of their pro rata share of Ishar Singh's land, which had been in possession of Mt. Shanti Devi for a long time. It was alleged in the plaint that according to the Mitakshara, as understood in the Northern Provinces, the sister of a childless Hindu was not in the line of heirs, before the enactment of Act 2 of 1929, and therefore the possession of Mt. Shanti Devi was unlawful. In reply the defendant pleaded *inter alia* that she had acquired an indefeasible title by adverse possession and that the plaintiffs' suit was barred by time. The trial Judge found against the defendant on this point and passed a decree in favour of the plaintiffs for their 7/20th share in the land. The defendant's appeal to the District Judge having been dismissed, she has preferred a second appeal in this Court.

It is no longer denied that Mt. Shanti Devi was not in the line of Ishar Singh's heirs. It is also admitted on behalf of the plaintiffs that they have never been in actual possession of the land since Ishar Singh's death. The facts found are that in the lifetime of Ishar Singh, the land was cultivated by his tenant Amir Chand, who continued in actual cultivating possession after his death till 1931. Ishar Singh had died on 10th February 1923, when the rabi crop was standing. The revenue papers throw no light as to who took the landlord's share of the produce for that harvest. The khasra girdawari for kharif 1923 however contains a note, dated 10th February 1923, stating that Amir Chand was holding as tenant under Mt. Shanti Devi. All the subsequent khasra girdawaris till 1931 show that he cultivated the land as her tenant and gave the landlord's share of the produce to her. It is admitted that Mt. Shanti Devi has been in possession from 1931 up to the date of the institution of this suit. On these facts the Courts below have found that adverse possession of Mt. Shanti Devi started on 2nd October 1923 (the date of the note in the khasra girdawari) and as the requisite 12 years' period expired on 1st October 1935, when the Civil Courts were closed for the Dusehra holidays in continuation of the September vacation, she had not acquired a title by prescription on 8th October 1935, when on the re-opening day of the Courts the plaintiffs instituted the present suit.

For the appellant it has been contended that the lower Courts have erred in interpreting the note in khasra girdawari as showing that Mt. Shanti Devi's possession started on the date on which the note was made. It really shows that Amir Chand, who had been in possession since Ishar Singh's lifetime, had attorned to her from the time when the rabi crop was sown in July or August, and as the suit was filed more than twelve years from that time she must be held to have acquired an indefeasible right by adverse possession. In reply, Mr. Manchanda has urged that the entry in the khasra girdawari was by itself no proof of the fact that Mt. Shanti Devi had actually taken the produce for kharif 1923. There is however no force in this contention, as Mani Singh, plaintiff 1, when examined as a witness, clearly stated that the produce of kharif 1923 had in fact been taken by Mt. Shanti Devi.

The sole question for determination therefore is whether in the circumstances the period of twelve years should be counted from 2nd October 1923, the date on which the entry was made in the khasra girdawari, or the time when the crop was actually sown, two or three months before. In considering this point, it must be borne in mind that Amir Chand had been in cultivating possession of the land since the lifetime of Ishar Singh and there is no proof that he acknowledged any one as his landlord for rabi 1923. Indeed, it seems probable that he appropriated the whole of the produce of that harvest to himself. It is admitted for the plaintiffs that they or any other collateral has never been in actual possession of the land and it is difficult to see how they could be presumed to have been in constructive possession of the land during this period. The learned District Judge seems to think that this conclusion follows from the rule that "possession follows title". But that rule is obviously inapplicable to the facts of the case. Here the land was in the physical possession of a third party, who had not acknowledged the collaterals as landlords and therefore his possession could not possibly be considered to be for, or under, them especially when at the next harvest he actually attorned to Mt. Shanti Devi and continued to cultivate under her till 1931. The learned District Judge has cited a number of rulings in support of his conclusion, but none of them appears to have any bearing on this case. In

29 Cal 518,¹ the land in dispute had been submerged and it was held that during the period of submersion, possession must be presumed to follow title, and therefore had remained with the real owner. 38 All 411² was a case in which certain land was the subject of a usufructuary mortgage and it was held that title by adverse possession could not be acquired against the mortgagor during the currency of the mortgage. In A I R 1928 Lah 306³, the land in question was banjar and not in actual possession of anyone. To such land the rule that "possession follows title" was of course rightly applied. The facts of the present case are entirely different and these cases are of no real assistance whatever. Amir Chand's possession from the date of the death of Ishar Singh till the harvesting of the rabi crop of 1923 cannot be said to have been on behalf of either the plaintiffs or the defendant.

In kharif 1923 however he definitely attorned to the defendant and having acknowledged her as the owner, began to give her the landlord's share of the produce. From that harvest she has been in continuous possession. The entry in the khasra girdawari was no doubt made on 2nd October 1923, but this does not indicate that the attornment took place on that date. Indeed, by acknowledging her as the landlord and paying her the landlord's share of the produce of that harvest in full, Amir Chand must be taken to have attorned to her from the date when the crop was sown. The actual date of attornment is no doubt now known, but whatever it might have been, it related back *nunc pro tunc* to the time of sowing the crop, the benefit of which was enjoyed by her. Mt. Shanti Devi's possession must therefore be held to have commenced in August 1923 at the latest. It is beyond question that since then she has been in possession *nec vi, nec clam, nec precario*, for more than twelve years, when the suit was brought on 8th October 1935. She must therefore be held to have acquired an indefeasible title by prescription. It seems to have been argued successfully in the Courts below that in order to establish

adverse possession, it is necessary that the claimant must not only hold openly and as of right for the requisite period, but he must also prove that he did so to the knowledge of the owner. This however is not a correct view of the law. In 61 Cal 262⁴ it has been laid down by their Lordships of the Privy Council that it is sufficient that the possession of the trespasser should be overt and without any attempt at concealment, so that the person against whom time is running ought, if he exercises due vigilance, to be aware of what is happening: *see also* to the same effect 67 P L R 1911⁵ and 48 P L R 1915.⁶

I hold that on the facts proved in the case, Mt. Shanti Devi has succeeded in establishing that she had been in adverse possession for more than twelve years at the date of the suit. I accept the appeal, set aside the judgments and decrees of both the Courts below, and dismiss the plaintiffs' suit with costs throughout.

B.D./R.K.

Appeal accepted.

4. Secretary of State v. Debendra Lal, A I R 1934 P C 23=147 I C 545=61 I A 78=61 Cal 262 (P C).

5. Gokul Chand v. Rajji, (1911) 67 P L R 1911=10 I C 841.

6. Kishen Narain v. Puran Chand, A I R 1915 Lah 119=28 I C 298=48 P L R 1915.

A. I. R. 1938 Lahore 8

JAI LAL AND ABDUL RASHID JJ.

Lala Jinda Ram — Appellant.

v.

Model Town Society Ltd. — Respondent.

Second Appeal No. 1248 of 1936, Decided on 11th February 1937, from decree of District Judge, Lahore, D/. 10th October 1936.

(a) Interpretation of Statutes—Conflict between—Rule having force of law and a bye-law—Rule is to be preferred.

Ordinarily a rule, which is as effective as a section of the Act, must be followed in preference to a bye-law if there is a conflict between the two.

[P 10 C 1]

(b) Co-operative Societies Act (1912), S. 8 (3) — Bye-laws under, bye-law 3 — Registered building society constructing house for member—Transaction is not loan.

Where a society registered under the Co-operative Societies Act constructs a house for its member under the bye-law framed under S. 8 (3), the transaction does not amount to a loan. [P 10 C 1]

Jiwan Lal Kapur — *for Appellant.*

Badri Das and Manohar Lal Sachdeva

— *for Respondent.*

Anant Ram Khosla for Govt. Advocate

— *for the Crown.*

1. Secretary of State v. Krishnamani Gupta, (1902) 29 Cal 518=29 I A 104=6 C W N 617=8 Sar 260 (P C).

2. Kunwar Sen v. Darbari Lal, A I R 1916 All 79=84 I C 171=88 All 411=14 A L J 488.

3. Nur Muhammad v. Qaim, A I R 1928 Lah 306=110 I C 857=29 P L R 881.

Jai Lal J.—This second appeal has been referred to a Division Bench by a Judge in Chambers in view of the important question of law involved. The appellant is Rai Sahib Jinda Ram, a member of the Model Town Society Limited, which has been registered under the Co-operative Societies Act, 2 of 1912. The Society undertook to construct a house for Rai Sahib Jinda Ram in the Model Town and it appears that after the house had been constructed, there was some dispute between the parties as to the amount claimable on account of it by the Society. This dispute was referred by the Committee of the Society to the Registrar of Co-operative Societies professing to act under R. 18 of the rules framed by the Local Government under S. 43, Co-operative Societies Act. Sub.s. (5) of S. 43, which empowers the Local Government to frame rules, also provides that the rules so framed shall have the same force as if they had been enacted in the Act. It appears however that when the Society was registered, a set of bye-laws was framed by it, which were accepted to be correct by the Registrar, and the Society was registered.

The power to frame bye-laws has been conferred on a Society under S. 8 (3) of the Act and it is provided that the Registrar may register a society if, on an examination of the bye-laws framed by the society which must be submitted with the application for registration, he is satisfied that the bye-laws are not opposed either to the Act or to the rules framed by the Local Government. S. 10 provides that the order of the Registrar registering a society is conclusive and cannot be questioned. The bye-laws, on the submission of which a society has been registered, can be amended by it under S. 11 of the Act, and the Registrar has been given certain powers with regard to the scrutiny of the amendment, but we are not concerned with this matter in the present appeal. It must however be mentioned that among the bye-laws framed by the Model Town Society Limited, when it was registered, there is a bye-law No. 37, which reads as follows :

Any dispute, concerning the business of the society between members or past members of the society or persons claiming through them, or between a member or past member or persons so claiming through them and the committee or any officer of the society, shall be referred to the

Registrar as provided in the rules notified by Government under the Co-operative Societies Act. One arbitrator shall be nominated by each of the parties out of the Panel of Arbitrators and the 3rd Arbitrator shall be nominated by the Registrar and he shall be the Chairman of the Board. When any party to a dispute fails to nominate an Arbitrator from the Panel within 15 days of the notice to him, the Registrar shall nominate an Arbitrator in his place from the Panel.

Rule 18 framed by the Local Government under the powers conferred upon it by S. 43 (5), Co-operative Societies Act, runs as follows :

18. (a) Any dispute concerning the business of a co-operative society between members or past members of the society or persons claiming through them, or between a member or past member or persons so claiming and the committee or any officer shall be referred to the Registrar. Reference may be made by the committee or by the society by resolution in general meeting or by any party to the dispute, or if the dispute concerns a sum due from a member of the committee to the society by any member of the society; (b) the Registrar may either decide the dispute himself, or appoint an arbitrator, or refer the dispute to three arbitrators, of whom one shall be nominated by each of the parties and the third shall be nominated by the Registrar and shall act as Chairman.

On a reference being made to the Registrar by the Committee of the Society of the dispute between it and Rai Sahib Jinda Ram, the Registrar appointed one arbitrator to decide the dispute and that arbitrator gave an award which was not acceptable to Rai Sahib Jinda Ram who appealed to the Registrar, but having failed therein, instituted the suit, out of which this second appeal has arisen, for an injunction against the Society restraining it from executing the award. This suit has been dismissed by the Courts below. It is contended on behalf of the appellant that bye-law No 37 of the Model Town Society Limited, being the basis of the contract between the parties, the arbitration could have been only under that bye-law and not under R. 18. It would be observed from a comparison of R. 18 and bye-law No. 37 that there is a conflict between them as to the persons to whom reference has to be made by the Registrar, but there is no conflict between the two that the initial procedure by the parties in a dispute is to refer the matter to the Registrar. So far as the Committee of the Society therefore is concerned, the matter was rightly referred to the Registrar and it was the Registrar who had then to exercise his powers under the law either by deciding the matter himself or by re-

ferring it to one arbitrator or to three arbitrators. The difference between the bye-law and the rule is that whereas the bye-law merely provides for the reference to a dispute by the Registrar to three arbitrators, the rule empowers the Registrar to decide the matter himself or to refer it to one arbitrator or to three arbitrators.

I have already stated that R. 18 must be deemed to form part of the Act and the Registrar was under the circumstances bound to act in accordance therewith, and if he found a conflict between the bye-law and the rule, it was for him to decide which of the two he should follow. He preferred to follow the rule and it is impossible to hold that in doing so he acted illegally. There is no force in the contention of the learned counsel for the appellant that when there is a conflict between the rule and the bye-law, the bye-law should be preferred. No authority has been cited in support of this contention, and ordinarily the rule, which is as effective as a section of the Act, must be followed in preference to a bye-law if there is a conflict between the two. In any case, it is not possible to hold that the Registrar should have followed the bye-law and therefore that he acted illegally in acting under R. 18.

The next contention raised on behalf of the appellant is that the transaction between the parties to this suit was beyond the competence of the Model Town Society, Limited, by virtue of the bye-laws framed by it. It was contended that the transaction in fact was one of a loan by the Society to one of its members, and the objects of the Society as mentioned in bye-law No. 3 do not extend to the granting of loans to its members. Whether the Society is entitled to lend money to its members under its bye-laws is a matter on which we need express no opinion, because I am of opinion that the transaction in question does not amount to the granting of a loan by the Society to one of its members; on the other hand, it was the construction of a house by the Society for a member, and the subsequent dispute is about the recovery of the amount spent by the Society on the construction. Clause (c) of bye-law No. 3 clearly provides that one of the objects of the Society is to build residential houses and other buildings for private and public use and convenience of the

members. The next objection of the appellant is that the reference to the Registrar was not properly made by the Committee. R. 18 provides that reference may be made to the Registrar by the Committee or by the Society by resolution in general meeting of its members or by any party to the dispute. A resolution in this case was passed by the Committee in which it is provided that the dispute with certain members, among whom the appellant is mentioned, should be referred to arbitration. That can have reference only to R. 18 under which the matter is referred to the Registrar *inter alia* for reference to arbitration. It was so understood by the Committee and also by the appellant himself, who does not appear to have raised any objection initially to the course adopted by the Committee or by the Registrar.

Finally the learned counsel for the appellant raised the question that the award of the arbitrator was manifestly unjust, because two engineers had been appointed by him who valued the building at a certain figure and the award is much above that figure. This is a matter which was not raised before the learned District Judge in appeal before him and cannot be raised for the first time in second appeal. I would consequently dismiss this appeal, but in view of the fact that the Model Town Society Limited itself is responsible for framing a wrong bye-law, I would order that the parties should bear their own costs throughout.

Abdul Rashid J.—I agree.

B.D./R.K.

Appeal dismissed.

* A. I. R. 1938 Lahore 10

SKEMP J.

Manohar Lal and others—Defendants
—Appellants.

v.

Kishan Lal and others—Plaintiffs—
Respondents.

First Appeal No. 109 of 1936, Decided on 15th March 1937, from order of Senior Sub-Judge, Rohtak, D/. 30th April 1936.

* (a) Civil P. C. (1908), O. 43, R. 1, Cl. (s)—Appointed receiver declining to act—Appointment of receiver in general may be contested in appeal.

Where a receiver is appointed but he refuses to act, an appeal on the point whether a receiver should or should not be appointed can be enter-

tained : 73 P R 1902 and A I R 1923 Lah 48, Rel. on. [P 11 C 2]

(b) Civil P. C. (1908), O. 40, R. 1—Partition suit—Likelihood of debts being realized or settled by defendants without plaintiff's knowledge — Appointment of receiver is proper.

Where in a suit for partition of the moveable and immovable property, it is likely that debts may be realized by the defendants without the plaintiff's knowledge or settlement of these debts may be arrived at by the defendants in a manner prejudicial to the plaintiff, it is just and convenient to appoint a receiver during such suit. [P 12 C 1, 2]

D. N. Aggarwal — *for Appellants.*

Faqir Chand Mittal — *for Respondents.*

Judgment.—This is an appeal against an order appointing a receiver. A preliminary objection is taken that in this case an appeal does not lie. On 30th April 1936, the Senior Subordinate Judge of Rohtak, at the instance of the plaintiff, passed an order appointing Rai Bahadur Chaudhri Lal Chand for the management and control of all moveable property in dispute. He gave eight directions to the receiver, one of which was the furnishing of security. The opposite party appealed through Mr. D. N. Aggarwal, who on 5th May 1936 obtained an order from a Division Bench in the following terms: "Admitted S. B. The order appointing receiver is suspended meanwhile." The same day Mr. Aggarwal sent a telegram informing his clients:

"Congratulations. Order appointing receiver suspended. Inform receiver or Court if necessary."

While this was going on in Lahore, in Rohtak, Rai Bahadur Chaudhri Lal Chand had on 2nd May declined to act as receiver; and on 4th May the Court appointed Lala Lachhman Das, Advocate, Jhajjar, as a receiver on terms slightly modified. This order was passed in the absence of the parties who were to be informed. Lala Lachhman Das was also informed, but on 6th May the defendant's mukhtar put in an application saying that an appeal against the order appointing a receiver had been made, the appointment had been suspended and requesting that nothing further be done. Thereon on 7th May the Senior Subordinate Judge informed Lala Lachhman Das that the order had been suspended and that he was not to do anything. Accordingly Lala Lachhman Das has taken no steps and has not furnished security.

Now, it is clear that the order of the Division Bench and the telegram of Mr. Aggarwal refer to the order of 30th April. They had no knowledge of the order of the Senior Subordinate Judge of 4th May; but the telegram was interpreted very naturally as referring to the appointment of a receiver in general terms. The appeal was lodged against the order of 30th April, but the gentleman then named refused to act. No appeal has been lodged against the order appointing Lala Lachhman Das. The point taken by Mr. Faqir Chand Mittal for the respondents is that no appeal lies against an order appointing a receiver if the order is incomplete, e. g. if the receiver has been ordered to furnish security and has not done so at the time of the appeal. Mr. Faqir Chand points out that there are conflicting authorities on this point. According to Sir Dinshaw Fardunji Mulla's Civil Procedure Code, Edn. 10, p. 1066:

It has been held by the High Courts of Calcutta, Bombay and Allahabad that an order that a receiver be appointed without appointing anybody by name as receiver and adjourning the application to a later date for nominating a receiver is not an order within the meaning of this rule and it is not, therefore, appealable under O. 48, R. 1, Cl. (s), Civil P. C. The contrary has been held by a Full Bench of the Madras High Court and by the Patna High Court.

Mr. Faqir Chand also referred to some other rulings not cited by Mulla. Mr. Aggarwal for the appellants drew my attention to a Division Bench ruling of the Chief Court, 73 P R 1902.¹ In that case the District Judge had nominated the Collector who refused to act; but the Bench overruled a preliminary objection and decided to hear the appeal on the point whether a receiver should be appointed or not. This ruling was followed in the High Court in a Single Bench case, reported in 72 I C 569,² by Campbell J. There is no ruling of the Punjab Chief Court or of the Lahore High Court to the contrary and I decide to follow these two rulings without further discussion. On the merits the parties are members of the family of Ramji Lal deceased. Ramji Lal was married twice. By his first wife he had a son Kishan Lal who is the principal plaintiff, his five sons having also been added as plaintiffs. The defendants are the sons

1. *Mt. Budhwanti v. Mt. Bishen Koer*, (1902) 73 P R 1902=59 P L R 1902.

2. *Ragbhir Singh Jaswant Singh v. Narinjan Singh*, A I R 1923 Lah 48=72 I C 569.

of the second wife of Ramji Lal, Mt. Munni. The plaintiff sued for partition of the family property and rendition of accounts as far as the agricultural land was concerned. He only sought a declaration that he was the owner of one-sixth share. Mutation of land left by Ramji Lal had been effected in favour of Kishen Lal and his five half-brothers.

Prima facie the plaintiff is entitled to a share; the defendants allege that it is only one seventh share and not one-sixth as he claims, but that is not material at this stage. The defendants rely on a previous partition alleging that the plaintiff had taken cash and house property only but no land. This previous partition is denied by the plaintiff and the defendants do not allege that it was effected by an instrument in writing nor indeed name the date on which it took place. They rely in support of this partition on a previous statement by Ramji Lal dated 21st March 1929. The statement was made in the course of previous litigation and is obviously inadmissible in evidence. They also rely on the will of Ramji Lal executed on 13th December 1934, a few days before his death on 23rd December 1934. Its terms are of course admissible. It recites that the testator had six sons, the eldest of whom Kishen Lal by his first wife had already received much in moveable property and household effects; and a large amount of money had been spent on his education and marriage. The will further recites that Kishen Lal is living separate from him for some time as a divided member of the family, that he has separate business and no share in any property left with the testator. No dates and indeed no precise facts or details of any kind are given in this will. The trial Judge said that there was no danger to the immovable property, but he appointed a receiver for the moveable property seeing that the very nature of the property is such as might place the plaintiffs at a disadvantage or make it inconvenient for the Court and the plaintiffs to go into accounts in this case. . . . Debts may be realized without the plaintiffs' knowledge or settlement arrived at in a manner prejudicial to them.

The defendants admit having realized a part of the debt. It is urged that this order is very prejudicial to the defendants who are conducting mainly a money lending business. I adjourned the case for three days in order that both the parties might attend and see if some settlement

could be come to, but none of the defendants have come. It appears to me that it is just and convenient to appoint a receiver, the last argument of the trial Judge being particularly cogent. The appellants' counsel attacked the appointment of Lala Lachhmas Das personally but was unable to suggest anybody else. He also attacked the detailed instructions. I do not think there is any force in any of the criticisms except with reference to instruction No. 7, which allows 10 per cent. commission on all realizations made by the receiver and 5 per cent. on all disbursements made under Court's order. Mr. Aggarwal contends that this is very high. I pronounce no final opinion but direct that this question of remuneration be reconsidered by the trial Judge in consultation with both the parties and the receiver. It is open to the trial Judge to repeat this direction, if he wishes, or to modify it. I reject this appeal with costs.

V.B.B./A.L.

Appeal rejected.

* A. I. R. 1938 Lahore 12

SKEMP J.

Hari Ram — Defendant — Appellant.
v.

*Firm Maddu Mal - Durga Das —
Plaintiffs — Respondents.*

First Appeal No. 20 of 1937, Decided on 12th March 1937, from order of Sub-Judge, First Class, Lahore, D/- 4th January 1937.

* Civil P. C. (1908), O. 40, R. 1—Appointment of receiver is not limited to property over which plaintiff has lien.

The words 'just and convenient' in O. 40, R. 1 construed according to the ordinary rules do not limit the appointment of a receiver to property over which the plaintiff has a lien. Receiver can be appointed if the appointment is in fact just and convenient: *A I R 1935 Rang 398, Rel.on.*

[P 14 C 1]

Diwan Mehr Chand — for Appellant.

Amin Chand Mehta—for Respondents.

Judgment.—This is an appeal against an order of a Subordinate Judge of the First Class, Lahore, appointing a receiver ad interim. The following facts led up to the order: On 4th September 1936, the parties to this litigation referred a claim to the arbitration of Mr. Manohar Lal Sachdev, an advocate of this Court. On 8th November 1936, he made an award setting forth that the defendant owed the plain-

tiff an amount of over Rs. 60,000 with interest at 9 per cent. per annum on one promissory note, and nearly Rs. 25,000 with interest at the same rate on another promissory note. In the agreement of reference, the defendant admitted owing the said sums but prayed for the reduction of amount due and the rate of interest charged. The defendant then absented himself from the arbitration proceedings but the plaintiff agreed to the reduction of interest from 9 per cent. to 6 per cent. per annum. The arbitrator held that there was no reason for reducing the principal amounts claimed and gave the plaintiff an award for upwards of a lac of rupees on 8th November 1936. On 10th November 1936 the plaintiff made an application under Para. 20 of Sch. 2, Civil P. C., that the award should be filed in Court. On 18th December he applied for a temporary injunction to restrain the defendant from transferring his property and for the appointment of a receiver. On 21st December 1936 the Court issued an injunction and on 4th January 1937 made an order appointing Khawaja Nazir Ahmad receiver of the property. Both these orders were *ex parte*.

On the day of the hearing Mr. Amin Chand Mehta who represented the respondent sought to place on the record a report of Khwaja Nazir Ahmad Receiver made to the Court, but I disallowed this, first because the report was made after the date of the order appealed against and it is proper to look at the facts as they appeared on the date when the order was given; and, secondly, because it appeared that to take the report into account would necessitate the examination and cross-examination of the Official Receiver at considerable length. There is no appeal against the injunction. An appeal is lodged against the appointment of a receiver on the sole ground that the appointment is not in accordance with law and that the appointment of receiver should be restricted to cases in which the plaintiff has a lien on particular property. It was not argued in the course of the appeal that the appointment was not just and convenient. Mr. Amin Chand Mehta justified the order from the facts already given and also because on 20th September 1936, subsequent to the reference to arbitration, the defendant had alienated a house. This house was already under attachment by the Senior Subordinate

Judge for Rs. 1,000 and the balance was adjusted on a promissory note account in favour of a gentleman who, it is said, is a connection by marriage of the judgment-debtor. The learned argument of Diwan Mehr Chand for the appellant is that according to authorities the plaintiff must have an interest in the property before a receiver is appointed. This proposition is indeed laid down in 61 I C 849,¹ a Division Bench ruling of the Patna High Court. The head-note states:

There is no jurisdiction in a Court to appoint a receiver at the instance of a simple contract creditor unless the creditor establishes a special equity in favour of such appointment.

Similarly in 58 I C 405,² another Bench of the Patna High Court ruled that a Court has no jurisdiction to appoint a receiver of property regarding which no litigation is pending. Diwan Mehr Chand also urged that a Single Bench ruling of this Court, A I R 1936 Lah 102,³ cited 61 I C 849¹ with approval, but that was only to support a decision which would have been given in any case. In that case it was held that the plaintiff, at whose instance a receiver was appointed, had an interest in the property. Mr. Amin Chand Mehta relies on the actual wording of O. 40, R. 1 which lays down:

Where it appears to the Court to be just and convenient, the Court may by order appoint a receiver of any property whether before or after decree.

This Rule was altered in the Code of 1908, the words 'to be just and convenient' being substituted for the words 'to be necessary for the realization, preservation or better custody or management of any property, moveable or immovable, the subject of a suit or attachment'. This enlargement is significant especially when it is contrasted with O. 39, R. 1. Mr. Amin Chand Mehta relied particularly on a recent ruling of the Rangoon High Court—A I R 1935 Rang 398⁴—in a case in which a third party claimed the property attached and objected to the appointment of an interim receiver. The learned Judge after quoting O. 40, R. 1 said:

1. Pirthi Chand Lal v. Kalikanand Singh, A I R 1922 Pat 318=61 I C 849=6 P L J 366=3 P L T 24.

2. Chandreshwar Prasad v. Bisheshwar Pratap, A I R 1920 Pat 501=58 I C 405=5 P L J 513=1 P L T 643.

3. Harkishan Lal & Sons v. Peoples Bank of Northern India Ltd., A I R 1936 Lah 102.

4. A. R. A. R. A. L. Chettyar Firm v. U Sin, A I R 1935 Rang 398=159 I C 816.

The rule does not say that a receiver can be appointed only of property which is the subject matter of a pending suit. What it says is that if it is found just and convenient, a Court can appoint a receiver of any property, provided the plaintiff or the defendant has a right thereto . . .

It then said that this Order and the two preceding Orders had been designed by the Legislature in order to secure the plaintiff against any attempt on the part of the defendant to defeat the execution of any decree that may be passed against him. In my opinion the words 'just and convenient', construed according to the ordinary rules, do not limit the appointment of a receiver to property over which the plaintiff has a lien, and the appointment in this case was in fact just and convenient. Indeed, on a suggestion that the defendant-appellant should pay something into Court to settle the matter, the respondent's counsel said his client would accept eight annas in the rupee. I dismiss this appeal with costs.

P.R./D.S.

Appeal dismissed.

* A. I. R. 1938 Lahore 14

COLDSTREAM AND DIN MOHAMMAD JJ.

Firm Hari Chand-Sadhu Ram —

Plaintiff — Appellant.

v.

Mohammad Bakhsh and other —

Defendants — Respondents.

Second Appeal No. 1663 of 1936, Decided on 26th May 1937, from decree of Senior Sub-Judge, Jhang, D/- 30th October 1936.

* Punjab Relief of Indebtedness Act (7 of 1934), S. 21 — Provisions prohibiting Civil Court's jurisdiction should be strictly construed — Application under S. 9 — Suit by creditor for declaration that claims by alleged creditors of judgment-debtor are fictitious and for injunction prohibiting these creditors from recovering their claims before Board — Jurisdiction of Civil Court to entertain such suit is neither expressly barred by S. 21 nor impliedly barred under provisions of the Act.

The provisions of law, which bar the jurisdiction of ordinary tribunals, are to be strictly construed. [P 15 O 2]

Where in execution of the plaintiff's decree, the judgment-debtor applies under S. 9 for effecting a settlement with his creditors, and the plaintiff sues in the ordinary Civil Court for a declaration to the effect that the promissory notes produced by the alleged creditors of the judgment-debtor in the proceedings before the Board are fictitious and also seeks an injunction to restrain the alleged creditors from proving their claims before the Board and recovering them from the debtor,

neither of these reliefs attacks the procedure of the Board or the legality of the agreement arrived at under S. 17 and is consequently not covered by the express prohibition contained in S. 21.

[P 15 O 2]

Further, the Board is not a Board of adjudication but a mere Board of conciliation and has no jurisdiction to decide the disputes arising between the creditors inter se. It has no power to reject a claim as unfounded or fictitious nor to dismiss a claim as unproved. All that the Board can do is to use under S. 15 its best endeavours to induce the parties to arrive at an amicable settlement or to grant the debtor a certificate under S. 20 (1) in case any creditor does not accept a fair offer made by a debtor. [P 15 O 2 ; P 16 O 1]

Even a certificate under S. 20 does not debar the creditor from suing his debtor on his loan but only disentitles him to costs and interest after the date of the certification. The jurisdiction of adjudicating upon the validity or otherwise of a claim not having been vested in the Board, the jurisdiction of the ordinary Courts to determine such matters cannot be even impliedly barred.

[P 16 O 1]

Achhru Ram — for Appellant.

Muhammad Din Jan — for Respondents.

Din Mohammad J.—The facts of the case giving rise to this appeal are these. The plaintiff firm held two decrees of the aggregate value of Rs. 2,900 against Ghulam Qadir deceased, the father of Rab Nawaz. In execution of its decree, the firm got the land of Rab Nawaz attached. During the pendency of the execution proceedings, Rab Nawaz, who is a minor, through his next friend made an application to the Debt Conciliation Board under S. 9, Punjab Relief of Indebtedness Act (7 of 1934), for effecting a settlement between himself and his creditors. This application was made on 17th October 1935, and contained the names of eight creditors with the details of their dues amounting to Rs. 4,690-9-0. On 9th November 1935, a supplementary statement was put in, mentioning two more creditors, Mohammad Bakhsh and Ghulam Mohammad, and their debts were stated to be Rupees 1,300 and Rs. 1,100 respectively. On receipt of this application, the usual formalities appear to have been observed by the Board and notice sent to the creditors of Rab Nawaz under sub-s. (2) of S. 12 and sub-s. (1) of S. 13. On 27th January 1936, Mohammad Bakhsh, Ghulam Mohammad and one Sarwar Shah appeared before the Board and produced three promissory notes of the value of Rs. 1,300, Rs. 1,100 and Rs. 1,900 respectively. All these promissory notes purported to have been executed on 25th November 1934, by the mother of Rab Nawaz on his behalf. The

Board took action under sub-s. (2) of S. 14 and after marking the promissory notes for the purpose of identification and after verifying the correctness of the copies thereof, retained the copies and returned the originals to the creditors concerned. On 23rd March 1936 the firm instituted the suit out of which the present appeal has arisen, for a declaration that the debts shown by defendant 4 (Rab Nawaz) as due to defendants 1 to 3 (Mohammad Bakhsh, Ghulam Mohammad and Sarwar Shah) were 'baseless and fictitious'. They further claimed a permanent injunction restraining defendants 1 to 3 from proving their debts before the Board and recovering the same from the debtor. Rab Nawaz alone contested the suit, the other three defendants not having put in appearance at all, but even he was represented by an officer of the Court only and did not submit proper pleas. An issue was however framed by the Subordinate Judge trying the suit, whether the suit was competent in view of the prohibition as contained in S. 21 of the Act. The Subordinate Judge came to the conclusion that the jurisdiction of the Civil Courts to entertain such suits was barred by the clear provision of the law referred to above and he consequently dismissed the suit on 29th June 1936. An appeal was preferred against this order, but before it could be decided, the Board on 13th August 1936 concluded its proceedings, and recorded an agreement under S. 17 of the Act which covered two out of the three claims involved in the present litigation. On 30th October, the Senior Subordinate Judge heard the appeal and holding that the jurisdiction of the Civil Courts was impliedly barred, dismissed it. The firm then presented a further appeal to this Court which came on for hearing before Tek Chand J. and that learned Judge has referred the case to this Bench in view of the importance of the question involved. The only question that falls for determination before us is whether there is any express or implied prohibition against the entertaining of such suits by ordinary Civil Courts as contemplated by S. 9, Civil P. C. So far as the express prohibition is concerned, reliance is placed on S. 21 (a) (i) of the Act. This provision is couched in the following terms :

No Civil Court shall entertain any suit to question the validity of any procedure or the legality of any agreement made under this Act.

In my view, whatever the cases to which this provision may apply, the present case does not come within its ambit. Those provisions of law which bar the jurisdiction of the ordinary tribunals are to be strictly construed and so construed, the provision of law relied upon in this case will be found of no avail. The suit as it stands does not seek to question the validity of any procedure adopted by the Board nor does it attack the legality of any agreement made under the Act. It is true that in this case the proceedings before the Board have culminated in an agreement under S. 17 and howsoever favourable an order may be made by any Court of law, it might in the circumstances of the case prove to be infructuous but that is an extraneous consideration. We are solely concerned here with the relief claimed independently of the efficacy thereof, and that aspect of the case is alone to be decided by us irrespective of what developments have taken place later. The relief claimed in this suit is twofold. In the first place, a declaration is being asked for to the effect that the promissory notes produced by the alleged creditors are fictitious and secondly an injunction is being sought to restrain the alleged creditors from proving their claims or recovering them. Neither of these reliefs involves an attack on the procedure of the Board or the legality of the agreement and is consequently not covered by the prohibition.

The matter of implied prohibition however is not so simple. On the one hand, it is contended that the Board is a special tribunal, invested with certain powers and should therefore be the sole arbiter of all the matters that come before it. On the other hand, I am disposed to think, that it is not a Board of adjudication but a mere Board of conciliation and further has no jurisdiction to decide the disputes arising between the creditors inter se. It has no power to reject a claim as unfounded or fictitious nor to dismiss a claim as unproved. It is true that under sub s. (2) of S. 13, every debt of which a statement is not submitted to the Board in compliance with the provisions of sub-s. (1) of that section shall be deemed for all purposes and all occasions to have been duly discharged, but when a claim is submitted, all that the Board can do is to use under S. 15 its best endeavours to induce the parties to arrive at an amicable settlement.

or to grant the debtor a certificate under S. 20 (1) in case any creditor does not accept a fair offer made by a debtor. Even that certificate does not debar the creditor from suing his debtor on his loan but only disentitles him to costs and interest after the date of the certification. In these circumstances, the jurisdiction of adjudicating upon the validity or otherwise of a claim is not vested in the Board, and if this be so, the jurisdiction of the ordinary Courts to determine such matters cannot be even impliedly barred.

The matter however does not rest here. It will still be necessary to determine whether the relief claimed by the plaintiff in this case can be granted to him otherwise. For instance, it is open to the defendants to contend that a mere declaration in the form prayed for cannot be granted under S. 42, Specific Relief Act, or that the injunction claimed cannot be granted under S. 56 of the same Act, or that the reliefs claimed have become infructuous in view of the subsequent developments that have taken place before the Board, but as these points have not so far been raised nor have they been discussed and decided by the Courts below, I would refrain from expressing any opinion thereon. On the technical point on which the case has been decided, I would hold that so far as the reliefs claimed in this case are concerned, S. 21 does not debar the Civil Courts from entertaining them, and would accept the appeal, set aside the orders of the Courts below and remand the case to the trial Court for the disposal of the other points arising in the case. I would however leave the parties to bear their own costs throughout as the question on which they fought was not free from difficulty.

Coldstream J.—I agree.

V.B.B./A.L.

Appeal accepted.

A. I. R. 1938 Lahore 16

DIN MOHAMMAD J.

Lachhman Singh—Plaintiff —
Appellant.

v.

Firm Dasuandhi Ram-Babu Ram —
Defendants—Respondents.

Second Appeal No. 456 of 1937, Decided on 13th July 1937, from decree of Dist. Judge, Ambala, D/- 2nd February 1937.

Civil P. C. (1908), O. 21, R. 54—All formalities except that of affixing order on conspicuous part of court-house proved — No evidence to the contrary — Attachment is presumed to be valid.

Where all the formalities required by O. 21 R. 54 were admitted except the affixing of the order on the conspicuous part of the court-house, which was not specifically mentioned by the bailiff, but there was no evidence to the contrary:

Held that all the formalities relating to attachment were duly observed: *A I R 1928 P C 139; A I R 1933 Cal 212 and A I R 1928 Lah 423, Disting.; A I R 1934 P C 217, Rel. on.*

[P 17 C 1, 2]

Shamair Chand — *for Appellant.*

M. L. Puri — *for Respondents.*

Judgment.—The facts of this case are given at length in the judgment under appeal and need not be recapitulated. The questions that arose for decision in the Courts below were: (1) Whether the attachment of the judgment-debtor's property was valid; (2) If so, whether the sale in favour of Lachhman Singh during the pendency of that attachment was void; and (3) Whether Lachhman Singh could raise any objections to the attachment after the only objection raised by his vendor had been dismissed by the executing Court. The trial Court came to the conclusion that the attachment was valid and consequently the sale in favour of Lachhman Singh was void. On the third question it found that Lachhman Singh was barred by the rule of constructive res judicata. On appeal, the District Judge held that the attachment was invalid, but agreeing with the trial Court on the question of constructive res judicata affirmed its decision and dismissed the appeal. Hence this appeal. The same questions have been raised before me as were raised in the Courts below, and after hearing counsel on both sides, I have come to the conclusion that the decision of the trial Court that the original attachment was valid was in consonance with law, and that being so no other question falls for determination in this case, for it is conceded by the appellant that, if the original attachment is held to be valid, the sale in favour of Lachhman Singh cannot stand.

It appears from the record that on 25th July 1934 a warrant of attachment was issued by the executing Court calling upon the bailiff to attach the property in question and to affix a copy of the prohibitory order issued by the Court on a conspicuous part of the court-house as well as on a

conspicuous part of the property and to proclaim the order by beat of drum. The endorsement on the back of this warrant shows that these formalities were observed, though no specific mention was made of the affixing of a copy of the said order upon a conspicuous part of the court-house. Similarly, on the back of the order prohibiting the judgment-debtor from transferring or charging the property in any way, there is an endorsement dated 30th July 1934 stating that a copy of the order had been affixed on a conspicuous part of the property and that the order has been duly proclaimed. As against this, there is not an iota of evidence on the record to show that no copy of the order was affixed upon a conspicuous part of the court-house. In these circumstances, the principle enunciated by their Lordships of the Privy Council in a case reported in A I R 1934 P C 217¹ is fully applicable. Their Lordships remarked :

The Judicial Commissioner in the present case has held that the attachment has not been proved because there was no direct evidence that a copy of the order of attachment was affixed in the Collector's office. Their Lordships are of opinion that there is evidence that the land was attached, and that, in the absence of any evidence to the contrary, it ought to be presumed that all necessary formalities were complied with : see S. 114, Evidence Act.

Now, in the present case it is not denied that an order was made prohibiting the judgment-debtor from transferring or charging the property in any way, as provided for in sub-r. (1) of R. 54. It is also not denied that the order was proclaimed as required by sub-r. (2) of R. 54. It is further not in dispute that a copy of the order was affixed in the office of the Collector. The only thing that is disputed is the affixing of a copy of the order on a conspicuous part of the property. It was open to the vendee from the judgment-debtor to lead evidence on the point and to prove by direct evidence that that formality had not been observed. He could have examined the bailiff or the attesting witnesses of his report on this point. Not having done so, he cannot be allowed to take advantage of the fact that, while submitting the report, the bailiff did not specifically mention that that formality had also been observed. In my view, it was not necessary for the bailiff to have

entered into minute details. It would have been enough had he merely stated that the order of the Court had been complied with. Moreover, it appears to me to be improbable that the bailiff who had duly proclaimed the order and further affixed a copy of it on a conspicuous part of the property as also in the office of the Collector, would have failed to affix a copy of the order on a conspicuous part of the court-house, which of all things was the easiest to do. I am therefore inclined to hold that all formalities relating to attachment were duly observed and that the sale in favour of Lachhman Singh was void *ab initio*.

Counsel for the appellant has relied upon 51 Mad 349,² 59 Cal 1176³ and 4 Lah 211.⁴ In my opinion however none of these cases is in point. In 51 Mad 349² all that was laid down by their Lordships of the Privy Council was that if nothing more is done than the mere passing of an order attaching the property, the attachment not having been completed by the observance of the other formalities laid down in R. 54 of O. 21, is not valid. In 59 Cal 1176³ the decision of the Court below that to render an attachment effectual, the affixing of the prohibitory order on the court-house was absolutely necessary was not challenged and the learned Judges remarked that in view of 51 Mad 349,² the view of the Court below could not be disputed. In 4 Lah 211⁴ it was held by a Division Bench of this Court that in order to constitute a valid attachment the proclamation described in the second portion of R. 54 must be carried out. It is enough to say that the judgment in A I R 1934 P C 217¹ was delivered long after the three cases mentioned above were decided, and at the present moment is the only authoritative pronouncement on the question at issue. I accordingly affirm the decision of the lower Appellate Court though on different grounds, and dismiss this appeal with costs.

V.B.B./R.K.

Appeal dismissed.

2. Muthiah Chetty v. Palaniappa Chetti, A I R 1928 P C 189=109 I C 626=55 I A 256=51 Mad 349 (P O).

3. Nabadwip Chandra Das v. Loke Nath, A I R 1933 Cal 212=142 I C 452=59 Cal 1176=36 C W N 738.

4. Mula Ram v. Jiwanda Ram, A I R 1923 Lah 423=72 I C 452=4 Lah 211.

1. Muhammad Akbar Khan v. Musharaf Shah, A I R 1934 P C 217=151 I C 221=61 I A 371=15 Lah 836 (P O).

* A. I. R. 1938 Lahore 18

ADDISON AND DIN MOHAMMAD JJ.

Mohammad Ramzan Khan —

Defendant — Petitioner.
v.

Khubi Khan — Plaintiff —

Respondent.

Civil Revn. Petn. No. 505 of 1936, Decided on 25th February 1937, from order of Addl. Judge, Small Cause Court, Delhi, D/- 20th June 1936.

* Provincial Small Cause Courts Act (1887) S. 17 (1), as amended by Act 9 of 1935) — Scope—Applicant must deposit full decretal amount at time of presenting application if he has not made previous application for security—Court cannot extend time for making deposit or for furnishing security.

The applicant applying under S. 17 (1) for a review of judgment or for an order to set aside a decree passed ex parte shall and must, at the time of presenting his application, do one of two things, namely, either deposit in Court the amount due from him under the decree or give such security for the performance of the decree as the Court may have directed on a previous application made by him in this behalf. If he does not make the previous application, he must put in the decretal amount in full. If he has made it and been successful in getting an order for security instead of depositing the money in full, he can furnish the security which the Court may have previously directed. It is no longer open to the Court to extend the time within which the deposit is to be made or security furnished: *A I R 1931 Lah 332 (F B), Expl.* [P 19 C 1]

Mohammad Amin — for Petitioner.

Vishnu Datta — for Respondent.

Order.—The Additional Judge, Small Cause Court, Delhi, passed a decree in favour of the plaintiff against the defendant for Rs. 97.13.0 with costs. A petition for review was put in by the defendant, and this petition was dismissed on 20th June 1936, on the ground that at the time of presenting the application for review, the applicant neither deposited in the Court the amount due from him under the decree nor gave such security for the performance of the decree as the Court might, on a previous application made by him in this behalf, have directed. Against this order dismissing the application for review, the defendant preferred a revision petition to this Court under S. 25, Provincial Small Cause Courts Act. The petition came before a Single Judge where reliance was placed on 12 Lah 359.¹ The Judge hear-

ing the revision referred it to a Division Bench as he considered the matter raised was important, namely whether, in view of the amendment of S. 17, Provincial Small Cause Courts Act, the provisions thereof as regards security, etc., could still be considered to be directory and not mandatory. The old S. 17 (1) ran as follows:

The procedure prescribed in the Code of Civil Procedure, 1908, shall, save in so far as is otherwise provided by that Code or by this Act, be the procedure followed in a Court of Small Causes in all suits cognizable by it and in all proceedings arising out of such suits;

Provided that an applicant for an order to set aside a decree passed ex parte or for a review of judgment shall, at the time of presenting his application, either deposit in the Court the amount due from him under the decree or in pursuance of the judgment, or give security to the satisfaction of the Court for the performance of the decree or compliance with the judgment as the Court may direct.

By Act 9 of 1935, S. 17 (1) was amended to run as follows:

The procedure prescribed in the Code of Civil Procedure, 1908 shall, save in so far as is otherwise provided by that Code or by this Act, be the procedure followed in a Court of Small Causes in all suits cognizable by it and in all proceedings arising out of such suits;

Provided that an applicant for an order to set aside a decree passed ex parte or for a review of judgment shall, at the time of presenting his application, either deposit in the Court the amount due from him under the decree or in pursuance of the judgment, or give such security for the performance of the decree or compliance with the judgment as the Court may, on a previous application made by him in this behalf, have directed.

In 12 Lah 359¹ the learned Judges before whom the question came held that the provision contained in the old S. 17, Provincial Small Cause Courts Act, that an applicant for an order to set aside an ex parte decree shall, at the time of presenting his application, either deposit in the Court the amount due from him under the decree or give security to the satisfaction of the Court for the performance of the decree as the Court may direct, was directory and not mandatory; and that it was open to the Court in appropriate cases to extend the time within which the deposit could be made or security furnished.

It seems to us that the amendment of S. 17 by Act 9 of 1935 was meant to show and does show that the applicant for a review of judgment must, at the time of presenting his application, either deposit in the Court the amount due from him under the decree or give such security for the performance of the decree as the Court

1. Gedi Mal-Dharam Das v. Huna Mal Sedhu Ram, A I R 1931 Lah 332=131 I C 685=12 Lah 359=32 P L R 504 (F B).

may, on a previous application made by him in this behalf, have directed. The only part of the section which could be said to be obscure has been repealed and a new provision inserted in which there is no obscurity. As S. 17 (1) now stands, the procedure prescribed in the Code of Civil Procedure, 1908, shall, with a saving clause, be the procedure followed in a Court of Small Causes, provided that an applicant for a review of judgment or for an order to set aside a decree passed ex parte shall and must, at the time of presenting his application, do one of two things, namely, either deposit in the Court the amount due from him under the decree or give such security for the performance of the decree as the Court may have directed on a previous application made by him in this behalf. If he does not make the previous application, he must put in the money in full. If he has made it and been successful in getting an order for security instead of depositing the money in full, he can furnish the security which the Court may have previously directed. It is no longer open to the Court to extend the time within which the deposit is to be made or security furnished. The decision of the Additional Judge Small Cause Court, Delhi, was therefore correct, and we dismiss this revision petition but make no order as to costs here.

K.B./A.L.

*Revision dismissed.***A. I. R. 1938 Lahore 19**

COLDSTREAM J.

Mohammad Sadiq — Petitioner.

v.

Emperor.

Criminal Revn. Petn. No. 1028 of 1937, Decided on 7th October 1937, from order of Sess. Judge, Sialkot, D/- 13th July 1937.

Criminal P. C. (1898), Ss. 190 (1) (c) and 191 — Magistrate taking cognizance on charge sheet filed at his instance — Magistrate acts under S. 190 (1) (c) — Failure to comply with S. 191 vitiates entire proceedings in his Court.

When a charge sheet is filed against any person at the instance of the Magistrate and the latter takes cognizance on such charge sheet, though apparently the case is taken cognizance of on a police report, the action of the Magistrate practically amounts to his taking cognizance under Section 190 (1) (c), as he is the real originator of the proceedings. The accused is therefore entitled to have the case transferred to some other Magistrate and the failure on the part of the Magistrate to

comply with the provisions of S. 191 will vitiate the entire proceedings in his Court. [P 20 C 1, 2]

Hem Raj Mahajan for Advocate-General
— for the Crown.

Facts — Mt. Umat-ul-Hussain brought a complaint under S. 107, Criminal P. C., against one Muhammad Ramzan, a resident of Sialkot, on 6th May 1937, in the Court of Pir Mubarik Ali, Magistrate, First Class. The Magistrate after recording the statement of the complainant on 7th May 1937, dismissed her complaint, but according to the allegations made in the present petition directed the Naib Court to ring up the police, as the girl in his opinion appeared to be a minor. The present accused, while the statement of the girl was being recorded, was sitting in the verandah of the Court-room of the Magistrate and was called in. The Magistrate told the Sub-Inspector of Police on his arrival there that the girl and Muhammad Sadiq, the present petitioner, be taken into custody and their case be investigated and proper action be taken therein. As a result of that direction, the girl and the accused, Muhammad Sadiq, were taken to the City Police Station and after the statement of the girl was recorded, a case under Ss. 363, 366, 368, 376 and 343, Penal Code, was registered against the accused. He was produced eventually before the said Magistrate for trial. The trial commenced in the Court of the learned Magistrate when an application was made to this Court that as the prosecution of the accused was initiated at the instance of the Magistrate and he had not complied with the provisions of S. 191, Criminal P. C., consequently the trial was bad in law and the High Court be moved to quash the proceedings and to direct the re-trial of the accused by some other competent Magistrate or some other proper order which the High Court deems fit be passed in the present case. A notice was issued to the Crown counsel, who did not appear before me to oppose the present petition.

Grounds.—Now it is a fact that the proceedings against the accused started at the instance of the Magistrate and consequently the Magistrate did act under the provisions of S. 190, Para. 1, Cl. (c), which is to the effect :

Upon information received from any person other than a Police Officer, or upon his own knowledge or suspicion that such offence has been committed.

There is no denial of the fact that the learned Magistrate, when he recorded the statement of Mt. Umat-ul-Hussain, in the complaint under S. 107, Criminal P. C., entertained suspicion of an offence having been committed by the present accused, as the girl appeared to the learned Magistrate to be a minor. Under these circumstances it was incumbent on the learned Magistrate to comply with the provisions of S. 191, Criminal P. C. Failure on his part to comply with the provisions of the said section undoubtedly vitiated the trial in the Court of the said Magistrate. There are a number of authorities in support of this proposition : e. g. on p. 991 of the Criminal Procedure Code by Chitaley, Vol. 1, it was observed :

Moreover, when a charge sheet is filed against any person at the instance of the Magistrate, and the latter takes cognizance on such charge sheet, though apparently the case is taken cognizance of on a Police report, the Magistrate being the real originator of the proceedings is not competent to try the case and the accused is entitled to have the case transferred to some other Magistrate.

116 P L R 1903,¹ 59 I C 384² and 73 I C 576³ lay down the same proposition. I am therefore of the opinion that the failure on the part of the learned Magistrate to comply with the provisions of S. 191 in the present case vitiated the entire proceedings in his Court and I therefore send up the case to the Hon'ble the High Court with the recommendations that the proceedings in the Court of the said Magistrate be quashed and a retrial by another Magistrate be ordered. The petitioner being in judicial lock-up, it is desirable that he should be let on bail, pending the decision by the High Court. I therefore admit him on bail of Rs. 2,000 with one surety of the like amount. The bail shall be furnished by the accused in the Court of the Magistrate.

Order. — Technically no doubt the Magistrate took cognizance on a police chalan as is urged by Crown counsel who opposes this petition, that is to say the case was one within S. 190 (1) (b), Criminal P. C. It is not shown where the learned Sessions Judge has got the information that the Magistrate ordered the police to take the petitioner into custody.

1. Crown v. Jumman, (1903) 116 P L R 1903.

2. Bodha v. Emperor, (1921) 8 A I R Lah 235 = 59 I C 384 = 16 P L R 1921 = 27 Cr L J 96.

3. Chander Sen v. Emperor, (1928) 10 A I R All 383 = 17 I C 576 = 24 Cr L J 656 = 21 A L J 89.

The allegation of Mr. Hem Raj Advocate is that the Magistrate ordered the police to investigate and, if any cognizable offence was discovered, to take legal action. At the same time, it seems clear that the action of the Magistrate practically amounted to his taking cognizance under S. 190 (1) (c). I think it proper to apply the principle of S. 191 and I accordingly accept the recommendation of the Sessions Judge, quash the proceedings and order retrial by another Magistrate to be selected by the District Magistrate.

B.D./R.K.

Retrial ordered.

A. I. R. 1938 Lahore 20

JAI LAL J.

*Kishan Lal and another — Plaintiffs
— Appellants.*

v.

*Lal Chand and others—Defendants—
Respondents.*

Second Appeal No. 1311 of 1936, Decided on 16th February 1937, from decree of Dist. Judge, Attock at Campbellpur, D/- 18th July 1936.

Insolvency — Joint Hindu family — Coparcener—Manager brother adjudged insolvent for his personal debts—Shares of other brothers in joint family property do not vest in Official Receiver.

In a joint Hindu family consisting of brothers, on the insolvency of the brother, who is a manager of the family, the shares of other brothers do not vest in the Official Receiver when such manager brother is adjudged insolvent for debts due personally from him : *A I R 1932 Lah 151, Disting.* [P 21 C 2]

Shambu Lal Puri for Mukand Lal Puri
— for Appellants.

Shamair Chand — for Respondents.

Judgment.—The appellants are two brothers of Gokal Chand who was adjudicated an insolvent and whose property vested in the Official Receiver. The Official Receiver sold a house to the respondent assuming that it belonged to Gokal Chand. It has been found that the house belonged to the three brothers, the appellants and Gokal Chand, and that Gokal Chand had a one-third share in it, but it is contended on behalf of the respondent that the debts, which have been proved in the insolvency of Gokal Chand, are debts which were originally due from the father of Gokal Chand and the appellants, and therefore

as Gokal Chand has been found to be a member of a joint Hindu family with the appellants, he could sell the entire coparcenary property to discharge the debts of the father. For this reason, it is contended, his right to sell the shares of his brothers also vests in the Official Receiver who was competent to sell the whole house.

In support of this contention reliance is placed on 13 Lah 464.¹ In that case however, father was adjudicated insolvent and it was held that his right to sell the sons' share in the joint property to discharge his debts vested in the Official Receiver. It is however the pious duty of the sons to pay the father's debts but the same rule does not necessarily apply with regard to the debts in respect of which a decree has been passed against the eldest brother, and the principle laid down in 13 Lah 464¹ cannot by analogy be extended to such cases. No authority has been cited in which it has been laid down that if one brother is adjudicated insolvent and he is manager of a joint Hindu family, then the entire family property vests in the Official Receiver. Gokal Chand was not adjudicated insolvent as manager of the family. There are debts due from him personally. It is not possible under the circumstances to hold that the shares of the two brothers also vest in the Official Receiver. It may be that the creditors, to whom debts were due from the father of Gokal Chand and his two brothers, may have remedy in respect of their debts against the two brothers, the appellants, in spite of the insolvency of Gokal Chand, but no authority has been cited to show that the Official Receiver is entitled to deal with the shares of the brothers of Gokal Chand in the house in dispute. I accordingly accept this appeal, set aside the decrees of the Courts below and decree the plaintiff's suit but leave the parties to bear their own costs throughout.

W.D./A.L.

Appeal allowed.

1. Gori Shankar v. Basheswar Nath, A I R 1932 Lah 151=185 I O 217=18 Lah 464=93 P L R 814.

* A. I. R. 1938 Lahore 21

JAI LAL J.

Thakar Das — Plaintiff — Petitioner.
v.

Amar Chand — Defendant —
Respondent.

Civil Revn. Petition No. 635 of 1936, Decided on 26th February 1937, from decree of Senior Sub-Judge, Ferozepore, D/- 29th June 1936.

* Mortgage—Usufructuary mortgage—Suit by mortgagor for unpaid balance of mortgage money or for compensation is maintainable—Measure of compensation is difference between amount stipulated to be paid and amount actually paid—Such suit is not for specific performance.

In the case of a possessory mortgage where a mortgage has been completed and possession has been given to the mortgagee but the full amount of the consideration is not paid to the mortgagor, a suit by the mortgagor for the balance of the amount due is maintainable as a suit for compensation and the measure of compensation is the difference between the amount stipulated to be paid by the mortgagee and the amount actually paid by him. Such a suit is not for the specific performance of a contract: *A I R 1933 Lah 1* and *A I R 1935 Pat 125, Foll.*; *A I R 1936 Lah 727, Disting.* [P 22 C 1]

Mohan Lal Aggarwal — *for Petitioner.*
Bawa Sant Singh—*for Respondent.*

Order.—The petitioner mortgaged his land with possession to the respondent for Rs. 400 out of which Rs. 240 were left with the mortgagee for payment to a creditor of the mortgagor petitioner. The respondent not having paid Rs. 240 to the creditor, the petitioner instituted a suit for recovery of Rs. 240 and interest thereon against the respondent. The suit was for the recovery of the amount stipulated to be paid on the mortgage by the respondent and it was expressly stated in the plaint that the plaintiff had suffered loss to that extent. The suit was therefore also for compensation for the non-performance of his contract by the defendant. This suit having been decreed by the trial Court, an appeal was preferred to the Senior Subordinate Judge who accepted it merely on the ground that such a suit was not maintainable. He refrained from deciding the other question involved in the case. In support of his conclusion, the learned Senior Subordinate Judge has relied upon 38 P L R 574,¹ a judgment of a Division

1. Sewa Singh v. Milkha Singh, A I R 1936 Lah 727=164 I O 582=17 Lah 270=98 P L R 574.

Bench of this Court, but that judgment in my opinion does not support the view of the learned Judge below. In a similar case I had held in A I R 1933 Lah 1² that a suit by a mortgagor to recover the unpaid balance of the mortgage money in a possessory mortgage is maintainable. A similar view had been taken by this Court in A I R 1925 Lah 174,³ and was subsequently taken in A I R 1935 Lah 26.⁴ Recently in A I R 1935 Pat 125⁵ it has been held that such a suit is maintainable as a suit for compensation and that the measure of compensation is the difference between the amount stipulated to be paid by the mortgagee and the amount actually paid by him. Even in 38 P L R 574¹ it has been held that a suit for compensation is maintainable. In my view, where a mortgage has been completed and possession has been given to the mortgagee, as in the present case, a suit for recovery of the balance of the amount due to the mortgagor is not a suit for specific performance of the contract.

I held in A I R 1933 Lah 1² that a suit for specific performance of the contract in such a case does not lie and also that a suit of the present description is not a suit for specific performance of the contract. Whether the amount payable by the mortgagee to the mortgagor is a debt due to the mortgagor was not decided by me and that was the point involved in 38 P L R 574¹ and apparently it was held that it was not a debt and not therefore attachable at the instance of a creditor of the mortgagor. 38 P L R 574¹ therefore does not apply to the facts of this case and there is ample authority that a suit for recovery of the unpaid balance in a mortgage of this description is maintainable at the instance of the mortgagor. Probably the proper form of the suit would be a suit for compensation and the measure of damages would be as indicated in A I R 1935 Pat 125.⁵

I accept the petition, set aside the decree of the Senior Subordinate Judge and send the case back to him with direction to proceed with the appeal in accordance

2. Thakur Singh v. Jagat Singh, A I R 1923 Lah 1=140 I O 495=33 P L R 1085.

3. Imam Din v. Dittu, A I R 1925 Lah 174=78 I C 445.

4. Jai Gopal v. Sundar Singh, A I R 1935 Lah 26=159 I O 768.

5. Wahid Ali v. Biptu Chamar, A I R 1935 Pat 125=159 I O 177.

with law, with due regard to the observations made above. The costs of this petition shall be paid by the respondent. Parties to appear before the Senior Subordinate Judge on 30th March 1937.

S.C./D.S.

Case remanded.

*** A. I. R. 1938 Lahore 22**

JAI LAL J.

Gandu and others, Plaintiffs and others, Defendants—Appellants.

v.

Mt. Nasibo and others—Defendants — Respondents.

Second Appeal No. 1068 of 1936, Decided on 18th February 1937, from decree of Dist. Judge, Hoshiarpur, D/. 4th June 1936.

* Civil P. C. (1908), O. 47, R. 4 (2) (a) — 'Opposite party' — Pro forma defendant not taking interest—Proceedings ex parte against him throughout — His interest sufficiently guarded by plaintiff — Such defendant is not 'opposite party' — Notice to him of application for review is not necessary before it is granted.

In a suit by some reversioners for setting aside an alienation, a certain reversioner was made a pro forma defendant in the suit. He however took no interest in the litigation and all the proceedings were ex parte against him from the very beginning. His interest was sufficiently guarded by one of the plaintiffs reversioners. The suit was decreed but on the application for review of the judgment, the suit was dismissed. On appeal by the plaintiff against the order granting review, to which the pro forma defendant joined as appellant, it was contended by the pro forma defendant that notice to him was necessary before the review was granted :

Held that the pro forma defendant could not under such circumstances fall within the meaning of 'opposite party' in O. 47, R. 4 (2) (a), and therefore notice to him before the granting of the review application was not necessary. [P 29 C 1]

L. Saunders—for Appellants.

Nanak Chand Pandit—for Respondents.

Judgment. — Some of the reversioners instituted a suit to set aside an alienation. The defendants were the alienors and the alienees and the remaining defendants were reversioners among whom was one Nathu. The proceedings against Nathu were throughout ex parte. He took no interest in the litigation but the suit was ultimately decreed. The alienees thereupon made an application for review of judgment. This application was granted and the suit was dismissed. Thereupon the plaintiffs-reversioners preferred an appeal to the District Judge and contended that the application for review had been

illegally granted without proper notice to them. The District Judge accepted this contention and remanded the case to the trial Judge to re-hear the application for review. The trial Judge after hearing the application for review again granted it and an appeal was preferred to the learned District Judge from the order granting the application for review. On this occasion, Nathu appeared in the proceedings for the first time as an appellant, along with the plaintiffs-reversioners. It was contended on his behalf that the application for review had been granted without notice to him (Nathu). The learned District Judge has held that under the circumstances, no notice to Nathu was necessary, because he had taken no interest in the litigation; he was not a plaintiff in the suit and his interest was sufficiently safeguarded by the remaining reversioners, i. e. the plaintiffs.

It is true that before the application for review can be granted, notice must be given to the opposite party and if such a notice has not been given, it is a good ground for an appeal. The question is whether, under the circumstances of this case, Nathu can come within the definition of "opposite party". I am inclined to agree with the view of the learned District Judge that he cannot. The proceedings against him were ex parte from the very beginning. He was a pro forma defendant. He did not become an appellant even when the appeal was originally preferred from the first order of the District Judge granting the application for review. It is only now that he has become an appellant. His real brother Amien was present throughout the proceedings. Under the circumstances there is no reason to interfere with the order of the learned District Judge. I dismiss the appeal, but leave the parties to bear their own costs.

K.B./A.L.

Appeal dismissed.

* A. I. R. 1938 Lahore 23

COLDSTREAM AND ABDUL RASHID JJ.

*Alopi Parshad and another—**Plaintiffs—Appellants.*

v.

*Court of Wards and others —**Defendants—Respondents.*

First Appeal No. 109 of 1936, Decided on 18th March 1937, from decree of Sub. Judge, First Class, Delhi, D/. 30.10.1935.

* (a) Limitation Act (1908), Art. 113 — Agreement between A and B providing that B should finance A's litigation in respect of certain property and in return should get certain share of it after decree—Agreement also providing that in case of appeal from decree to Privy Council B would be entitled to greater share — Suit by B more than three years after date of decree but within three years of refusal of performance — Suit held within time as second part of Art. 113 applied.

Statutes of limitation must be strictly construed and no man is to be deprived of rights which would by law belong to him unless the specific provisions of law, which are alleged to take away these rights, can be shown to apply clearly and in precise terms to his case. [P 27 O 1]

The question as to whether the first part of Art. 113 is or is not applicable depends to a great extent on the language of the agreement.

[P 26 O 2]

An agreement between A and B provided that B should finance A's litigation in respect of certain property and in return should get certain share of the property after the passing of the decree. It was also provided that if an appeal was preferred from the decree to the Privy Council, B would be entitled to a greater share. B brought a suit for the specific performance of the contract more than three years after the date of the decree but within three years of the refusal to perform the contract:

Held that the date of the decree could not be the time fixed within meaning of the first part of Art. 113 as B was entitled to get the share after the decree which meant when it became unassailable. As the decree, before appeal from it to the High Court and then to Privy Council, could not be said to be unassailable, it must be held that no date for specific performance of the contract was fixed. The second part of Art. 113 therefore applied and the suit was within time : *Case law discussed.*

[P 26 O 1, 2; P 27 O 1]

(b) Contract Act (1872), S. 23—Chamerty and maintenance—B agreeing to finance litigation costing about Rs. 9,000 of A in return for part worth about one lakh of recovered property — A, man of weak intellect and in habit of drinking — Agreement held unfair and therefore invalid.

A fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being per se opposed to public policy. But agreements of such a kind ought to be carefully watched and when extortionate, unconscionable or made for improper objects, ought to be held invalid. The question as to whether a contract is inequitable and unconscionable depends on the circumstances of each particular case.

[P 27 O 2;

P 28 O 1; P 29 O 1]

By an agreement between A and B, B agreed to finance the litigation of A in respect of certain property in return for part worth about one lakh of the recovered property, knowing well that the litigation would cost about Rs. 9,000. A was a man of weak intellect and was in the habit of drinking :

Held that the agreement was unconscionable and therefore invalid : 2 Cal 233 (P C) and 20 Cal 843 (P C), *Foll.*

[P 29 O 1]

Achhru Ram — *for Appellants.*

Ram Lal (Govt. Advocate) and Suraj Narain (for No. 1), M. A. Majid and Bishan Narain (for Nos. 2 & 3) —
for Respondents.

Abdul Rashid J. — The material facts of the case, for the purposes of this appeal, may be shortly stated. Mirza Surriya Jah, the head of the Mughal Royal Family of Delhi, died on 8th February 1913, leaving him surviving two wives and two daughters. On his death, the Court of Wards assumed superintendence of the estate left by him on behalf of his daughters and widows. Saleem Mohammad Shah claimed to be the son of Mirza Surriya Jah and his sole heir. His status was however denied by the Court of Wards. Saleem Mohammad Shah was informed by the Court of Wards that he should take steps to establish his claim in a Court of law. In April 1913, Saleem Mohammad Shah was given a compassionate allowance of Rs. 100 per month. An allowance of Rs. 200 per month was also granted to his widow Nawab Qaisar Jahan Begam, defendant 2. Saleem Mohammad Shah applied for a loan to carry on the necessary litigation but his application was rejected by the Court of Wards on 15th July 1913, on the ground that he could bring a friendly suit to establish his claim and the litigation would not involve a great deal of expense. On 26th January 1920, Saleem Mohammad Shah brought a suit for possession of the property left by Mirza Surriya Jah in forma pauperis. The defendants in the suit were the Court of Wards and the surviving widows and daughters of Mirza Surriya Jah. The application to sue in forma pauperis was contested on behalf of the Court of Wards. On 27th August 1920, Mr. Abdul Rahman (now Sir Abdul Rahman) counsel for Saleem Mohammad Shah made a statement to the effect that his client was prepared to pay the court-fee. The Court thereupon directed Saleem Mohammad Shah to pay the court-fee before 4th October 1920. The court-fee was paid on that date. Saleem Mohammad Shah had claimed the entire estate of Mirza Surriya Jah, but he succeeded in getting a decree on 10th May 1925 for a $14/32$ share in the property left by Mirza Surriya Jah.

On 2nd October 1920, an agreement Ex. P-1 was entered into between Saleem Mohammad Shah (hereinafter referred to

as the first party) on one side and Alopī Parshad Ram Sarup (hereinafter referred to as the second party) on the other side, whereby the second party offered to finance the litigation on behalf of the first party, and the first party agreed to transfer a $3/16$ th or $4/16$ th share (as the case may be) of the property obtained by him, as a result of the litigation, in favour of the second party. It was stated in the deed of agreement that the first party was an owner of considerable moveable and immovable property by virtue of inheritance from his father, that the whole of this property was in possession of the Court of Wards, that the first party had no means whatever to pay court-fee and other costs of litigation, that the second party had agreed to bear all the expenses of the case, and that in lieu of the services of the second party, a $3/16$ th share would be transferred to them if no appeal were preferred to the Privy Council, but that a $4/16$ th share would be made over to the second party if an appeal was preferred to the Privy Council. It was further stated in this agreement that all the expenses of the litigation shall be paid by the second party according to the bills sent by the counsel. After the decree is passed, the second party shall be entitled to get their share to the extent of 3 annas or 4 annas in the rupee as the case may be, and the first party shall have power either to get the entire property partitioned and then give the said share or to get the value of the entire property assessed and then pay money in cash. Until the share of the second party amounting to $3/16$ th or $4/16$ th is paid, the first party is not entitled to alienate or transfer the property obtained as a result of the litigation in any manner.

On 16th July 1925, the Court of Wards had assumed superintendence of the estate of Saleem Mohammad Shah also as he had become a sharer in the property inherited by the widows and the daughters of Mirza Surriya Jah by means of the decree passed in his favour on 10th May 1925. On 17th September 1925 Saleem Mohammad Shah died. On 5th January 1926 the present plaintiffs submitted a petition to the Deputy Commissioner demanding a $3/16$ th share of the property decreed in favour of Saleem Mohammad Shah. On 5th March 1926 plaintiffs' petition, demanding a share in the property of Saleem Mohammad Shah, was

rejected by the Deputy Commissioner. On 28th April 1926 another application was made by the plaintiffs to the Deputy Commissioner and the Deputy Commissioner offered to pay the plaintiffs without prejudice a sum of Rs. 8,500 on the ground that they had spent about Rupees 8,000 in financing the litigation on behalf of Saleem Mohammad Shah. The plaintiffs declined to accept the offer of the Deputy Commissioner and instituted the present suit on 16th October 1928, for possession by partition of 3/16th share out of the 7/16th decreed in favour of Saleem Mohammad Shah by the decree dated 10th May 1925. The claim of the plaintiffs was solely based on the agreement referred to above. It was stated in the plaint that the cause of action had accrued to the plaintiffs on 10th May 1925 when the decree was passed and on 5th March 1926, when the Deputy Commissioner rejected the plaintiffs' claim on behalf of the Court of Wards. The Court of Wards was the first defendant in the case, Nawab Qaisar Jahan Begam widow of Saleem Mohammad Shah, and Jaimur Jahan Begam, his daughter, were the second and the third defendants respectively.

On behalf of the Court of Wards, it was pleaded that the plaintiffs' suit was barred by limitation, that Saleem Mohammad Shah was a man of weak intellect and was addicted to drinking, that the agreement dated 2nd October 1920 was not executed by him of his own free will, that the agreement was unconscionable and inequitable and was opposed to public policy and that the plaintiffs had only spent about Rs. 8,000 in financing the litigation on behalf of Saleem Mohammad Shah. It was further pleaded that the plaintiffs were not entitled to interest and that in any case they could not claim more than Rs. 8,500 which the Deputy Commissioner had offered to pay them. Almost similar pleas were raised on behalf of defendants 2 and 3. An additional plea was raised on behalf of Nawab Qaisar Jahan Begam to the effect that her dower debt amounting to Rs. 50,000 was the first charge on the estate left by Saleem Mohammad Shah, her deceased husband. On the pleadings of the parties the trial Court framed 18 issues, but in this appeal we are only concerned with five issues which are in the following terms:

1. Is the suit within time? 2. Did Mirza Saleem Mohammad Shah execute agreement Ex. P. 1 in favour of the plaintiffs? 3. If so, was he a man of weak intellect and addicted to drinking? What is the effect, and was the said agreement not executed by him of his own free will? 4. Is the said agreement unlawful and opposed to public policy and therefore not binding on defendant 1?
16. Are plaintiffs entitled to any interest?

The trial Court held that the suit of the plaintiffs was barred by limitation under Art. 113, Limitation Act, on the ground that the suit was one for specific performance of a contract and time began to run from 10th May 1925 when a decree for possession of a 3/16th share was passed in favour of Saleem Mohammad Shah. It further held that the agreement Ex. P. 1 was not inequitable or extortionate and that Mirza Saleem Mohammad Shah and his heirs were bound by it. It was also held by the lower Court that Rs. 10,000 had been spent by the plaintiffs in financing the litigation on behalf of Saleem Mohammad Shah and that they were entitled to interest at the rate of 12 per cent. per annum from the date of the advance to the date of the decree and 6 per cent. per annum future interest. On the above findings, the trial Court dismissed the suit on the score of limitation. Against this decision the plaintiffs have preferred an appeal to this Court. In his opening address the learned counsel for the appellants attacked the judgment of the trial Court on two points only. He contended firstly that the suit was not barred by limitation, and secondly that the lower Court was wrong in holding that the plaintiffs had spent only Rs. 10,000 in financing the litigation instead of Rupees 19,000 alleged to have been spent by them. The learned Government Advocate in reply raised an additional point, namely that the agreement Ex. P. 1 was inequitable and extortionate and should not be given effect to and that the plaintiffs in any case were not entitled to anything more than the costs decreed by the Senior Subordinate Judge, Delhi, in favour of Saleem Mohammad Shah amounting to Rs. 6,330 on 10th May 1925.

It will be convenient to deal with the question of limitation first of all. Art. 113, Limitation Act, provides a period of three years for suits for specific performance of a contract. The limitation begins to run from the date fixed for the performance of the contract, or if no such date is fixed, when the plaintiff has notice that performance is refused. The trial Court has

held that though no date for the performance of the contract was fixed in the agreement Ex. P. 1, it must be held that limitation began to run from 10th May 1925, when a decree was passed in favour of Saleem Mohammad Shah, in view of the maxim *certum est quod certum reddi potest*. According to the trial Court, the date for the performance of the contract was ascertainable and accordingly such date must be taken to be the date fixed for the performance of the contract. Para. 3 of the agreement Ex. P. 1 states that after a decree is passed, the second party shall be entitled to get their share to the extent of three annas or four annas as the case may be and the first party shall have power either to get the entire property partitioned and then give the said share or get the value of the entire property assessed and then pay money in cash. The agreement further provides that in the case of an appeal to His Majesty in Council the plaintiffs would meet the entire expenses incurred in the prosecution of the appeal and that their share would then be 4/16th instead of 3/16th. In my opinion, it is clear from the provisions of the agreement that the plaintiffs could not sue for specific performance of the contract entered into by means of the agreement Ex. P. 1 on 10th May 1925, when a decree was passed in favour of Saleem Mohammad Shah. If the plaintiffs had instituted a suit on that date for specific performance of the contract, their suit would have been liable to dismissal as being premature. It is clear therefore that 10th May 1925 cannot possibly be regarded as a terminus a quo for the purposes of limitation. The maxim alluded to above and relied on by the trial Court has no application to the facts of the present case.

It was contended by the learned Government Advocate in support of the decision of the trial Court on the question of limitation that under para. 3 of Ex. P. 1 the plaintiffs became "entitled" to their share on the passing of the decree and that the mere fact that the property was to be partitioned or the value thereof was to be assessed did not in any way affect the title of the plaintiffs which accrued to them on 10th May 1925. In my opinion this contention is devoid of all force. The plaintiffs were entitled to get their share after the decree which undoubtedly means when the decree becomes unassailable. On

10th May 1925 the decree in favour of Saleem Mohammad Shah had not become unassailable. It was liable to be challenged in an appeal to the High Court, and on the decision of such an appeal by an appeal to His Majesty in Council. The 10th May 1925 cannot therefore be regarded as the date on which the plaintiffs became entitled to their share. If 10th May 1925 cannot be regarded as the date fixed for the performance of the contract, it must be held that no date for the specific performance of the contract was fixed within the purview of Art. 113, Limitation Act. The second part of Art. 113 would therefore be applicable to the facts of the present case. The trial Court has observed that if 10th May 1925 cannot be regarded as the starting point of limitation, the suit must be held to be within time as no demand or refusal by the defendants is alleged or proved to have been made before November 1925. On the question of limitation, the learned counsel for the appellants relied on A I R 1933 All 410,¹ where it was held that:

The force of the word "fixed" used in Art. 113, Lim. Act, implies that the date should be fixed definitely and should not be left to be gathered from surrounding circumstances of the case. It must be a date clearly mentioned in the contract whether the said contract be oral or in writing.

In a case reported in 11 Lah' 69² the promisor undertook to execute the sale deed after payment of the last instalment in the Government treasury and after the acquisition of proprietary rights, it was held that the maxim *certum est quod certum reddi potest* could not be invoked in reference to this agreement and that the suit was not barred by the first part of Art. 113, Lim. Act. A number of other rulings were also relied upon by the learned counsel for the appellants, but it is unnecessary to deal with them as the question as to whether the first part of Art. 113, Lim. Act, is or is not applicable must depend to a great extent on the language of the agreement. On behalf of the respondents, reliance was placed on two Oudh rulings, 9 I C 243³ and 66 I C 622.⁴ In the first of these rulings, there

1. Kashi Prasad v. Ohhab Lal, A I R 1933 All 410=145 I C 586=1933 A L J 300.

2. Waryam Singh v. Gopi Chand, A I R 1930 Lah 34 = 119 I C 491 = 11 Lah 69 = 31 P L R 352.

3. Gajadhar Singh v. Kandhya Buksh, (1911) 9 I C 243.

4. Bisheshar Dayal v. Mt. Har Raj Kaur, A I R 1921 Oudh 248=66 I C 622.

was absolutely no uncertainty as to the date while in the second ruling the real question in dispute was left undecided as the case was settled by means of a compromise. 217 P L R 1911⁵ is also not of any great assistance to the respondents as it does not contain any discussion as to whether the first part or the second part of Art. 113, Lim. Act, was applicable to the facts of that case. It was held by a Full Bench of the Punjab Chief Court in 26 P R 1911⁶ that :

Statutes of limitation must be strictly construed and that no man is to be deprived of rights which would by law belong to him unless the specific provisions of law, which are alleged to take away these rights, can be shown to apply clearly and in precise terms to his case.

It was also held that :

The law of limitation must be strictly construed, i. e. its scope cannot be stretched to extend to cases not covered by its language, and, when the indications as to its application are not clear, the construction must be in favour of the right to proceed.

In the present case the respondents have failed to bring the case specifically within the purview of the first part of Art. 113, Lim. Act. I would therefore hold that the second part of Art. 113, Lim. Act, is applicable to the facts of the present case and that the suit of the plaintiffs is within limitation. The next question for determination is whether the plaintiffs have succeeded in establishing that Rs. 19,000 were spent by them in financing the litigation on behalf of Saleem Mohammad Shah. The learned counsel for the appellants merely drew our attention to four cheques of Rs. 5,000, Rupees 10,000, Rs. 3,500 and Rs. 500 which were issued by the plaintiffs in favour of Mr. Abdul Rahman, counsel for Saleem Mohammad Shah, and which were cashed by him between 13th January 1921 and 31st August 1922. It was contended by the learned counsel that the statement of Mr. Abdul Rahman showed that all these cheques were paid to him for carrying on the litigation launched by Saleem Mohammad Shah against the Court of Wards and the widows and daughters of Mirza Surriya Jah. Out of this sum of Rs. 19,000, Rs. 10,000 was stated to be the fee paid to Mr. Abdul Rahman as counsel in the case. Nawab Qaisar Jahan Begam, defendant 2, and her witnesses have stated that the fee

fixed with Mr. Abdul Rahman was Rupees 2,000 only. Mr. Abdul Rahman on the other hand has stated as a witness that the fee was Rs. 10,000. Mr. Abdul Rahman was a lawyer of 11 years' standing in January 1921. I am of the opinion that a fee of Rs. 10,000 was highly excessive in view of the amount of work involved and in view of the status of Mr. Abdul Rahman as an advocate at the time when this fee is alleged to have been paid. It was clearly stated in the agreement (Ex. P-1) that the plaintiffs would pay all the expenses of litigation without any objection according to the bills sent by the counsel. The duty of keeping accounts or demanding accounts from the counsel was expressly imposed on the plaintiffs by means of the agreement which forms the basis of the present suit. The plaintiffs have failed to produce any accounts or bills of counsel.

In these circumstances the only way of determining the expenses of litigation is to rely on the decree sheet in the suit brought by Saleem Mohammad Shah against the Court of Wards in the year 1920. This decree sheet is printed at p. 107 of Vol. 2 of the printed paper book. It shows that a sum of Rs. 6,330 was spent by the plaintiffs in that litigation. Rs. 3,000-8-0 were spent on the court-fees and Rs. 3,000 were taxed as pleader's fee. It is true that there are some small items which cannot be included in the decree sheet. The amount spent in incidental charges cannot, however, be taken to be more than 33 per cent. of the amount shown in the decree sheet as the costs of the plaintiff. In view of the non-production of accounts by the plaintiffs of the money spent on the litigation on behalf of Saleem Mohammad Shah, I would hold the reasonable expenses of the litigation to be the sum of Rs. 6,330 shown as the costs incurred by the plaintiff in the decree sheet plus a sum of Rs. 2,110 on account of incidental charges. The total amount spent by the plaintiffs in pursuance of the agreement Ex. P. 1 would, therefore, come to Rs. 8,440. This sum was ample to cover all the reasonable expenses incurred on behalf of Saleem Mohammad Shah in the previous suit. It was held by their Lordships of the Privy Council in 4 I A 23⁷ that :

A fair agreement to supply funds to carry on a suit in consideration of having a share of the pro-

5. *Fazal Din v. Amir-ud-din*, (1911) 217 P L R 1911=11 I O 299=188 P W R 1911.

6. *Sundar v. Salig Ram*, (1911) 26 P R 1911=9 I O 800=34 PLR 1911=88 PWR 1911 (FB).

7. *Ram Kumar Kundu v. Chunder Canto Mookerjee*, (1879) 2 Cal 233=4 I A 23 (P O).

erty, if recovered, ought not to be regarded as being per se opposed to public policy. But agreements of such a kind ought to be carefully watched, and when extortionate, unconscionable, or made for improper objects, ought to be held invalid.

In another Privy Council case reported in 20 Cal 843,⁸ it was laid down that :

The English law of champerty is not in force in India. Agreements made by claimants of property in litigation to share it with others on their obtaining decrees in consideration of funds being supplied by the latter for carrying on their suits are not in themselves opposed to public policy, nor are they necessarily void. But such agreements, when extortionate, are inequitable; and in that case should not receive effect.

In order to determine whether the present agreement is extortionate or inequitable, we have to take into account the respective positions of the parties and other circumstances existing on 2nd October 1920, when the agreement in question was executed by Saleem Mohammad Shah. Alopi Parshad, plaintiff, deposed as a witness that before the execution of the agreement Ex. P.1, he had seen the properties in the city and could approximately assess the value of the properties outside the city. His estimate was that the properties claimed by Saleem Mohammad Shah were worth about eight lacs of rupees. In the plaint of the previous case it was stated that the value of the properties was ten lacs of rupees. A 3/16th share of properties worth eight lacs of rupees would come to one lac and fifty thousand rupees. It would also be apparent to shrewd businessmen like Alopi Parshad and Ram Sarup that the expenses of litigation could not be more than eight or nine thousand rupees if no appeal were preferred to the High Court and could not be very much more than twelve thousand rupees if such an appeal were preferred. By advancing about ten to twelve thousand rupees to Saleem Mohammad Shah, the plaintiffs stood to gain a sum of one lac and fifty thousand rupees in the event of Saleem Mohammad Shah succeeding in the litigation launched by him. They safeguarded themselves by demanding a bigger share of the property in case an appeal were preferred to the Privy Council.

Mr. Abdul Rahman in his statement dated 7th February 1933 deposed that though he had not seen Saleem Mohammad Shah purchasing drinks he saw him slightly intoxicated twice and told him not to come

to his office in that condition. Nasir-uddin (D. W. 3) deposed that Rang Mahal was at a distance of about 500 yards from the house of Saleem Mohammad Shah in Kucha Chellan. Saleem Mohammad Shah used to pass the whole day long in Rang Mahal and used to take cocaine in concealment. A year before his death, Saleem Mohammad Shah had told him that he had given up cocaine and he never saw him taking cocaine during that year. It is also in evidence that Saleem Mohammad Shah was a man of weak intellect and was inclined to waste money in making presents to different officials. The considerations enumerated above, in my opinion, make it highly probable that Saleem Mohammad Shah was induced to enter into an unfair bargain whereby he agreed to give up property worth a lac and fifty thousand rupees for a sum of ten or twelve thousand rupees. The learned counsel for the appellants contended that Alopi Parshad Ram Sarup knew that the litigation would take a long time and that during the interval the property might depreciate in value. In 1920 it could not be said with any degree of certainty that immovable property in Delhi would go down in value in a few years. On the other hand, the plaintiffs might have anticipated a rise in the value of immovable property in Delhi. In any case we have to take into consideration the conditions prevailing in the town of Delhi in the year 1920. In a case reported in 11 All 57,⁹ on the advice of his legal advisers, the obligor executed a bond for Rs. 25,000 in consideration of the obligee agreeing to defray the expenses of an appeal to the High Court. The obligor agreed to pay the Rs. 25,000 within one year from his recovering possession of the property in suit; and at the request of the obligor's pleader, the obligee advanced Rs. 3,700 which was applied to the expenses of the appeal. In these circumstances it was held that:

Although there was nothing to show that the obligor could have obtained an advance on terms more advantageous to himself, it was for the obligee to establish to the Court's satisfaction, without reasonable doubt, that he could not have done so; and that, this not having been established, and the reasonableness and fairness of the bargain not being proved by showing that there had been difficulties in negotiating it, or that others had refused it as not sufficiently advanta-

8. *Raghunath v. Nilkanth*, (1898) 20 Cal 848=20 I A 112 (P C).

9. *Ohunni Kuar v. Rup Singh*, (1888) 11 All 57 =1888 A W N 296.

geous to them, the Court should hold the bargain to be a hard and unconscionable one, which should not be enforced.

In my opinion the question as to whether a contract is inequitable and unconscionable depends on the circumstances of each particular case. After considering the entire evidence on the record, I am of the opinion that in the present case Saleem Mohammad Shah was induced to enter into an agreement which was highly detrimental to his interests and that such a contract falls within the purview of the observations made by their Lordships of the Privy Council in 20 Cal 843.⁸ I would therefore refuse to enforce this agreement.

The final question for consideration is whether on equitable grounds some relief should be given to the appellants. As I have held Rs. 8,440 to be the reasonable expenses of the litigation financed by the appellants on behalf of Saleem Muhammad Shah, I would pass a decree in their favour for this amount. A sum of Rs. 8,500 was tendered to the appellants by the Court of Wards on 4th July 1928, i. e., about three months prior to the filing of the present suit by the appellants. As this reasonable offer was refused by the appellants, they are not entitled to any interest or the costs of the litigation. No interest should be allowed to them from the year 1921 to the year 1928 as the expense of Rs. 8,440 incurred by them during the litigation cannot be converted into a profitable investment in view of the inequitable nature of the agreement entered into by them with Saleem Mohammad Shah. For the reasons given above, I would accept this appeal, set aside the judgment and the decree of the Court below and grant the plaintiffs a decree for Rs. 8,440. I would order the parties to bear their own costs throughout.

Coldstream J.—I agree.

S.O./D.S. *Appeal partly allowed.*

A. I. R. 1938 Lahore 29

YOUNG C. J. AND MONROE J.

Guranditta Mal — Petitioner.

v.

Emperor.

Criminal Revn. No. 1653 of 1936, Decided on 4th March 1937, from order of Sess. Judge, Jullundur, D/- 19th November 1936.

Punjab Municipal Act (3 of 1911) S. 81, as amended in 1933—Scope—Mere use of word

'rent' will not of necessity make that sum recoverable under S. 81 unless "claimable by committee under Act".

The operation of S. 81 is controlled by the words "claimable by a committee under this Act" in the same section. It is not any sum that can be described as rent or fee which can be recovered under the summary provisions of the section, but only a sum that is claimable by the committee under the express provisions of the Act. The mere use of the word 'rent' applied to a sum recoverable by the committee will not of necessity make that sum recoverable as rent "claimable by committee under the Act": *A I R 1934 Lah 699, Ref.*

[P 30 C 1]

Nand Lal for Mela Ram —

for Petitioner.

Des Raj Sawhney — *for the Crown.*

Amar Nath Chopra —

for the Municipal Committee.

Young C. J.—The Municipal Committee, Nur Mahal, sought for and obtained an order from Rana Mahmud Khan, Magistrate, 3rd Class, Phillaur, under S. 81, Punjab Municipal Act, for the payment of a sum of money from Guran Ditta, which was described as rent. Guran Ditta brought an objection to this order before the Magistrate in which he admitted that he had built a shop on a site belonging to the Municipal Committee, but he said that no rent was due from him. The Magistrate refused to make any inquiry and disallowed the objection. Guran Ditta then applied in revision to the learned Sessions Judge at Jullundur. He held that S. 81, Punjab Municipal Act, did not apply to the sum claimed by the Committee. It appears from his judgment that the record does not show on what basis the Municipal Committee claimed the amount and that even in their resolution authorizing the prosecution of the claim, there is nothing to show what the nature of their claim is. The learned Judge submitted the matter to this Court with the recommendation that the order of the Magistrate be set aside. The learned Judge held that before any order was made by the Magistrate it was necessary that it should be shown that the amount claimed fell within the terms of S. 81 of the Act. That section provides that:

Any arrears of any tax, water rate, rent, fee or any other money claimable by a committee under this Act may be recovered on application to a Magistrate having jurisdiction within the limits of the Municipality or in any other place where the person from whom the money is claimable may for the time being be resident, by the distress and sale of any moveable property within the limits of his jurisdiction belonging to such person. . . .

The reference in the first instance came before Abdul Rashid J. and in view of the argument before him he thought it desirable that there should be a decision by a Division Bench. It has already been held by a Division Bench of this Court in 15 Lah 884¹ that where liability for payment of rent arises out of a contract between the parties, it must be determined by a Civil Court and cannot be recovered summarily under S. 81 and it was objected that because the word 'rent' had been added to the section by an Amending Act 3 of 1933, which came into operation after the cause of action in 15 Lah 884¹ arose, that judgment was no longer good law.

In our opinion the operation of the section is controlled by the words "claimable by a committee under this Act". It is not any sum that can be described as rent or fee which can be recovered under the summary provisions of the section, but only a sum that is claimable by the committee under the express provisions of the Act. The mere use of the word 'rent' applied to a sum recoverable by the committee will not of necessity make that sum recoverable as rent claimable by the committee under the Act. If, for example, the sum was payable as rent under a lease, a contract made independently of the Act, that sum would clearly not be recoverable under the summary powers. Having failed to show the nature of the sum payable, the Committee were not entitled to obtain an order under S. 81 of the Act and we therefore accept the recommendation of the learned Judge and set aside the order of the Magistrate.

W.D./A.L.

Order set aside.

1. Municipal Committee, Delhi v. Hafiz Abdullah, A I R 1934 Lah 699=152 I C 919=15 Lah 884.

A. I. R. 1938 Lahore 30

COLDSTREAM J.

*Firm Shankar Lal-Kundan Lal —
Defendant — Appellant.*

v.

*Firm Jamna Das-Piyare Lal, Plain-
tiff and others, Defendants — Res-
pondents.*

First Appeal No. 60 of 1937, Decided on 10th June 1937, from order of Addl. Dist. Judge, Hissar, D/- 16th March 1937.

**Sale — Postponement of delivery until pay-
ment of entire price — Passing of property is**

not stayed per se—Vendor selling ascertained goods —Condition to keep goods locked with vendor until payment of price — On default goods to be re-sold after notice to vendee—Property in goods held passed to vendee — Suit to recover price held also maintainable under S. 55 (2), Sale of Goods Act.

A provision in a contract of sale for postponement of delivery until payment of the entire price will not per se stay the passing of the property in the goods sold. [P 31 C 1]

Where a vendor sold his ascertained specific deliverable goods to the vendee on condition that the vendor would keep the goods locked up until the vendee paid the price and if the price was not paid by a certain date the vendor was to be at liberty to re-sell the goods after giving a week's notice to the vendee and the vendee failed to pay as contracted and hence the vendor brought a suit to recover the balance of price :

Held that intention of the parties was that property should pass as a matter of fact, because the vendor did not reserve the right of disposal of the goods until the price was paid and hence the suit was valid : A I R 1930 All 661 and 30 R R 355, Rel. on. [P 31 C 1]

Held further that the vendor had a right to sue for price of goods sold under S. 55 (2), Sale of Goods Act, as the statement in the contract of sale that the seller would have the right to re-sell after notice did not deprive him of his legal right to sue for the price if he desired. [P 31 C 1]

Charanjiv Lal — *for Appellant.*

Indar Dev for Achhru Ram —

for Respondents.

Judgment. — The plaintiff-respondent Firm Jamna Das-Piyare Lal on 1st September 1932 sold by a deed a "kotha" of barley to the appellant-defendant Firm Shankar Lal-Kundan Lal. The price, Rs. 2,029.3.6 plus weighing and other charges was to be paid by 26th March 1935, but the buyer had the option of paying before that date. One of the conditions of the contract was that the kotha was to be kept locked by the seller until the price was paid and if the price was not paid as contracted, the seller was to be at liberty to re-sell the barley after giving a week's notice to the buyer. The defendants had not paid the full price on the contract date and the plaintiffs sued them for the balance of the price. The trial Court dismissed the suit holding that as property in the goods sold had not passed, the payment of the price being a condition precedent to the fulfilment of the contract, the plaintiffs had no right to sue for the price but could only recover damages. On appeal by the plaintiffs, this decision was reversed by the learned District Judge who held that property passed when the contract was made and

gave the plaintiffs the decree they sought. The defendants have appealed. The only question is whether the lower Appellate Court was wrong in finding that the property in the barley sold has passed. It is not disputed that the sale was of ascertained specific deliverable goods. For the appellants, reliance is placed on S. 25, Sale of Goods Act, which enacts that :

Where there is a contract for the sale of specific goods the seller may, by the terms of the contract reserve the right of disposal of the goods until certain conditions are fulfilled. In such case notwithstanding the delivery of the goods to a buyer the property in the goods does not pass to the buyer until the conditions precedent imposed by the seller are fulfilled.

In my opinion the lower Appellate Court's decision is correct. The proved circumstances show that the intention of the parties was that property should pass as a matter of fact. The seller here did not reserve the right of disposal of the barley until the price was paid and there is good authority for the proposition that a provision in a contract of sale for postponement of delivery until payment of the entire price will not per se stay the passing of the property in the goods sold: A I R 1930 All 661¹ and 30 R R 355.² The contract did not reserve to the seller the right to sell the goods pending the fulfilment of a condition precedent; it provided that the default of payment would give the seller a right to re-sell after notice. The buyer could insist on delivery at any time by paying the price. It would further appear that in any case the seller had a right to sue for the price under S. 55 (2), Sale of Goods Act. The statement in the contract that the seller would have the right to re-sell after notice would not deprive him of his legal right to sue for the price if he desired. This appeal fails and is dismissed with costs.

B.D./R.K.

Appeal dismissed.

1. Peare Lal Kishan Prasad v. Diwan Singh Ganeshi Lal, A I R 1930 All 661=125 I C 453=1930 A L J 777.

2. James Tarling v. Baxter, 30 R R 355.

A. I. R. 1938 Lahore 31

ADDISON AND DIN MOHAMMAD JJ.

Lal Singh and others — Appellants.

v.

Emperor.

Criminal Appeal No. 119 of 1937, Decided on 4th March 1937, from order of Addl. Sess. Judge, Amritsar, D/- 21st December 1936.

Penal Code (1860), S. 302—Several injuries caused by accused resulting in gangrene in foot and leg and causing death — Accused held guilty of murder.

Where a person was seriously injured by the accused and died subsequently, but in post mortem examination it was found that the immediate cause of death was gangrene which had set in in the right foot and leg as a result of injury :

Held that the accused were guilty of an offence under S. 302 : A I R 1928 Lah 851, *Rel. on.*

[P 32 C 2 ; P 33 C 1]

D. C. Ralli for B. R. Puri —

for Appellants.

A. G. Maurice — *for the Crown.*

Din Mohammad J.—Lal Singh, Jagat Singh, Tarlok Singh, Anokh Singh, Dalip Singh and Teja Singh have been convicted of an offence punishable under S. 302 read with S. 149, I. P. C., and sentenced to transportation for life. They have appealed. The case for the prosecution is that on 18th August 1936 the accused formed an unlawful assembly and in prosecution of the common object of that assembly, they committed the murder of Achhar Singh. The report of this occurrence was made to the police by Ganda Singh, who is a real brother of Teja Singh, and an uncle of Lal Singh and Jagat Singh, and a granduncle of Dalip Singh, Tarlok Singh and Anokh Singh, accused. This report was made at 12 o'clock at village Kohali where the Sub-Inspector was engaged in the investigation of another case. The Sub-Inspector accompanied Ganda Singh to the spot and found Achhar Singh lying seriously injured. He accordingly first recorded his statement and then despatched him to Amritsar for medical treatment. Dr. P. R. Puri, Resident Medical Officer of Civil Hospital, Amritsar, examined him and found no less than fourteen injuries on his person including eight incised wounds. Both his legs were badly smashed. He was admitted as an indoor patient and ultimately died on 29th August. The post mortem examination on his body was performed by Lt. Col. Dargan, Civil Surgeon, who found that the immediate cause of his death was gangrene which had set in in the right foot and leg. At the trial the case for the prosecution has been supported by Ganda Singh (P. W. 6), Waryaman (P. W. 8) and Lachhman Singh (P. W. 10). As already stated, Ganda Singh is a close relation of the accused. Waryaman was a kamin of Achhar Singh. They all have consistently stated that it

was the six accused persons who had set upon Achhar Singh while he was in his fields. Of the accused, Teja Singh was armed with a dang, Jagat Singh with a spade and the rest with hatchets. The accused thrashed Achhar Singh mercilessly and left him only when he had lost consciousness.

Of the accused, Lal Singh has alone admitted his presence at the time of the occurrence along with his son Tehlu, but has set up a counter version to explain the injuries found on Achhar Singh. He has stated that Lachhman Singh, Ganda Singh and Achhar Singh in company with four other persons attacked him and while two of the companions of Achhar Singh inflicted injuries on him with sharp edged weapons, his cousin Banta Singh and one Hazara Singh defended him and that it was in the course of the melee that ensued that Achhar Singh received his injuries. Lal Singh had some injuries on his person which were examined by Dr. Ghulam Muhammad, but the Civil Surgeon, who checked the injuries, had stated that they looked like fabricated wounds.

The accused examined Makhan Singh, Bahadar Singh, Bachan Singh and Kishen Singh in their defence. Makhan Singh stated that on hearing the noise which proceeded from the field of Achhar Singh, he hurried to the spot in company with Bahadar Singh and found a fight going on between Achhar Singh and Lachhman Singh on one side and Lal Singh, Tehl Singh, Banta Singh and Hazara Singh on the other. On their intervention, the parties desisted from fighting and it was then noticed that both Lal Singh and Achhar Singh were injured. Bahadar Singh also made a statement to the same effect. Bachan Singh stated that he was proceeding to his village in company with Kishen Singh when Kishen Singh noticed a fight going on in a field close by and that on going there they found two persons injured. Kishen Singh supported him.

On going through the record most carefully and weighing the evidence produced on both sides, we are disposed to think that while the story related by the defence witnesses is improbable and untrue, there is no reason to disbelieve the prosecution witnesses. If it were true that Banta Singh, Tehl Singh and Hazara Singh had inflicted injuries on Achhar Singh, it cannot be conceived that Achhar Singh or the

other prosecution witnesses would have allowed them to escape unpunished by substituting a completely different set of persons for them. Cases do arise, no doubt, where false additions are made, but the implication of persons who are innocent in place of those who are guilty is a very rare phenomena and much more cogent and convincing evidence is required to establish that factor than that produced in the present case by the defence. We accordingly hold that the complicity of all the accused persons in the commission of the crime is established beyond reasonable doubt.

The only question that falls for determination now is the nature of the offence committed by the appellants, especially in view of the fact that gangrene had supervened. Counsel for the appellants have relied on 42 All 302¹ and A I R 1934 Lah 368² and contended that the facts established on the record do not constitute an offence punishable under S. 302, I. P. C. In 42 All 302¹ three injuries had been inflicted on the deceased, one of which was a fracture of the bones of the left forearm, another was a fracture of a bone in the right hand while the third was a fracture of both the bones of the left leg. All these injuries had been inflicted with a blunt weapon. It was held by a Division Bench of the Allahabad High Court that, in the circumstances of the case, the law allowed them to record a conviction in the alternative under S. 304 or S. 325, I. P. C. In A I R 1934 Lah 368² the medical evidence was that death was due to meningitis and compression, but it was not possible to say if they had any direct connexion with the injuries inflicted by the appellant, and it was on these grounds that the conviction was recorded under S. 326, I. P. C. It would be obvious that those two authorities are not relevant to the case before us.

In A I R 1928 Lah 851³ the same learned Judges who decided A I R 1934 Lah 368² in a case in which a person had received grievous injuries and as a result of those injuries pneumonia had

1. Rama Singh v. Emperor, A I R 1920 All 110 = 58 I O 468 = 21 Or L J 788 = 42 All 302 = 18 A L J 224.

2. Chanan Das v. Emperor, A I R 1934 Lah 868 = 1934 Or O 617 = 151 I O 238 = 35 Or L J 1283.

3. Fazla v. Emperor, A I R 1928 Lah 851 = 110 I O 230 = 29 Or L J 678.

supervened, resulting in his death, had held that the assailants of the deceased were guilty of murder. We consider that that authority comes very near to the facts of the present case. The question in this case however is more or less academic as even if the accused were found to be guilty of an offence punishable under S. 326 only, they would deserve nothing less than transportation for life, considering the number and the nature of the injuries inflicted by them on their victim. We accordingly dismiss this appeal and confirm the sentence of transportation for life imposed on the appellants.

S.C./D.S.

Appeal dismissed.

* A. I. R. 1938 Lahore 33

ADDISON AND DIN MOHAMMAD JJ.

Munshi Ram—Defendant—Appellant.
v.

Mehr Das and another, Plaintiffs and others, Defendants—Respondents.

Letters Patent Appeal No. 97 of 1936, Decided on 4th February 1937, from decree of Jai Lal J., D/- 8th April 1936, reported in *A I R 1936 Lah 920*.

* (a) Punjab Courts Act (6 of 1918), S. 41 (3) — Interpretation of clause in statement of custom would involve decision regarding validity or existence of custom — Certificate is necessary (*Obiter*).

The interpretation of a clause in the village statement of custom would involve a decision regarding the validity or the existence of a custom and therefore a certificate under S. 41 (3) is necessary before appeal is preferred to the High Court: *A I R 1932 Lah 397*; *A I R 1932 Lah 463* and *157 I O 341, Dissent*. [P 34 C 2]

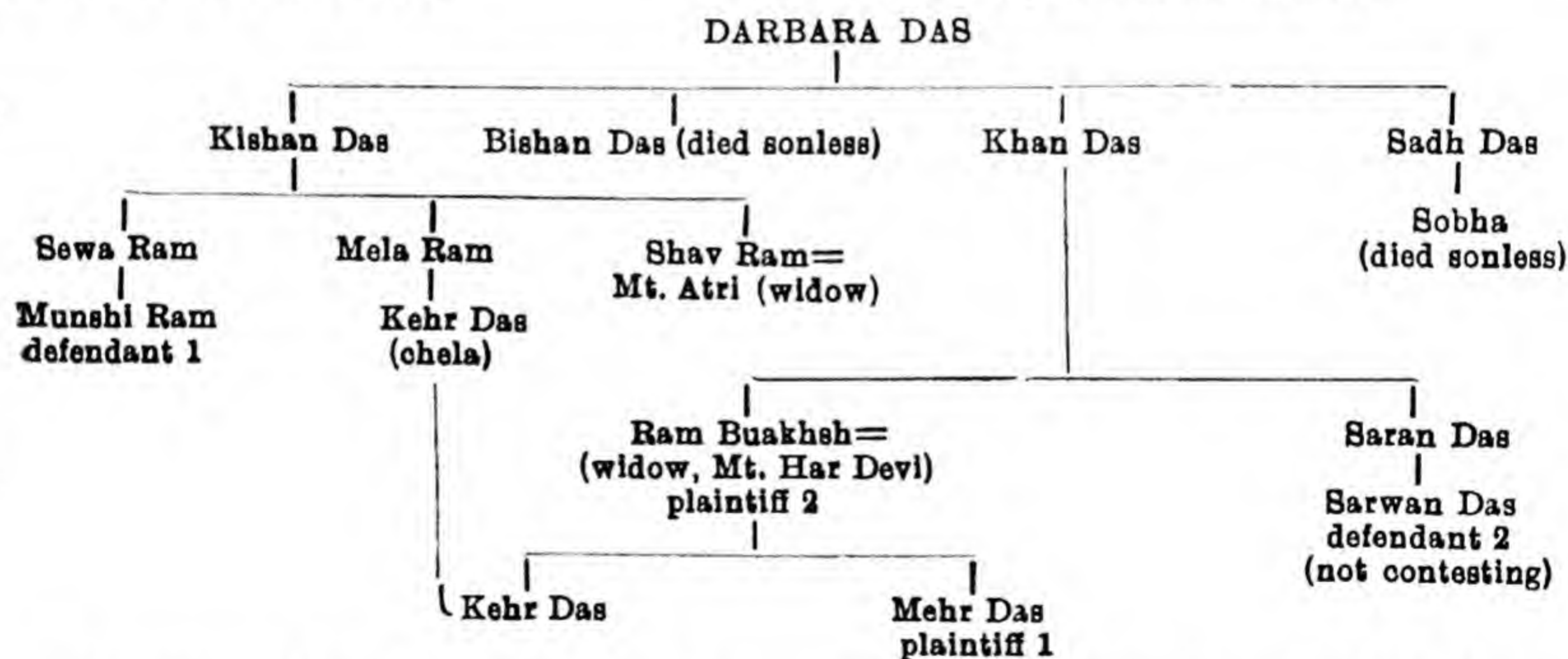
(b) Punjab Courts Act (6 of 1918), S. 41 (1) and (3)—Natural meaning of.

The natural meaning of S. 41 (1) and (3) is that (a) even though the decision on custom by the lower Appellate Court is wrong; (b) even though the lower Appellate Court has failed to determine a material point of custom and (c) even though the lower Appellate Court's procedure is marred by grave irregularities, still High Court shall not interfere unless the certificate has been issued: *A I R 1916 Lah 276, Foll.* [P 35 C 1]

Qabul Chand for M. L. Puri —
for Appellant.

D. N. Aggarwal — *for Respondents*
(*Plaintiffs*).

Addison J.—This is an appeal under the Letters Patent from the decision of Jai Lal J. The following pedigree-table is necessary to understand it :



The property in suit was ancestral property in the hands of Mela Ram. Upon his death, his chela Kehr Das succeeded him. The parties are Udasis Fakirs, but it would seem that they are not in charge of any institution, that is, they are merely land owners. Munshi Ram, the real nephew of Mela Ram, disputed the right of Kehr Das to succeed, but it was held that being a chela of Mela Ram, he succeeded as his son. Kehr Das himself has now died. The land has been mutated in favour of Munshi Ram who is defendant 1 in the present

1938 L/5 & 6

case. The widow of Ram Bakhsh, Mt. Har Devi, and Mehr Das, who was the real brother of Kehr Das, have brought this present suit for a declaration that the agricultural land, which had been mutated in the name of Munshi Ram, belonged to them as they were the heirs of Kehr Das. They also sued for possession of a house, but they have given up this part of their claim, and we are only concerned with the agricultural land. Munshi Ram pleaded that the land being ancestral and Kehr Das having succeeded as a son, he, as

nephew of Mela Ram and cousin of Kehr Das in his adoptive family, was the heir according to custom which the parties followed.

The trial Judge held that there was no family custom proved, but that the parties followed the Customary law of the district. He further held that Kehr Das, as ohela of Mela Ram took the place of a fully adopted son of Mela Ram and in that capacity succeeded him and that the plaintiffs were not entitled to succeed according to custom as natural heirs of Kehr Das as Kehr Das had been adopted completely out of his own branch of the family. He therefore dismissed the suit. On appeal, the learned District Judge held that the parties followed custom and that by that custom Munshi Ram was entitled to succeed on the death of Kehr Das. He consequently dismissed the appeal. The plaintiffs then applied to the District Judge for a certificate under the provisions of S. 41 (3), Punjab Courts Act. The application was barred by time under the proviso to that sub-section, and as there was no sufficient cause for not presenting it within the proper period, the application was dismissed and the certificate was not granted. The plaintiffs then instituted a second appeal in this Court without a certificate. Jai Lal J. accepted the appeal and decreed the plaintiff's suit as regards the agricultural land. Against this decision, the defendant Munshi Ram has preferred this appeal under the Letters Patent.

The learned single Judge, though he accepted the appeal, stated that the question involved in it was not free from difficulty. He also said that the appellants were in possession of the property and that Munshi Ram could therefore only succeed by proving clearly a better title to succeed. He seems to have overlooked the fact that the land has been mutated in favour of Munshi Ram whose name has been incorporated in the revenue papers as owner. There is a statutory presumption in favour of Munshi Ram under S. 44, Land Revenue Act, and this has not been given effect to. Apart from that, there is the question of want of certificate required by S. 41 (3), Punjab Courts Act. The learned single Judge said that the lower Appellate Court had decided the matter not on the basis of any evidence, but merely on the analogy of succession to the estate of an appointed heir. He went on to say that in these

circumstances a certificate was not necessary and referred to 157 I O 341.¹ That authority however was only to the effect that where the conclusion of the District Judge was based not upon a consideration of evidence, that is to say on a decision as to the weight of evidence, but was based on the interpretation of a clause in the *wajib-ul-arz*, a second appeal lay to the High Court without a certificate, and the learned Judges relied upon two judgments of Jai Lal J. to the same effect, which are reported in A I R 1932 Lah 397² and A I R 1932 Lah 463.³ The present case is not one which depends upon the interpretation of any clause of a *wajib-ul-arz* (statement of custom) but, even if it did, we are of opinion that the interpretation of a clause in the village statement of custom would involve a decision regarding the validity or existence of a custom and that a certificate would therefore be necessary under S. 41 (3) of Punjab Courts Act. By S. 41 (1) an appeal is allowed to the High Court from a decree on any of the following grounds, namely (a) the decision being contrary to law or some custom having the force of law ; (b) the decision having failed to determine some material issue of law or custom having the force of law ; (c) a substantial error or defect in the procedure provided by the Code of Civil Procedure or by any other law for the time being in force.

Section 41 (3) however then goes on to enact that, notwithstanding anything in sub.s. (1), no appeal shall lie to the High Court from a decree passed in appeal by any Court subordinate to the High Court regarding the validity or the existence of any custom unless the Judge of the lower Appellate Court has certified that the custom is of sufficient importance, and that the evidence regarding it is so conflicting or uncertain that there is such substantial doubt regarding its validity or existence as to justify such appeal. The appellants themselves admitted that a question of custom was involved in their appeal when they applied for a certificate, and there is no doubt that the question in dispute is whether by custom Munshi Ram succeeds or the plaintiffs. No appeal there-

1. Indar Singh v. Jai Singh, (1935) 87 P L R 390=157 I O 341.

2. Ghafur v. Shahab-ud-din, A I R 1932 Lah 397 =188 I O 680=88 P L R 416.

3. Gul Mohammad v. Attar Singh, A I R 1932 Lah 463=188 I O 688=88 P L R 479.

fore was competent without this certificate, which the appellants could have obtained had they put in an application within time. It was laid down by a Division Bench of the Punjab Chief Court in 22 P R 1916⁴ that the natural meaning of S. 41 (1) and (3), Punjab Courts Act appears to be that (a) even though the decision on custom by the lower Appellate Court is wrong; (b) even though the lower Appellate Court has failed to determine a material point of custom; (c) even though the lower Appellate Court's procedure is marred by grave irregularities, still this Court shall not interfere unless the certificate has issued. With this decision we are in full agreement, and hold that the appeal to this Court was incompetent for want of the necessary certificate.

We accept the appeal with costs before us, before the single Judge, and in the District Court, and restore the decree of the lower Appellate Court, dismissing the suit.

S O./D.S.

Appeal allowed.

4. Sohna Mal v. Nanak Chand, A I R 1916 Lah 276=84 I C 904=22 P R 1916.

A. I. R. 1938 Lahore 35

ADDISON AND DIN MOHAMMAD JJ.

Hayat and others — Plaintiffs — Appellants.

v.

Mutalli and others — Defendants — Respondents.

Letters Patent Appeal No. 62 of 1936, Decided on 4th March 1937, from decree of Abdul Rashid J., D/. 22nd February 1936.

(a) Civil P. C. (1908), O. 41, R. 20 — 'Interested'— Defendant dying during pendency of suit — Legal representatives brought on record—In appeal, legal representatives not impleaded until right of appeal barred against them — Such persons cannot be joined under O. 41, R. 20—Time cannot be extended under S. 5, Limitation Act.

Where during the pendency of a suit a defendant dies and his legal representatives are brought on record, but in appeal they are not impleaded until the limitation for appeal against them has expired, they cannot be joined as respondents under O. 41, R. 20, Civil P. C., as such persons cannot be deemed to be persons interested in the result of the appeal filed against other defendants. S. 5, Lim. Act, cannot apply to such a case even if some of the appellants are minors: A I R 1927 P O 262, *Foll.*; A I R 1929 Mad 348, *Dissent.* [P 87 C 1]

(b) Civil P. C. (1908), O. 22, R. 4 — Joint interest or liability — Joint decree in favour of all defendants, their interests not being separate—Some of such defendants not made parties to appeal — Non-inclusion results in abatement of appeal as a whole — Where interests are separable, appeal can proceed against those defendants that are impleaded.

If a decree is made jointly in favour of all the defendants, and their interests inter se are neither separate nor separable, it may lead to two conflicting decrees, if an appeal is allowed in the absence of some of the defendants in whose favour the original decree stands. In cases like these therefore, the non-inclusion of some of the defendants as respondents must naturally result in the failure of the whole appeal. But where this is not the case and there is no danger of coming into conflict with any other recognized principle of law, there is no bar against an appeal proceeding in the absence of some of the defendants who are not impleaded as respondents. [P 88 C 1]

A suit was brought by the daughter's sons of the deceased against the reversioners for a declaration that the property in suit belonged to them and was in their possession. On the death of one of the defendants during the course of the suit, his legal representatives were brought on record. The suit was dismissed. In appeal from such decree, instead of impleading these legal representatives as respondents, the name of the deceased defendant was mentioned. The appellant applied for making them respondents but at a time when the limitation for appeal against them had expired:

Held that as succession had opened, every reversioner was interested in the estate only to the extent of his own share and no more and so each reversioner had a clearly defined interest in the suit. The suit as brought, though declaratory in form, was possessory in effect. It was as if each one of the defendants ran the risk of being disturbed qua his own share of the property and relief was claimed against him to that limited extent only. The appeal, in these circumstances, could not abate as a whole merely by the omission to implead the legal representatives of the deceased defendant as respondents. The appeal therefore could proceed against those defendants that were impleaded as respondents: A I R 1928 Lah 572 (*F B*) and A I R 1935 Lah 853, *Foll.*; A I R 1932 Lah 281 and A I R 1932 Lah 624, *Expl.* [P 88 C 2]

Chiranjiva Lal Aggarwal and Kundan Lal Gosain — *for Appellants.*

Mehr Chand Mahajan and Ghulam Mohy-ud-Din — *for Respondents.*

Din Mohammad J. — This Letters Patent appeal has arisen in the following circumstances: One Bakhsha, who owned a considerable amount of landed property in two villages, Mitha Lak and Dera, made two wills in favour of his daughter's sons, Hayat and Ali: a will of his property situated at Mitha Lak in 1909 and that of his property situated at Dera in 1911. He had a son, Jalal, living then, but Jalal was a born idiot. It was provided in the wills

that if Jalal ever got over his idiocy and exhibited sense, he would inherit the estate thus bequeathed to Hayat and Ali. On 6th May 1914 Bakhsha died, and on 26th April 1921, both Hayat and Ali brought a suit against Jalal for a declaration that they were the owners of the land. On 22nd June 1921, a decree was made in favour of Hayat and Ali to the effect that the Dera lands should be mutated in their favour at once and the Mitha Lak lands after the death of Jalal, provided that he died childless. On 26th July 1921, certain reversioners of Bakhsha instituted a suit for a declaration that the decree, dated 22nd June 1921, should not affect their rights. On 20th February 1922, the reversioners' suit was decreed in regard to the Dera lands only. On appeal to this Court, that decree was varied and the declaration in the reversioners' favour was extended to the whole of the ancestral property owned by Bakhsha, whether situated at Mitha Lak or at Dera and the non-ancestral property of Bakhsha, now in suit, was allowed to remain with Hayat and Ali. Jalal did not recover from his malady and died in the same morbid state of mind on 15th July 1930. The reversioners of Jalal alleged that he had left a will in their favour of the non-ancestral property and this gave rise to the present suit by Hayat and the three descendants of Ali, who are all minors. It was brought against 30 defendants and was for a declaration, by cancellation of the will, dated 1st June 1930, that the property in suit belonged to them and was in their possession and that the defendants had no concern with it. Out of these 30 defendants, one was Salehon, son of Ahmad. He died during the pendency of the suit and was replaced on the record by his minor sons, Bakhsh and Maula, under the guardianship of their uncle Lala. The Subordinate Judge held *inter alia* that the defendants had failed to prove any valid will in their favour, but all the same dismissed the plaintiffs' suit on the ground that they had failed to prove their own title.

Against this order, the plaintiffs preferred an appeal to the District Judge, and in the memorandum of appeal instead of impleading the legal representatives of Salehon, deceased, mentioned the name of Salehon himself in spite of his death. The suit had been dismissed on 26th February 1934 and the appeal was filed on 22nd

March 1934. On 21st April 1934, this mistake came to the notice of the appellants who at once put in an application for its rectification. To this application, objection was taken on behalf of the respondents on the ground that the Court had no power to implead those respondents out of time who had not been impleaded within time, and that as the appeal could not proceed in their absence, it failed as a whole. The District Judge held that in spite of 6 Rang 29¹ he was empowered by law to bring those respondents on the record who had not been impleaded, but as the appellants in his view had failed to make out a case for the exercise of his discretion, he expressed his inability to accede to their request. Consequently on the admission of the appellants' counsel that the appeal could not proceed in the absence of those respondents whose names had been left out, he dismissed the appeal. The appellants then preferred a second appeal to this Court, but the learned Judge before whom it came on for hearing agreed with that decision on the main points and dismissed the appeal. It is against that order that this appeal has been presented.

Counsel for the appellants has strenuously contended that, in the first place, the District Judge should have exercised his powers under O. 41, R. 20, Civil P. C., and brought on the record the names of Salehon's representatives; secondly, the District Judge should have exercised his discretion in favour of the minor appellants under S. 5, Lim. Act, and should have condoned the delay in impleading the respondents who had been left out, inasmuch as the omission was accidental and had been occasioned by the existence of Salehon's name on the record, despite the fact that his legal representatives had already been impleaded in his place, and, thirdly, that, at any rate, the non-impleading of Salehon's representatives could not entail the failure of the appeal as a whole. Counsel for the respondents has reiterated the arguments employed by the District Judge as well as the learned Judge of this Court and equally forcibly urged that none of the prayers made by the appellants could be granted and that the appeal before the District Judge could not be entertained in the absence of

1. *Chockalingam Chetty v. Seethal Ache*, A I R 1927 P C 252=107 I C 237=6 Rang 29=55 I A 7 (P C).

Salehon's representatives, inasmuch as the interests of all the respondents were joint and Salehon's representatives had obtained a decree in their favour which had concluded the whole matter.

We first take up the question of O. 41, R. 20, Civil P. C. It is true that this Rule enables a Court to implead as a respondent any person who was a party to the suit in the Court from whose decree the appeal was preferred and who had not been made a party to the appeal, but the condition precedent is that he must be interested in the result of the appeal. Now, as remarked by their Lordships of the Privy Council, giving these words their natural meaning—and they cannot be disregarded—it seems impossible to say that in this case the defendants against whom the right of appeal has become barred, are interested in the result of the appeal filed by the plaintiff against the other defendants.

In the face of such a clear pronouncement, it was impossible for the District Judge to have brought Salehon's representatives on the record. The District Judge however thought differently, solely relying on A I R 1929 Mad 343.² We have given due consideration to the remarks made by the learned Judges in that case, but we are constrained to say, with all respect, that we are not impressed by the points of distinction raised by them in getting out of the binding authority of the Privy Council judgment referred to above. That authority did not proceed on facts, but was based on the interpretation of a rule of law and so long as the wording of the enactment remains as it is, the only authoritative interpretation of it is that put on it by their Lordships of the Privy Council. We may also remark in this connexion that S. 5, Lim. Act, does not come into play in this matter. The applications, to which that section is applicable, are clearly set forth in the section itself and unless a new rule is introduced in the Civil Procedure Code making S. 5 applicable to applications made under O. 41, R. 20 or until their Lordships of the Privy Council change their view, the Courts in India are precluded from impleading as a respondent any person who was a party to the original suit and who has not been impleaded in the appeal, if once the limitation for the appeal has expired. It may be that the minor plaintiffs may succeed

in a separate suit in setting aside the decree of the Courts below on the ground of gross negligence of their next friend, but that is an extraneous consideration which should not persuade us to overlook an express provision of law.

We now come to the discussion of the effect of the non-impleading of Salehon's legal representatives on the case as it stood before the District Judge. As stated above, the appellants contend that the appeal before the District Judge could proceed even without those respondents, except to the extent of their share, while the respondents urge that it could not proceed at all and that it failed in toto on account of the non-inclusion of Salehon's sons who had obtained a joint decree in their favour along with the other respondents. In support of their respective contentions, counsel on both sides have relied on authorities dealing with the question of abatement and so has the learned Judge of this Court, and though those authorities have no direct bearing on the matter before us, yet it may be possible to apply the principles deducible therefrom to this case by way of analogy.

The subject of abatement has been so fully discussed in the various judgments of this Court as well as of the other High Courts in India that it would be a mere act of supererogation to discuss it again at length. The main thing to be considered in this connection is the true import of O. 22, R. 4, Civil P. C. which deals with the subject. Under sub-r. (1) of that Rule, if one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, the Court on an application made in that behalf, is empowered to cause the legal representative of the deceased defendant to be made a party and to proceed with the suit. If no application is made under sub-r. (1), the only penalty that sub-r. (3) provides is that the suit against the deceased defendant shall abate. On the letter of the law therefore the contention of the appellants must prevail, unless some other rule of law is violated thereby. For example, the argument that prevailed with the High Court and was approved by their Lordships of the Privy Council in 6 Rang 29¹ was that the finding in favour of the defendants, who were not impleaded as respondents, enured to the benefit of those defendants also who derived

² Kunhanna Rai v. Manakke, A I R 1929 Mad 848=117 I C 796=56 M L J 915.

their title from them and had consequently become *res judicata*. Similarly, if a decree is made jointly in favour of all the defendants, and their interests inter se are neither separate nor separable, it may lead to two conflicting decrees if an appeal is allowed in the absence of some of the defendants in whose favour the original decree stands. In cases like these, therefore, the non-inclusion of some of the defendants as respondents must naturally result in the failure of the whole appeal. But where this is not the case, and there is no danger of coming into conflict with any other recognized principle of law, there is no bar against an appeal proceeding in the absence of some of the defendants, who are not impleaded as respondents.

The leading authority of this Court on the question of abatement is 10 Lah 7.³ In that case there was a joint sale in favour of four vendees and all that was said in the sale deed was that the property had been sold to the vendees in equal shares. The reversioners of the vendor brought a declaratory suit and failed. At the hearing of the appeal it was noticed that one of the vendees had died and his legal representative had not been brought on the record within time. Five learned Judges of this Court after discussing the matter most exhaustively came to the conclusion that the appeal had abated only to the extent of the deceased respondent's share in the sale. At p. 13 of the report Sir Shadi Lal C. J. observed:

It is a matter of common sense that the Court should not be called upon to make two inconsistent decrees about the same property, and in order to avoid conflicting decrees, the Court has no alternative but to dismiss the appeal as a whole. If, on the other hand, the success of the appeal would not lead to such a result, there is no valid reason why the Court should not hear the appeal and adjudicate upon the dispute between the parties who are before it.

The rule laid down in this authority was recently applied to another case reported in 16 Lah 747,⁴ where too the suit was partly declaratory and partly possessory, but the shares of the parties in the land in suit had been specified in the mutation recorded after the death of the last owner. We are in complete accord with the prin-

ciples enunciated in these two judgments and hold that to cases like these the test laid down there is the only sound test to be applied. We are aware that in 13 Lah 70⁵ and 14 Lah 234⁶ the decision of the learned Judges was against the appellants in those cases, but the principle underlying those judgments is the same as that laid down in 10 Lah 7.³ In 13 Lah 70⁵ it was expressly remarked that the shares of the defendants were neither separate nor separable and in 14 Lah 234⁶ it was observed that on the facts of that case the suit could not have been properly framed, without impleading the whole proprietary body and could not have proceeded against some of the proprietors only, and if the decree were allowed to stand against some proprietors and reversed against others, it would result in two inconsistent decrees.

Applying now the recognized test to the present case, though by way of analogy only as stated above, we find that all the defendants impleaded in the case had a clearly defined interest in the suit, their shares in the estate of Jalal deceased having been specified. As the succession had opened, every reversioner was interested in the estate only to the extent of his own share and no more. The suit that was instituted by the appellants, though declaratory in form, was possessory in effect. It was as if each one of the defendants ran the risk of being disturbed qua his own share of the property and relief was claimed against him to that limited extent only. The appellants could have even compromised the suit with some of the defendants if they so desired and proceeded against the rest in spite of the compromise. In these circumstances it cannot be urged that by merely omitting the names of Salehon's representatives from the list of respondents the appellants lost the whole appeal. He had 1/48th share in the land in suit and that was undoubtedly lost, but the remaining 47/48th part of the estate could not be affected in any manner. The observations by Sir Shadi Lal C. J. in 10 Lah 7³ at p. 15 are pertinent in this connection:

The Courts exist for determining the merits of the dispute between litigants, and it is their duty to avoid, if they can legally do so, a result which causes hardship.

3. Sant Singh v. Gulab Singh, A I R 1928 Lah 572=114 I O 417=10 Lah 7=80 P L R 453 (F B).

4. Bakhshish Singh v. Makhan Singh, A I R 1985 Lah 853=159 I O 999=16 Lah 747=87 P L R 850.

5. Mt. Umrao Bibi v. Ram Kishan, A I R 1932 Lah 281=187 I O 820=13 Lah 70=88 P L R 1003.

6. Ram Ditta v. Shaman, A I R 1932 Lah 624=139 I O 683=14 Lah 234=83 P L R 919.

On these grounds we accept the appeal, reverse the judgment of the learned Judge of this Court and remand the case to the District Judge for disposal in accordance with law. The plaintiffs will get their costs here. Costs in the Court of the District Judge will be in his discretion.

K.B./A.L.

Appeal accepted.

* A. I. R. 1938 Lahore 39

JAI LAL J.

Ibrahim — Defendant — Appellant.

v.

*Yusaf, Defendant and others, Plaintiffs
— Respondents.*

Second Appeal No. 1463 of 1936, Decided on 18th February 1937, from decree of Dist. Judge, Ambala, D/- 5th August 1936.

(a) Possession Possession is tantamount to notice of claim or interest of person in possession—Enquiry into title of person in possession—Factum of possession proved—Notice must be assumed.

The underlying principle of Ss. 48 and 49, Registration Act and S. 53-A, T. P. Act, is that possession is tantamount to notice of the interest or claim in the property of the person in possession, and whoever deals with such property is put on enquiry as to the title of the person in possession. If therefore the factum of possession is proved, notice to the transferee of the claim or interest of the person in possession must be assumed.

[P 40 C 1]

* (b) Possession — Person in possession under one title—Subsequent acquisition of another title by unregistered document which however requires registration—Subsequent acquisition of title by another person by registered document—Possession of prior person is notice to subsequent acquirer—Postponement of title.

If a person, who is in possession of the property already by virtue of another title, subsequently secures another title to that property by means of a document which requires registration but which has not been registered, the factum of possession prior to the subsequent acquisition of title puts a subsequent purchaser of the same property by means of a registered document, on enquiry as to the title of the person already in possession and has the effect of postponing him to the title subsequently acquired by the person in possession: *A I R 1929 Pat 284, Foll.*

[P 40 C 2]

*Barkat Ali — for Appellant.**Tek Chand — for Respondents.*

Judgment.—This second appeal arises out of a suit brought by Madhu Singh and others plaintiffs-respondents for possession of 3 bighas 15 biswas of land, khasra Nos. 480, 480/1 and 481. The defendants are Ibrahim and Yusaf. The land in dispute originally belonged to Yusaf. The

plaintiffs claimed that Yusaf had sold this land to them on 9th January 1933, by a registered sale deed. Ibrahim, who was the real contesting defendant, pleaded that prior to 5th January 1928, Yusaf had given the land in dispute to him in exchange for land given by him to Yusaf by an oral agreement, subsequently reduced to writing in a document, Ex. D-1, dated 5th January 1928, which was described by Ibrahim and his witnesses to be a yaddasht or merely a record of transaction of exchange, which had already been orally completed. The learned District Judge has held that the document Ex. D-1 is a dispositive document and is not a record of a transaction which had already been orally completed. He has also held that Ex. D-1 required registration and being unregistered is inadmissible in evidence. He has consequently granted a decree to the plaintiffs, thus concurring with the trial Judge.

On this appeal it is contended on behalf of the appellant that the conclusion of the learned Judge that Ex. D-1 is a dispositive document is erroneous and that it is clear from the circumstances, the copies of the khasra girdawari and the oral evidence, that the transaction of exchange had been completed before 5th January 1928. On the face of the document, Ex. D-1 is a dispositive document and it is doubtful whether extraneous evidence can be given to prove that it related to a transaction already completed and therefore did not require registration. But it is not necessary to give any definite finding on this matter, because in my opinion the conclusion of the learned District Judge that there is no reliable evidence of a prior transaction of exchange is correct. I have examined the copies of the khasra girdawari and find that there is no mention of exchange there, except in the girdawari in connection with rabi of 1928, which must have taken place after 5th January 1928. The opinion of the learned Judge below as to the reliability of the oral evidence is conclusive in this second appeal. It must therefore be assumed for the purposes of this case that an exchange was effected by Yusaf and Ibrahim on 5th January 1928, by means of Ex. D-1, which is inadmissible for want of registration.

It is however contended that the document can be relied upon under the Proviso of S. 49, Registration Act, as evidence of part performance of a contract for the

purpose of S. 53-A, T. P. Act. The learned District Judge has held that if reference is made to S. 53-A, T. P. Act, the Proviso to that section says that :

Nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

He has held that there is no evidence on the present record of any notice to the plaintiffs-respondents of the part performance of the contract. The part performance of the contract in this case however is the possession of Ibrahim. There can be no doubt that Ibrahim was and is in actual possession of the land in suit. Prior to the date of exchange he was in possession as a lessee. He claims to be in possession as a transferee by means of an exchange after that date. S. 48, Registration Act, provides that all non-testamentary documents duly registered under the Act, and relating to any property, whether moveable or immovable, shall take effect against any oral agreement or declaration relating to such property, unless the agreement or declaration has been accompanied or followed by delivery of possession, and the same constitutes a valid transfer under any law for the time being in force. The underlying principle is that possession is tantamount to notice of the interest or claim in the property of the person in possession, and whoever deals with such property is put on enquiry as to the title of the person in possession. If therefore the factum of possession is proved, notice to the transferee of the claim or interest of the person in possession must be assumed.

In the present case it has been found by the learned District Judge that Ibrahim was in possession. That being so, the plaintiffs-respondents were put on their enquiry as to the claim of Ibrahim and having regard therefore to the provisions of Ss. 48 and 49, Registration Act, and S. 53-A, T. P. Act, the principle of which applies to this province, it must be assumed that the plaintiffs-respondents had notice of the possession of Ibrahim. That being so, they were put on enquiry as to his claim to the property, and having made no enquiry, must be postponed to his claim under the unregistered document of 5th January 1928, which is prior in date to the registered document in their favour.

The only one question that remains to be decided is whether the fact that Ibrahim was in possession merely as a tenant before 5th January 1928 affects the case. That matter has been disposed of in a judgment of the Patna High Court reported in 8 Pat 316,¹ in which it has been held that if a person, who is in possession of the property already by virtue of another title, subsequently secures another title to that property by means of a document, which requires registration, but which has not been registered, the factum of possession prior to the subsequent acquisition of title puts a subsequent purchaser of the same property by means of a registered document on enquiry as to the title of the person already in possession and has the effect of postponing him to the title subsequently acquired by the person in possession. This case fully applies to the facts of the present case.

The learned counsel for the respondents finally contended that there was no finding by the learned District Judge that Ex. D.1 is a genuine document or was executed by Yusuf on 5th January 1928, as alleged by both Ibrahim and Yusuf, and that therefore the case should be remanded to the District Judge for an enquiry and a finding on this matter. In the first instance in my opinion the learned District Judge has given a finding though it is not clearly expressed that the document is genuine. He has rejected it only on the ground of its not being registered. But I am of opinion that it is not necessary to remand the case for the purpose, because there is ample evidence on the record to prove that the document was executed on 5th January 1928, and is a genuine one.

The consequence of the above discussion is that by virtue of the possession of Ibrahim, he is entitled to claim priority over the plaintiffs-respondents owing to an exchange effected by him on 5th January 1928. It does however appear that he was negligent in not getting Ex. D.1 registered. I therefore leave the parties to bear their own costs throughout. The appeal is accepted and the plaintiffs' suit dismissed.

B.D./R.K.

Appeal allowed.

1. Balchand Mahton v. Bulaki Singh, (1929) 16 A I R Pat 284=117 I O 170=8 Pat 316.

A. I. R. 1938 Lahore 41**JAI LAL AND ABDUL RASHID JJ.***Ram Het Gir and another —**Defendants — Appellants.*
v.*Banwari Lal, Plaintiff and another,*
Defendant — Respondents.

First Appeal No. 1873 of 1935, Decided on 23rd February 1937, from decree of Sub-Judge, First Class, Kangra at Dharamsala, D/. 19th July 1935.

(a) Civil P. C. (1908), S. 149 and O. 33, R. 7 — Application to sue as pauper rejected — Simultaneous order to pay court-fee by certain date — Court-fee paid by that date — Suit held filed when application to sue as pauper was made.

A person made an application to sue as a pauper under O. 33, R. 2. It was rejected by the Court which at the same time asked him to deposit the proper court-fee by a certain date. On so depositing the court-fees by that date :

Held that the suit should be deemed to have been filed on the date when application under O. 33, R. 2 was first made : *A I R 1937 Lah 151; A I R 1918 Mad 1039; A I R 1917 Cal 696; 24 Cal 889 and A I R 1922 Lah 225, Disting.*

[P 42 C 2]

(b) Principal and Agent — Power to execute pro-note — Principal not doing business involving execution of bill of exchange — Agent has no authority to execute pro-note.

Where the principal is not carrying on any business which may involve the executing, accepting or endorsing any bill of exchange, the agent has no authority to execute any promissory note on behalf of his principal either expressly or impliedly.

[P 43 C 1]

(c) Power of Attorney — Power granted to conduct litigation — Power making principal accept all acts done by agent — Agent cannot execute pro-note for his principal.

Where a principal executes a power of attorney to his agent for the purpose of carrying on litigation in various Courts, and the concluding sentence of which is to the effect "that the executant shall accept and agree to all the acts and deeds of the agent aforesaid as having been done by himself," it merely implies that the principal would be bound by the acts of the agent so far as the carrying on of litigation in Courts is concerned. The powers conferred on the agent by the concluding sentence of the power of attorney cannot be construed to mean that the agent was authorized to execute promissory notes on behalf of his principal.

[P 42 C 2 ; P 43 C 1]

Mehr Chand Mahajan and N. L. Sadana
— *for Appellants.*

Jaggan Nath Aggarwal and Asa Ram —
for Respondents.

Abdul Rashid J. — The material facts of the case for the purposes of this appeal may be shortly stated. On 11th April 1931 Ram Het Gir, defendant 1, executed two promissory notes in favour of Ghania

Lal, defendant 3, for Rs. 2,180 and Rupees 15,000 respectively. The signatures at the foot of the promissory notes were as follows : "Mahant Ram Het Gir for himself and as general agent of Khoob Ram and Khoob Ram Gir, debtor". It was stipulated in the promissory notes that interest will be charged at the rate of eight annas per cent. per mensem. Ghania Lal, defendant 3, who is the grandfather of the plaintiff, transferred these promissory notes in favour of the plaintiff. The plaintiff instituted the suit, out of which the present appeal has arisen, on 10th April 1934, for recovery of Rs. 20,270 on the basis of the above-mentioned promissory notes. Defendant 1 pleaded that he put his signatures on the promissory notes in question as general agent of Khoob Ram Gir, defendant 2, at the instance of defendant 3. He further pleaded that as a matter of fact no money was due to defendant 3 from him and that he did not receive any consideration for the promissory notes. He however stated in his written statement that he had no power as general agent of Khoob Ram Gir to execute the promissory notes. Khoob Ram Gir, defendant 2, pleaded that he never executed any promissory notes in favour of defendant 3 and that he never authorized defendant 1 to execute any promissory notes on his behalf. He also pleaded that he received no consideration for the promissory notes, that defendant 3 and the plaintiff constituted a joint Hindu family and that the suit by the plaintiff was a collusive one. On these pleadings, the trial Court framed the following issues :

(1) Whether defendant 1 is not liable for the payment of the debt in suit and that the promissory notes Ex. P-3 and Ex. P-4, dated 11th April 1931, are without consideration? (2) Whether defendant 2 is liable for the payment of the debt in suit? (3) Whether the suit is time-barred? and (4) Whether defendant 1 has lived outside British India; if so, for how long?

It was held by the trial Court that the promissory notes in question were executed by defendant 1 on his own behalf and as the general agent of defendant 2, that full consideration passed and that the suit was within limitation. On these findings a decree for Rs. 20,270 with costs and future interest was passed in favour of the plaintiff against defendants 1 and 2. Against this decision, Ram Het Gir and Khoob Ram Gir have preferred an appeal to this Court. On 10th April 1934 the plaintiff had preferred an application under O. 33, R. 2

Civil P. C., for permission to sue in forma pauperis. On 11th April 1934 this application was dismissed and the order of dismissal concludes with the following words:

I therefore dismiss the application of the plaintiff to sue in forma pauperis. He is now required to pay the full court-fee by 29th May 1934.

The court-fee was paid within time and the suit proceeded and resulted in a decree in favour of the plaintiff. It was urged on behalf of the appellants that the plaintiff's suit was barred by limitation. Reliance was placed in this connection on a Division Bench ruling of this Court reported in 17 Lah 831.¹ It was held in this case that where an application for leave to sue in forma pauperis is rejected under O. 33, R. 7, there is no proceeding left before the Court and the applicant can then only institute a suit in the ordinary manner and pay the court-fee, and such suit must be held to have been instituted on the day on which the court-fee is paid. In the reported case the application of the plaintiff to sue as a pauper was rejected on 8th July 1931. At the end of his order rejecting the application, the learned Senior Subordinate Judge had made a remark to the effect that the plaintiff was at liberty to prosecute the case on payment of the necessary court-fee. On 21st July 1931 the plaintiff presented an application stating that she had arranged to pay the entire court-fee amounting to Rs. 532.8-8 and that the Court may be pleased to allow her to deposit the court-fee. The Court thereupon passed an order to the effect that the court-fee should be paid on that very day, that the file be sent for and the case should come up on 6th August 1931. It is evident from the facts of the reported case that at the time of the rejection of the application for permission to sue as a pauper, no order was passed under S. 149, Civil P. C. requiring the plaintiff to pay the full court-fee within a certain period. When the Senior Subordinate Judge made a remark to the effect that the plaintiff was at liberty to prosecute the suit on payment of the necessary court-fee, he had obviously R. 15 of O. 33, Civil P. C., in mind. He was not at that time exercising the discretion that undoubtedly vested in him under S. 149, Civil P. C., by allowing the plaintiff to pay the full court-fee within a certain period. In my opinion

therefore the case reported as 17 Lah 831¹ is distinguishable.

The learned counsel for the appellants also quoted a large number of other rulings such as 40 Mad 687,² 20 C W N 669,³ 24 Cal 889⁴ and 3 Lah 35.⁵ None of these rulings is applicable to the facts of the present case. Some of these rulings were given under the old Code which did not contain the provisions now embodied in S. 149, Civil P. C., 1908. In none of these cases was the order rejecting the plaint passed simultaneously with the order requiring the plaintiff to pay the full court-fee within a certain period fixed by the Court. It must be remembered that in the present case the order rejecting the pauper application and the order requiring the plaintiff to pay the full court-fee under S. 149, Civil P. C. were passed simultaneously. I am therefore of the opinion that by virtue of the provisions of S. 149 of the Code, the present suit must be taken to have been instituted on 10th April 1934. If this be so, the suit is clearly within limitation. It is unnecessary to refer to the rulings quoted on behalf of the respondents as most of them have been fully discussed in 17 Lah 831.¹

The only other question for determination in this appeal is whether Ram Het Gir had any authority to sign the promissory notes on behalf of Khoob Ram Gir. On 24th August 1905 Khoob Ram Gir executed a power of attorney in favour of Ram Het Gir. This power of attorney is printed on p. 42 of the printed paper book. A perusal of this document makes it clear that Khoob Ram Gir appointed Ram Het Gir as his agent for the purposes of carrying on litigation pending in Civil, Criminal and Revenue Courts. The concluding sentence which is to the effect that the executant shall accept and agree to all the acts and deeds of the agent aforesaid as having been done by himself merely implies that Khoob Ram Gir would be bound by the acts of Ram Het Gir so far as the carrying on of litigation in Civil, Criminal and Revenue Courts is concerned. The powers conferred on the agent by the

1. *Alopi Prashad v. Mt. Gappi*, (1937) 24 A I R Lah 151=169 I C 868=17 Lah 831=89 P L R 158.

2. *Nellavadiu Ammal v Subramania Pillai*, (1918) 5 A I R Mad 1039=38 I C 617=40 Mad 687=31 M L J 269.

3. *Atul Chandra Sen v Peary Mohan*, (1917) 4 A I R Cal 696=38 I C 812=20 C W N 669.

4. *Abbhoy Churn Dey v. Bissesswarl*, (1897) 24 Cal 889.

5. *Dayal Das v. Sundar Das*, (1922) 9 A I R Lah 225=65 I C 741=3 Lah 85.

concluding sentence of the power of attorney cannot be construed to mean that the agent was authorized to execute promissory notes on behalf of his principal. On 16th December 1908, and 19th November 1920, two other powers of attorney were executed by Khoob Ram Gir in favour of Ram Het Gir. These were special powers of attorney and authorized Ram Het Gir to mortgage some properties belonging to the principal. None of these documents is therefore of any assistance to the plaintiff so far as the liability of Khoob Ram Gir is concerned. Ram Het Gir is the son of Labh Gir while Khoob Ram Gir is the chela of Labh Gir. It was contended by the learned counsel for the respondents that in view of their close relationship and in view of the fact that Ram Het Gir was generally managing the property possessed by Khoob Ram Gir, it must be held that Ram Het Gir was authorized impliedly to execute the promissory notes on behalf of his principal. This contention in my opinion is devoid of all force. Under S. 27, Negotiable Instruments Act:

A general authority to transact business and to receive and discharge debts does not confer upon an agent the power of accepting or endorsing bills of exchange so as to bind his principal.

Khoob Ram Gir was not carrying on any business which may involve the executing, accepting or endorsing of bills of exchange. Ram Het Gir therefore had no authority to execute promissory notes on behalf of his principal either expressly or impliedly. The trial Court has relied on S. 237, Contract Act, in making Khoob Ram Gir liable for the promissory notes executed by Ram Het Gir. This section runs in the following words:

When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority.

After examining the entire evidence, I am of the opinion that none of the acts done by Khoob Ram Gir was such as to induce defendant 3 or the plaintiff to believe that the executing of promissory notes on behalf of Khoob Ram Gir was within the scope of the authority of Ram Het Gir. For the reasons given above, I would accept this appeal so far as Khoob Ram Gir, defendant 2 is concerned, and dismiss the plaintiff's suit as against him. I would dismiss the appeal so far as Ram

Het Gir is concerned, and affirm the decree of the trial Court as against him. The plaintiff-respondent will get his entire costs from Ram Het Gir. There will be no order as to costs both in this Court and the Court below so far as Khoob Ram Gir is concerned, as he has succeeded on a highly technical plea.

Jai Lal J.—I agree.

B.D./R.K.

Order accordingly.

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BHIDE J.

Bishen Narain — Plaintiff —
Appellant.

v.

Swaroop Narain — Defendant —
Respondent.

Second Appeal No. 359 of 1937, Decided on 25th June 1937, from decree of Senior Sub.Judge, Delhi, D/. 12th December 1936.

Partnership—Rights of partners—Partnership coming into existence on date of execution of agreement—Suit by one partner for recovery of money advanced in pursuance thereof—Suit is not maintainable unless general account is asked—Fact that actual business did not commence is immaterial.

A partner brought a suit for recovery of certain amount advanced to the other partner in pursuance of a partnership agreement. The agreement of partnership came into existence on the date on which it was executed :

Held that the suit to recover an isolated sum was not maintainable without suing for general account. The fact that the partnership business did not actually commence was immaterial : *A I R 1919 Mad 373, Disting. [P 43 C 2; P 44 C 1]*

Bhagwat Dayal — *for Appellant.*

Shamair Chand — *for Respondent.*

Judgment. — A preliminary objection was raised that no second appeal is competent, as the suit as laid was a simple money suit for recovery of Rs. 500 and was of a Small Cause nature. This contention appears to be correct. The learned counsel for the appellant requests that the appeal may be treated as a petition for revision. But even if it were so treated, I see no good ground for interfering. The sum of Rs. 500 which the plaintiff wanted to recover had been advanced to the defendant in pursuance of a partnership agreement and the learned Judge of the Appellate Court was in my opinion right in holding that no suit for recovery of such an isolated item was maintainable without suing for a general account. It

was urged that partnership business did not actually commence; but this is immaterial. The agreement of partnership came into force on the date on which it was executed. Clause 13 of the agreement to which the learned counsel referred appears to relate merely to the period of the business of the partnership. 49 I C 191,¹ on which the learned counsel for the appellant relied, was a case of a different character. There the partnership business had ceased and accounts had already been taken. I dismiss the appeal with costs.

K.B./R.K.

Appeal dismissed.

1. Sunkara Ratha Doss v. Epari Kopils, A I R 1919 Mad 373=49 I C 191.

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ADDISON AND DIN MOHAMMAD JJ.

In the matter of Amritsar Produce Exchange Ltd.

Civil Ref. No. 34 of 1936, Decided on 8th February 1937, made by Commissioner of Income-tax, Punjab, North-West Frontier and Delhi Provinces, D/- 14th November 1936.

(a) Income-tax Act (1922) — Interpretation — Value of English judgments.

The English judgments in income-tax cases can be utilised as aids in the interpretation of analogous provisions of law though not as binding authorities on those matters where the language of the English and Indian Acts differs: *A I R 1932 P C 138, Ref.* [P 48 C 1]

(b) Income-tax Act (1922), S. 4 (3) (vii) — Burden to prove that receipt does not arise from business and is of casual nature is on person claiming exemption.

If exemption is claimed for any item of income received by an assessee, it is for him to show that the receipt does not arise from business and is of a casual and non-recurring nature; if he fails to prove either of these alternatives, he cannot bring his case within the purview of S. 4 (3) (vii) and he will be liable to pay income-tax on the item of income so received. [P 48 C 1, 2]

(c) Income-tax Act (1922), S. 4 (3) (vii) — Produce Exchange business — Investing deposits received in Government securities — Sale of such securities on profit — Profits held arose from business and were not covered by S. 4 (3) (vii) even if they were of a casual or non-recurring nature.

The assessee who was doing business as a Produce Exchange, received a large amount of deposits from his clients in the course of his business and invested them in Government securities. In the accounting year he sold the securities on profit:

Held that the profits arose from business, and even if they were of a casual or non-recurring

nature, they were not covered by S. 4 (3) (vii): *Case law discussed.* [P 48 C 2]

(d) Income-tax (1922), Ss. 10 (1) and 4 (3) (vii) — In determining whether particular receipts form part of business, intention of assessee is to be considered — Income-tax Department finding that assessee's intention was to make profit as part of business — High Court cannot go behind that finding.

It is the intention of the assessee that is to be considered in determining whether particular receipts are part of business, and when once it is found by the Income-tax Department as a matter of fact that the assessee's intention was to make profits from these investments as a part of the assessee's business, it is doubtful whether High Court can go behind that finding. [P 48 C 2]

(e) Income-tax—Capital or revenue account.

The question whether anything taken over comes into capital or revenue account would depend upon evidence of intention at the time. [P 48 C 2]

(f) Income-tax Act (1922), S. 48-A — Applicability.

Section 48-A comes into play only when the income-tax has been actually paid in excess and not earlier. [P 49 C 1]

Kirpa Ram Bajaj — *for Petitioner* (Assessee).

S. M. Sikri for J. N. Aggarwal — *for Respondent* (Commissioner of Income-tax).

Din Mohammad J. — Under S. 66 (2), Income-tax Act, the Commissioner of Income-tax has referred the following three questions to us: (1) Was there no material enabling a finding that the proper "account-attribution" for the profit on sale of Government securities within the account period was to profit and loss (and not to capital) account? (2) The only relevant evidence in respect of the profit on sale of property being that the said property was acquired in connection with the business of the assessee for the purpose of realizing moneys, and that this realisation was actually effected within a short time of acquisition, was this such conclusive proof of the profit being outside the scope of the Act that as a matter of law the Assistant Commissioner could not hold that this was not proved? (3) The assessee having in past assessments erroneously attributed part of the cost of an asset other than stock in trade to interest account and having also returned "Interest on Securities" in excess of what was actually then receivable and chargeable under S. 8, is he entitled as a matter of law to have his current assessment reduced by the over-assessment (or by any detail entering into that over-assessment)?

The facts bearing upon the first question formulated by the Commissioner are these: The assessee does business as a Produce Exchange and receives a large amount of deposits from his clients in the course of his business. These deposits he had invested in Government securities and in the accounting period he sold these securities on profit. A question arose whether this profit was on capital account or on revenue account, and it is this question that has been formulated by the Commissioner in the form indicated above. The controversy existing between "capital" and "revenue" has defied solution so far, and it is difficult therefore to lay down any general considerations which would conclusively determine whether a certain income falls under one head or the other. In this case however it is more a question of fact than of law, and it is on that basis that we propose to decide the matter at issue. It is not even denied by the assessee that the deposits that were invested in the shape of securities represented the moneys received by him from his clients in the course of business and the burden lies on him therefore to prove that the profits realized therefrom could not be charged to income-tax.

Counsel for the assessee contends that the investment in question was in the nature of 'fixed capital' and not in that of 'stock in trade', and consequently the profits realized from the securities could in no way form part of his profits or gains of business as contemplated by S. 10, Income-tax Act. He has further urged that the profit realized from these securities is covered by the exemption provided in S. 4 (3) (vii) and that as these profits are of a casual and non-recurring nature, the Act does not apply to them. In support of his contention, he has relied on 1 I T C 152,¹ 2 I T C 184,² 6 I T C 178³ and 7 I T C 67.⁴ But in our view these authorities are not applicable in this case.

In 1 I T C 152,¹ a banking concern claimed to deduct from the taxable profits, a certain sum which represented the amount of depreciation on war bonds and securities belonging to it. A Division Bench of the Bombay High Court held that that deduction could not be allowed under S. 9, Income-tax Act of 1918 (corresponding to S. 10, Income-tax Act of 1922). The ratio decidendi of that judgment was that the assessing officer was not entitled in his discretion to allow any deduction for sums paid or debited other than those properly paid and debited as detailed in sub-s. (2) of S. 9. It would be observed that that judgment does not touch the points awaiting solution before us. S. 10 of the present Act, which corresponds to S. 9 of the old Act, does expressly mention certain deductions which are permissible, and whenever a deduction is claimed, an assessee is bound to bring his case under one clause or another. Here, the assessee has put forward a claim not for deduction, but for exclusion on the ground that the income earned by him cannot be computed in calculating his total taxable income and the question whether a certain income is or is not profit or gain within the meaning of sub-s. (1) of S. 10 has nothing to do with the deductions permissible under sub-s. (2) thereof. Counsel for the assessee however urges that the converse of the principle laid down in the Bombay judgment holds good in the present case, but we do not agree with him. That judgment did not deal with the question of profits and concerned itself only with the point whether a certain deduction fell within the four corners of S. 9. It will not therefore be a safe guide in this matter. In 2 I T C 184,² the Punjab National Bank Limited had invested some moneys in Government securities and claimed deduction on account of some depreciation in the value of those securities. A Division Bench of this Court disallowed the claim on the ground that the investment in question represented 'fixed capital' and not 'floating capital' of the Bank. The learned Judges remarked:

It cannot be denied that the Bank purchased these securities not for the purpose of trading in them but for the purpose of retaining them permanently for use in an emergency. It is the practice of all properly managed Banks to invest a portion of their capital in high class securities in order to have a readily available supply of cash in a crisis. Those securities were not held by the Bank as floating capital: they were not held by the Bank with the object of being dealt in day by day in

1. In re Tata Industrial Bank Ltd., (1922) 9 A I R Bom 75=66 I C 979=46 Bom 567=24 Bom L R 118=1 I T C 152.

2. Punjab National Bank Ltd. v. Emperor, (1926) 18 A I R Lah 373=96 I C 380=7 Lah 227=27 P L R 416=2 I T C 184.

3. Commr. of Income-tax, Bengal v. Shaw, Wallace & Co., (1932) 19 A I R P C 138=186 I C 742=59 I A 206=59 Cal 1343=6 I T C 178 (P C).

4. Commr. of Income-tax Burma v. J. I. Milne, (1934) 21 A I R Rang 4=148 I C 98=11 Rang 454=7 I T C 67 (S B).

the ordinary course of business. They were held as an emergency reserve and were regarded as the equivalent of ready cash with this considerable advantage over ready cash that they brought in a small but secured amount of interest.

A superficial reading of the judgment no doubt supports the contention of the assessee to some extent, but in our view what the judgment intends to lay down is that in every case it is to be determined on its own facts whether the investment was a part of the ordinary business of the investor or otherwise. If it could be found that an investment had been made for the purpose of permanently excluding a certain sum from the floating capital of a concern, it might be permissible to hold that that sum was intended to serve as a reserve, or in other words, as fixed capital having no concern with the stock in trade. If on the other hand the facts relating to that investment unequivocally point to the conclusion that the investment is to all intents and purposes a part of the business and that the sum so invested is intended to serve as stock in trade, the profits arising therefrom will form part of the income of the concern. If the learned Judges however intended to lay down a rule of general application that in every case an investment in the shape of securities made by a concern should be treated as fixed capital, we respectfully beg to differ from that conclusion. In our view a sweeping assertion of that nature would be altogether opposed to law. In 6 I T C 178³ the question before their Lordships of the Privy Council was whether a sum of money received as compensation for loss or cessation of an agency was not income, profits or gains within the meaning of the Income-tax Act, and their Lordships came to the conclusion that it was not:

Income did not include receipts of any kind which were not especially exempted under the Act, and

the object of the Indian Act is to tax 'income' which is expanded into 'income' profits and gains though the expansion is more a matter of words than of substance.

In their Lordships' view:

Income in the Indian Income-tax Act connotes a periodical monetary return, coming in with some sort of regularity or expected regularity from definite sources. The source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return excluding anything in the nature of a mere windfall.

Their Lordships further thought that the expression 'receipts' arising from busi-

ness as used in S. 4 (3) (vii) meant receipts arising from the carrying on of business. We are in respectful agreement with the principles laid down by their Lordships of the Privy Council, but we fail to realize how they help the assessee. As indicated above, in every case that arises it is to be determined whether a certain profit is in the shape of a windfall or it is a part of a periodical monetary return with some sort of "regularity" or "expected regularity" and if it is found that the assessee intended to make these profits regularly, the judgment of their Lordships of the Privy Council will not stand in the way of the Income-tax Department assessing those profits. Besides, the Commissioner here contends that these profits arose from the carrying on of the normal business of the Company and if that be so, the exemption claimed by the assessee will not be available to him even under the Privy Council judgment. It may further be noted that in A I R 1935 P C 143⁵ at p. 145 their Lordships of the Privy Council have observed:

The word 'income' is not limited by the words 'profits' and 'gains'. Anything which can properly be described as income is taxable under the Act unless expressly exempted.

In 7 I T C 67,⁴ the assessee was a tin mine owner who had been lending money to a mining engineer for working a tin area. He made a further advance to him of a considerable amount of money under an agreement stipulating for payment of a share of the price of the mining area then contemplated to be sold, and received a large sum of money under the agreement. The Income-tax Department contended that the profits made by the assessee were taxable. The assessee however resisted it on the ground that they did not form part of a regular business. It was held by a Division Bench of the Rangoon High Court that these profits were covered by S. 4 (3) (vii), Income-tax Act. Page O. J. who delivered the principal judgment, remarked:

It does not appear to me that it was a business transaction in any sense, but was only a mode by which the assessee sought to secure himself against loss if he lent to Mr. W. S. this further sum of Rs. 10,000 It is clear to my mind upon the face of the agreement that the transaction out of which the £6000 accrued to the assessee formed no part of any business that the assessee was carrying on The transaction was a receipt, not being a receipt arising from business

5. Gopal Saran Narain Singh v. Commr. of Income-tax B. & O., (1935) 22 A I R P C 143 =156 I O 856=62 I A 207=14 Pat 552 (P O).

of a casual and non-recurring nature within S. 4 (3) (vii) of the Act.

With the principles underlying these remarks we are in respectful agreement, but the question still remains whether they apply to the case before us. On behalf of the Commissioner, on the other hand, reliance has been placed on 6 I T C 74⁶, 1 I T C 419⁷, (1883-90) 2 Tax Cas 571⁸, (1933) 17 Tax Cas 381⁹, (1925) 9 Tax Cas 141¹⁰ and (1906-11) 5 Tax Cas 159¹¹. In 6 I T C 74⁶ the assessee had purchased a plot of land with the idea of parcelling it into small plots and selling them as building sites at a profit and he sold some plots in furtherance of this intention. Later, the land remaining unsold was acquired by Government on payment of compensation. The Department assessed the profits which had thus accrued to the assessee and the assessee contested their right to do so. It was held that the transaction was an adventure in the nature of trade coming within the definition of 'business' in S. 2 (4), Income-tax Act, and that the receipts from the sales were profits of business and not casual receipts exempt from assessment. In 1 I T C 419⁷ the assessee who was once in regular business as a cloth and grain merchant, which he had given up, received a sum as brokerage for the sale of certain mills and this brokerage transaction was an isolated one in the year of assessment. On a question raised by the assessee that the sum as received by him was not assessable to income-tax as it fell within the meaning of S. 4 (3) (vii), Income-tax Act, a Division Bench of the Allahabad High Court decided against him and held that the transaction came within the definition of 'business' and was not therefore exempt under S. 4 (3) (vii). The learned Judges in the course of their judgment remarked:

In taking the view we do, we found ourselves mainly upon the use of the word 'nature' in the exemption. The word is not 'occurrence'. If the language were 'a casual or non-recurring occur-

rence', there would be much to be said for the contention of the assessee. But the expression 'nature' appears to us to be a word used independently of the accident of the event happening in fact once only or more often in a fortunate year. It connotes a class of dealing which might occur only once, but which might occur several times. Now the adventure of a businessman who is enabled through his business associations to negotiate a large transaction and thereby to earn a heavy commission, may undoubtedly be in fact non-recurring in the sense that so successful an adventure would not be likely to occur again. But, on the other hand, it is a class of transaction which might occur to any such businessman once only or half a dozen times again, during the course of the year.

In (1883-90) 2 Tax Cas 571⁸ at p. 578, the Lord President remarked:

Where the gain is made by the company by realising an investment at a larger price than was paid for it, the difference is to be reckoned among the profits and gains of the company.

In (1933) 17 Tax Cas 381⁹ certain banks converted their holdings of National War Bonds into 5 per cent. War Loan and 3½ per cent. Conversion Loan, the value of the stocks received in exchange being greater than the cost to the banks of the National War Bonds converted. It was held by Rowlatt J.:

They have got a new thing and at the moment they get it, they have got something which is worth more than that which is represented in their books as the thing they got it for. That is the whole of it, and it seems to me that for the purpose of arriving at this system of making profits, which is a perfectly proper system, there is a profit here, and therefore the Crown must succeed in this case.

In (1925) 9 Tax Cas 141¹⁰ it was held by the High Court of Justice (King's Bench Division) that any profits derived by the company from sales of land must be taken into account in computing for income-tax purposes the profits arising from the trade, adventure, or concern in the nature of trade exercised by the company. Pollock M. R. observed:

The question that we have to determine is whether the moneys derived from those sales of land fall into income or are to be treated as capital of the company. That is the question which often gives rise to difficulties and gives rise to different opinions We have to decide upon the substance of the case and not upon what any individual company may deem the particular item in the course of its trading I think the company could, if they pleased, deal with the proceeds of the sale of land either as capital or in profit and loss account according as they determined to be right The facts are not for us; the facts are for the Commissioners who had the case before them.

In (1906-11) 5 Tax Cas 159¹¹ it was held that the difference between the pur-

6. Parashram Chintaman v. Commr. of Income-tax, C. P. & Berar, (1931) 6 I T C 74.

7. In re Chunni Lal Kalyan Das, (1925) 12 A I R All 469=86 I C 189=47 All 368=28 A L J 65=1 I T C 419.

8. In re Northern Assurance Co., (1883-90) 2 Tax Cas 571.

9. Westminster Bank Ltd. v. Oslar, (1933) A C 189=17 Tax Cas 381=102 L J K B 110=148 L T 41=76 S J 831=49 T L R 43.

10. H. M. Insp. of Taxes v. The S. W. Office Co. Ltd. (1925) 9 Tax Cas 141.

11. Californian Copper Syndicate Ltd. v. Harris, (1906-11) 5 Tax Cas 159=6 F 894.

chase price and the value of the shares for which the property was exchanged is a profit assessable to income-tax. There the assessee which was a company formed for the purpose inter alia of acquiring and re-selling mining property had after acquiring and working various properties re-sold the whole to a second company receiving payment in fully paid shares of the latter company. The assessee contends that the English authorities are not of much help in the solution of the problem before us. As remarked by their Lordships of the Privy Council in 6 I T C 178³:

The Indian Act is not in pari materia; it is less elaborate in many ways, subject to fewer refinements and in arrangement and language it differs greatly from the provisions with which the Courts in this country have had to deal. Under such conditions, their Lordships think that little can be gained by attempting to reason from one to the other, at all events in the present case in which they think that the solution of the problem lies very near the surface of the Act, and depends mainly on general considerations.

This is true and we propose, therefore, that the decision of this case should proceed on its own facts and in the light of the Indian judgments, if any. We however consider that the English judgments can be utilised as aids in the interpretation of analogous provisions of law though not as binding authorities on those matters where the language of the English and Indian Acts differs. The word 'business' has been defined in the Income-tax Act as including any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture.

The term 'total income' has been defined as meaning

total amount of income, profits and gains from all sources to which this Act applies computed in the manner laid down in S. 16.

Under S. 6 those headings of income have been enumerated which are chargeable to income-tax and under S. 10, sub-s. (1) it is provided that the tax shall be payable by an assessee under the head 'business' in respect of the profits or gains of any business carried on by him. S. 4 (3) (vii) exempts only those receipts which are not receipts arising from business or the exercise of a profession, vocation or occupation and are of a casual and non-recurring nature. The combined effect of all these provisions of law appears to us to be this: If exemption is claimed for any item of income received by an assessee, it is for him to show that the receipt does not arise from business and is of a casual and

non-recurring nature. If he fails to prove either of these alternatives, he cannot bring his case within the purview of S. 4 (3) (vii) and he will be liable to pay income-tax on the item of income so received.

We have already indicated that the business of the assessee was a quasi-banking business and it received moneys from its clients for the purposes of the business. It is further clear to us that the investments that had been made had also been made as a part of the same business and the receipts arising therefrom were to all intents and purposes receipts from business. In these circumstances, even if the receipts were of a casual or non-recurring nature, they will not be covered by S. 4 (3) (vii). Apart from this, it is the intention of the assessee that is to be considered in such matters and when once it is found by the Department as a matter of fact that the assessee's intention was to make profits from these investments as a part of the assessee's business, it is doubtful whether we can go behind that finding. On these grounds, our reply to question 1 will be in the affirmative.

The second question need not detain us long. The property in question had been taken over by the old Company from a debtor in discharge of his loan, and the new Company realized profits out of it. As remarked by the Commissioner, the question whether anything taken over comes into capital or revenue account would depend upon evidence of intention at the time. The finding at which the department arrived was that "the object of purchase was re-selling at a profit as soon as a suitable opportunity arose". The assessee has failed to establish that the property was not acquired with the primary object of yielding a surplus on realization or that it was a mere windfall. We accordingly answer this question in the negative.

Coming now to question No. 3. It is admitted by the Department that the assessee was in the habit of compiling his account on the strictly mercantile basis even with regard to the interest on securities. The interest due on the securities was accordingly brought into the profit and loss statement last year even though it had not been actually received. The Income-tax Officer however adopted the cash basis in the present year and assessed the amount actually received by way of

interest. The procedure adopted by the Income-tax Officer will no doubt result in double assessment, but whether this is illegal or not will depend on the true interpretation to be put on S. 48-A (1) and (2). Further, that section comes into play only when the income-tax has been actually paid in excess and not earlier and we have not been referred to any other provision of law which we can invoke at the present stage of the assessment to grant to the assessee the relief prayed for. We are consequently constrained to answer this question too in the negative. We answer the three questions referred to us accordingly and order the assessee to pay the costs of the Commissioner.

P.R./D.S. *Answer accordingly.*

*** A. I. R. 1938 Lahore 49**

COLDSTREAM AND ABDUL RASHID JJ.

Firm Dwarka Das-Badri Das—Defendants—Appellants.

v.

Siri Ram and another, Plaintiffs and another, Defendant—Respondents.

First Appeal No. 1584 of 1935, Decided on 8th March 1937, from decree of Sub-Judge, First Class, Delhi, D/- 7th August 1935.

*** Civil P. C. (1908), S. 64 and O. 38, R. 5—Attachment before judgment made without complying with procedure laid down in O. 38, R. 5—Order is mere irregularity and not nullity—Third party cannot ignore it and enforce mortgage against claims under attachment.**

Though the order of attachment before judgment should comply with provisions of O. 38, R. 5, that is, the order should be a conditional order accompanied by a notice to the defendant, yet non-compliance with this procedure and failure to give the defendant an opportunity to furnish security does not make the ex parte order of attachment a nullity but simply renders it irregular, liable to be set aside only at the instance of the defendant. But a third party cannot ignore the attachment and enforce his mortgage against decree-holder's claims under attachment: *A I R 1934 All 456 and A I R 1919 Oudh 4, Rel. on; A I R 1922 Nag 238; A I R 1934 All 165 and A I R 1914 All 511, Ref. [P 51 O 1, 2; P 52 O 1]*

Jagan Nath Aggarwal, Bhagwat Dayal and Krishan Swarup—for Appellants.

Mehr Chand Mahajan and Vishnu Dutta—for Respondents (Plaintiffs).

Coldstream J.—The circumstances proved and admitted leading to the present appeal are as follows: Kidar Nath and

Shiv Parshad, proprietors of two firms in Delhi, finding themselves unable to pay their debts, compounded with their creditors, and on 30th September 1925 executed a deed promising to pay them half of what they owed in eight months. For the due discharge of this undertaking Suraj Bhan and Kirori Mal stood surety executing a bond recording their guarantee (D. 13). The debtors did not pay according to their promise and several of the creditors sued the sureties for the amount payable under the agreement and the security bond with the result that in 1927 several decrees were passed against Suraj Bhan and Kirori Mal. On 9th August 1928, the firm Dwarka Das Badri Das, to whom Kidar Nath and Sheo Parshad had owed Rs. 15,000 before the composition, sued Suraj Bhan and Kirori Mal in the Court of the Senior Subordinate Judge, Delhi, to recover half this sum in accordance with the guarantee agreement together with interest, the whole sum sued for being Rs. 8,839.9.0 (D. 1). At the same time they applied for attachment before judgment of two houses, one owned by Suraj Bhan and the other by Kirori Mal, alleging that the defendants had alienated their other immovable property and were about to alienate these houses (D. 2). The Senior Subordinate Judge passed an ex parte order as follows:

Attachment of immovable property as applied to be issued as the defendant intends to alienate his property in order to defeat and delay the decree that might be ultimately passed against him. In a similar suit decree has been passed against the defendant.

The order was issued in the form prescribed by the High Court for an order under R. 7 of O. 38, Civil P. C. restraining Suraj Bhan and Kirori Mal from transferring or creating a charge upon the houses and prohibiting all other persons from receiving them by purchase, gift or otherwise until further orders. The order was proclaimed, served on Suraj Bhan and Kirori Mal and a copy of it was posted on the house of Suraj Bhan. On 6th November 1928, Suraj Bhan and Kirori Mal applied for cancellation of the order asserting that they had no intention to alienate any property, that Suraj Bhan had immovable property worth two lakhs of rupees in Delhi and that the plaintiffs had got the attachment proclaimed simply to disgrace them (D. 5 and D 12-A). They also asked for compensation (Rs. 1,000) under S. 95, Civil P. C. What happened

in these attachment proceedings immediately after this is not known, but on 16th March 1932 counsel for Suraj Bhan withdrew his application. It is to be presumed that it was dismissed and the attachment order thus confirmed. On 4th September 1930, Suraj Bhan executed a deed mortgaging his house in respect of which the prohibitory order had been passed in favour of Siri Ram and his brother Ram Sarup for Rs. 20,000 with possession, taking the house on lease from the mortgagees. The mortgage (a translation of which is at page 84 of the printed book III) was registered six days later.

On 26th January 1933, Siri Ram and Ram Sarup sued Suraj Bhan to recover their mortgage loan. They obtained a preliminary mortgage decree on 6th March 1933. This decree was made final on 13th March 1935. On the day on which the preliminary decree was passed, the suit brought by Dwarka Das-Badri Das for Rs. 8,839.9.0 was also decreed. In executing this decree by sale of Suraj Bhan's house they were met by the objection of the mortgagees Siri Ram and Ram Sarup who asked that the sale should be subject to their mortgagee rights (D. 9). This objection was dismissed on 27th April 1933 on the ground that as the attachment before judgment was admittedly made long before the mortgage, the latter could not affect the former (D. 10). Thereupon Siri Ram and Ram Sarup instituted against the firm Dwarka Das-Badri Das the suit out of which this appeal arises alleging that the attachment of Suraj Bhan's house was illegal and invalid because it had been ordered without issuing notice and without giving Suraj Bhan the opportunity of furnishing security as required by O. 38, Civil P. C., and praying for a declaration that the mortgage created a first charge on the house in their favour and that the order of 27th April 1933 dismissing their objection was wrong.

The suit was contested by Dwarka Das-Badri Das on the pleas *inter alia* that the suit was barred by S. 47, Civil P. C., that the attachment was effective against the mortgage even though it had been ordered without notice to the objector, that the fact that the house had been attached had been admitted by the plaintiffs Siri Ram and Ram Sarup when their application for cancellation of the attachment order was dismissed, that the mortgage was a ficti-

tious transaction effected without consideration in bad faith to defraud creditors and that the suit was instituted in collusion with Suraj Bhan. Of the several issues struck for trial, we are concerned with three only, namely :

(1) Do the provisions of S. 47, Civil P. C. bar the suit ? (5) Was the mortgage effected in order to defraud the creditors of Suraj Bhan ? and (6) Was the attachment of Suraj Bhan's house before judgment in the suit Dwarka Das v. Suraj Bhan invalid, void and *ultra vires* and is the mortgage therefore (not) legally enforceable against the mortgaged property ?

On 5th June 1934, the Subordinate Judge decided that the suit was not barred by S. 47, Civil P. C., and after hearing the evidence produced by the parties he delivered judgment in favour of the plaintiffs holding that the attachment order was *ultra vires*, illegal and not binding on the plaintiffs and that the plaintiffs' mortgage was therefore enforceable against the mortgaged property. Against this decision the present appeal has been preferred by Dwarka Das-Badri Das. It is contended on their behalf that upon the evidence produced in the case the lower Court ought to have held that the mortgage was a fraudulent and bogus transaction and that in any case, having been effected contrary to the attachment, it was void as against the appellants' claim. As regards the point whether S. 47, Civil P. C., barred the suit, it is not disputed that this will depend on the question whether a valid attachment was subsisting at the time of the mortgage : *see* 6 Lah 544.¹

It is also not now disputed that the mortgage deed was properly executed and that the full consideration stated was paid to the mortgagor by the plaintiff-mortgagees. The argument is that the surrounding circumstances leave no room for doubt that the transaction was a fiction and a fraud and the mortgagees were not bona fide purchasers for valuable consideration. (His Lordship after discussing the evidence concluded that the transaction was not secret and the circumstances justified no presumption that the plaintiffs colluded with Suraj Bhan to hold the mortgaged property for him, and proceeded.) The question remains whether the mortgage was void against Dwarka Das-Badri Das under S. 64, Civil P. C. The Court had power to order the attach-

1. *Ishar Das v. Parma Nand*, A I R 1926 Lah 184=98 I O 30=6 Lah 544.

ment of any of the defendant's property : see S. 94, Civil P. C. The Rules prescribing the procedure are in O. 38 of the Code. They lay down that where the Court is satisfied that the defendant is about to dispose of the whole or part of the property to obstruct or delay the execution of any decree that may be passed against him, it may order his property to be attached. But R. 5 of the Order prescribes that before it orders attachment, the Court may direct the defendant either to furnish security to produce the property or the value of it, or to show cause why he should not furnish security. In doing so the Court may direct the conditional attachment of the property. R. 6 prescribes that where the defendant fails to show cause why he should not furnish security or fails to furnish the security, the Court may order the property to be attached, and R. 7 lays down that the attachment shall be made in the manner provided for the attachment of property in execution of a decree. In App F of the Code are prescribed the proper forms for notice to be given to defendant (No. 5), for the furnishing of security (No. 6), and the form in which the attachment is to be ordered (No. 7). The Court did not act in conformity with these Rules. It did not issue notice under R. 5 and made no order for a conditional attachment but forthwith and ex parte attached the property. The attachment order was therefore obviously irregular. In holding that it was a nullity the learned Subordinate Judge has relied on 68 I C 188² and A I R 1934 All 165.³ The first of these judgments is a decision by the Additional Judicial Commissioner of Nagpur and is to the point. It was there held that an attachment, apparently ordered under R. 6 of O. 38 of the Procedure Code without the procedure prescribed in R. 5 of the Order, was ultra vires and ineffective against the enforcement of a mortgage effected during the attachment. The Allahabad ruling also by a single Judge is to the same effect.

It is contended before us by the appellants' counsel that these do not lay down the law correctly inasmuch as the omission to observe the procedure laid down in R. 5 did not deprive the Court of its inherent jurisdiction under S. 94 and O. 38 of the Code to attach property before judgment.

The attachment order ought, no doubt, to have been expressly a conditional order accompanied by a notice to the defendant in accordance with sub-rule 1 of R. 5, but it is argued that this is an irregularity which cannot as against third parties affect the subsistence and legal effect of the attachment actually made. For the respondents it is argued that the power of a Court to attach before judgment, that is to say deprive a person of a right before any adjudication upon a claim against him, is one of a very special kind and the exercise of this power without all proper formalities vitiates an attachment, for, until the procedure prescribed by R. 5 has been followed and the defendant has failed to show cause or furnish security (R. 6), the Court can have no jurisdiction to make an absolute order of attachment before judgment.

Counsel have referred us to a very large number of decisions in support of their respective contentions. With the exception of the rulings cited above, those relied upon by the respondents' counsel do not appear to be of much assistance for the decision of the present case. The order in this case was obviously irregular and liable to be set aside on appeal by the defendant whose property was attached: see for example 23 I C 107.⁴ But will such an irregularity render the conditional attachment a mere nullity which a third party can ignore? I think not. In 23 I C 107,⁴ a Division Bench judgment by the Allahabad Court which was relied on by Rachhpal Singh J. in A I R 1934 All 165,³ where an attachment made without the defendant having been called upon to show cause or furnish security under R. 6 was set aside at the instance of the defendant in the suit, Ryves and Piggott JJ. remarked that the order was irregular and objectionable. As noticed by Sulaiman and Mukerji JJ. in A I R 1934 All 456⁵, it does not follow that the order was wholly ultra vires or void ab initio. The judgment in 55 I C 481⁶ (Stuart A. J. C. and Kanhaiya Lal A. J. C.) lends some support to my view. In that case a plaintiff had submitted an application purporting to be under O. 39, R. 1 of the Code but asking for attachment of a village.

4. Nathu Mal v. Kishori Lal, A I R 1914 All 511 = 23 I C 107.

5. Prag Nath v. Indra Devi, A I R 1934 All 456 = 148 I C 509.

6. Bishambhar Nath v. Girdhari Lal, A I R 1919 Oudh 4 = 55 I C 481 = 28 O C 18 = 7 O L J 1.

2. Bansel Lal v. Sita Ram, A I R 1922 Nag 238 = 68 I C 188.

3. Dular Singh v. Ram Chander, A I R 1934 All 165 = 147 I C 509 = 1938 A L J 1501.

The Court ordered attachment and issued an order restraining the defendant from transferring or charging the property and all other persons from receiving the property by purchase or otherwise. It was held that an attachment having been ordered and effected in accordance with the procedure prescribed in R. 8 of O. 38 and R. 54 of O. 21, the omission to issue a notice was nothing more than an irregularity which could have justified Ram Singh in moving the Court to discharge the order or asking a higher Court to set it aside. I have no doubt of the correctness of that judgment, if I say so with due respect, and I agree with the remarks made at p. 484 of the report regarding the effect of an attachment in the circumstances of the case. Those circumstances are not very different from those in the present case and the principle applied appears to me to be applicable here.

The Court in the present case was properly moved. It had jurisdiction to attach. It made an order of attachment, and this order was issued and the attachment carried out with the proper formalities required by the law. The present respondents had no right to raise any objection to the attachment and the only person who could object, the defendant in the case, did object, but the order continued to subsist and after the defendant had full opportunity to show cause under R. 6 it was ultimately confirmed and made absolute. I can see no ground for holding that it was a nullity, although the procedure of the Court was irregular. It follows that under S. 64, Civil P. C., the attachment made void the respondents' rights as against the appellants' claim under the attachment. I would therefore accept this appeal and setting aside the judgment of the trial Court dismiss the suit with costs throughout against the contesting defendants.

Abdul Rashid J.—I agree.

P.R./D.S. *Appeal accepted.*

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ADDISON AND DIN MOHAMMAD JJ.

Shahu — Plaintiff — Appellant.

v.

Mt. Rahmon — Defendant —

Respondent.

First Appeals Nos. 210 and 306 of 1936, Decided on 26th February 1937, from decree of Senior Sub.Judge, Gujrat, D/- 21st April 1936.

Civil P. C. (1908), O. 23, R. 1 and S. 11—Bar to fresh suit—In appeal parties agreeing to dismissal of appeal—Court passing order dismissing appeal allowing plaintiff to file fresh suit — Suit held not one withdrawn under O. 23, R. 1—Fresh suit on same cause of action held barred by *res judicata*.

Where on dismissal of the suit the plaintiff files an appeal and in appeal the Appellate Court passes an order that the parties agree that the appeal may be dismissed and further states in the order that the plaintiff is permitted to bring a fresh suit and ultimately concludes the order by stating that the appeal is dismissed, it cannot be said under these circumstances that the suit is withdrawn under O. 23, R. 1 and not dismissed. On the dismissal of the appeal, the suit automatically is dismissed and the Court ceases to have any further jurisdiction in the matter and it ceases to have any power to grant permission to the plaintiff to institute a fresh suit on the same cause of action. A subsequent suit brought by the plaintiff on the basis of such order is barred by principles of *res judicata*: *13 M I A 160 (P C)* and *A I R 1925 P C 55, Rel. on.*

[P 53 C 2; P 54 C 1, 2]

M. Sleem and Mohammad Monir —

for Appellant.

Niaz Ali — for Respondent.

Din Mohammad J.—This judgment will dispose of Civil Appeals Nos. 210 and 306 of 1936. They have arisen in the following circumstances: One Ali died leaving him surviving a minor widow, Mt. Rahmon, and a nephew Shahu. Ali's estate was under customary law mutated in favour of his widow. Some time after his death, Shahu petitioned the revenue authorities for the substitution of his name for that of Mt. Rahmon on the ground of her re-marriage with one Mian Khan. The Assistant Collector accepted the petition and effected the mutation accordingly. On appeal his order was set aside by the Collector. Thereupon Shahu instituted a declaratory suit in the Court of the Senior Subordinate Judge, Gujrat. Only one issue was raised in the case, that of re-marriage. The Subordinate Judge came to the conclusion that no re-marriage had been established and accordingly dismissed the suit with costs. In the course of his judgment the Senior Subordinate Judge also remarked that a declaratory suit could not be instituted inasmuch as the plaintiff was out of possession. He however did not dismiss the suit on that ground as that plea had not been urged. From that order of dismissal, an appeal was preferred to this Court which came on for hearing before a Division Bench on 13th February 1935. The learned Judges who composed the Bench made the following order:

The learned counsel for the parties agree that this appeal may be dismissed, and that the plaintiff-appellant may be permitted to bring a fresh suit for possession, if so advised. We grant permission to bring a fresh suit and dismiss this appeal. Parties to bear their own costs throughout.

Presumably in pursuance of this order, on 8th March 1935 Shahu instituted a suit for possession of the land in suit and the cause of action was stated to be the same as was urged in the previous suit. It was however added that according to Mt. Rahmon's own witnesses in the previous suit she had re-married Manak also. In para. 5 of the plaint it was stated that the suit was being instituted in accordance with the order of the High Court referred to above which had been made with the consent of the parties. Various defences were raised to this suit. The alleged re-marriage was denied. It was also contended that the land was not ancestral qua the plaintiff, and as Mt. Bhari, daughter of Ali by another wife, was alive, the plaintiff had no locus standi to bring the suit. It was further urged that the previous judgment of the Senior Subordinate Judge, holding that no re-marriage had been proved, operated as *res judicata*. On these pleadings seven issues were framed, viz :

- (1) Whether Mt. Rahmon has re-married Mian Khan as well as Manak after the death of Ali ?
- (2) Whether the plaintiff is an heir of the deceased Ali ?
- (3) Whether the decision in the previous suit operates as *res judicata* on the question of the second marriage of Mt. Rahmon ?
- (4) Whether she was no party to the compromise in the High Court by which the plaintiff was allowed to bring a fresh suit ?
- (5) How that permission affects the present case ?
- (6) Whether plaintiff can bring the present suit in the presence of the daughter of Ali ?
- (7) What relief is the plaintiff entitled to ?

On 30th March 1936, an additional issue was framed, viz. "whether the land in suit is ancestral qua the plaintiff?" The Senior Subordinate Judge held that re-marriage was established and further decided the question of *res judicata* against the defendant but dismissed the suit on the ground that the land being non-ancestral, the plaintiff had no locus standi to sue in the presence of Ali's daughter. Against this order the plaintiff has filed Civil Appeal No. 210 of 1936 attacking the decree of dismissal, while Mt. Rahmon has filed Civil Appeal No. 306 of 1936 claiming a declaration that she is the widow of Ali and not the wife of one Mian Khan. Counsel for the appellant has attacked the

judgment of the Senior Subordinate Judge on the ground that sufficient opportunity was not allowed to the appellant to prove the additional issue and that in fairness and justice the case should be remanded to enable the appellant to lead evidence on that issue. Counsel for the respondents, while opposing the appellant's application for remand, has pressed the question of *res judicata*, and as we consider that this objection is sufficient to dispose of the appeals, we propose to deal with it in the first instance.

We have already quoted the order of the learned Judges of this Court made on 13th February 1935 which forms the basis of the present discussion. On behalf of the respondent it is contended that inasmuch as the appeal was dismissed the learned Judges ceased to have any further jurisdiction in the matter and were therefore incompetent to allow the plaintiff permission to bring a fresh suit in respect of the subject matter of the previous suit. Counsel for the appellant has urged that, firstly, the order was made under O. 23, R. 1, although it was not clearly expressed in those terms, and that consequently the learned Judges were empowered under the law to grant the plaintiff permission to withdraw from the previous suit with liberty to institute a fresh suit in respect of the same cause of action ; and secondly, the order was made with the consent of the parties and the respondent was therefore precluded from raising any objection on this score.

On examining the authorities which have come to our notice on this point, we consider that the contention of the respondent must prevail. Whatever the impression of the parties at the time when the order was made, the order itself does not refer to O. 23, R. 1, nor is it so worded as to convey that it was intended by the Court to operate as an order under O. 23, R. 1. As stated above, at the very outset the order says : "that the parties agree that the appeal may be dismissed" and while stating "that the plaintiff is permitted to bring a fresh suit" it concludes with the words "we dismiss the appeal". In these circumstances, it cannot be urged that the previous suit was withdrawn and not dismissed. It has been pointed out in various judgments of the Courts in India as well as of their Lordships of the Privy Council that if once a suit is dismissed,

the Court ceases to have any further jurisdiction in the matter, and that consequently it is not empowered to grant permission to the plaintiff to institute a fresh suit on the same cause of action. A reference in this respect may be made to 13 M I A 160¹ and 47 All 158.² In 13 M I A 160¹ their Lordships of the Privy Council observed [*see headnote*] :

There is no power in the Courts in India, similar to that exercised by Courts of Equity or Common Law in England, to dismiss a suit with liberty for the plaintiff to bring a fresh suit for the same matter, or to enter a non-suit. Such power of the Indian Courts is limited to questions of form as in the case (1) of misjoinder of parties or of the matters in suit, (2) where a material document has been rejected for not having a proper stamp, and (3) if there has been an improper valuation of the subject matter of the suit ; but not to a case where the issue has been joined, and the plaintiff fails to produce the evidence he is bound to give to support the issue.

In 47 All 158² a suit was originally brought by the appellants against certain defendants contesting a gift executed by a Hindu widow. During the pendency of the suit the widow died. The plaintiffs might have continued their suit for a declaration but as their real intention was to get possession, they endeavoured to turn their suit into one for possession. This object they could not achieve in that suit as brought. Accordingly they made an application to the trial Court for permission to amend the plaint. The trial Court rejected the application on the ground that it was an attempt to introduce a new case. The plaintiffs admitted through their counsel that if they could not succeed in amending the plaint, their suit must fail. Thereupon the trial Judge dismissed the suit with costs remarking in the course of his judgment :

The death of the lady has given the plaintiff a fresh cause of action for possession. I leave them to the liberty of filing a fresh suit for possession.

The plaintiffs filed a fresh suit and the defendants pleaded the bar of *res judicata*. To meet that plea a similar argument was advanced as in the present case. Their Lordships of the Privy Council remarked as follows :

But as the Judges in the Court of the Judicial Commissioner have observed, some complication was introduced by the language of the Judge who

tried the first case and by his expressing himself as if he had power to give leave to bring a fresh suit. It was contended on behalf of the plaintiffs that in so expressing himself he was purporting to exercise the powers given to the Court by O. 28, which allows the Court in certain cases to grant the plaintiff permission to withdraw from a suit with liberty to issue a fresh suit, in which case the bar against a fresh suit which is otherwise imposed on a plaintiff who abandons his first suit is removed.

The same point was raised at their Lordships' bar, but their Lordships agree with the Court of the Judicial Commissioner that it is not a good one. There is no application for leave to withdraw the suit, nor was it withdrawn ; it was dismissed. And the power of the learned Judge ceased upon this dismissal. It may have been unfortunate for the plaintiffs that the learned Judge thought that he had a power which he did not possess

We are unable to distinguish the present case from the case decided in 47 All 158.² Here also it does not appear that any application for withdrawal had been made, nor was the previous case allowed to be withdrawn. Both parties agreed that the appeal may be dismissed and it was accordingly dismissed. In these circumstances we are constrained to hold that the finding arrived at in the previous suit that no re-marriage had taken place became final and could not be re-agitated in any subsequent suit. In this view of the case no other question arises. We accordingly affirm the decision of the Court below though on different grounds and dismiss Appeal No. 210 of 1936. In the peculiar circumstances of the case, we leave the parties to bear their own costs before us.

Coming now to Civil Appeal No. 306 of 1936, it was not necessary for Mt. Rahmon to have appealed, inasmuch as under R. 22 of O. 41 she could have supported the order of dismissal on any of the grounds decided against her. We have already upheld her plea of *res judicata* and decided that the previous finding of the Senior Subordinate Judge that she had not re-married stands. It is not therefore necessary to do anything further in the matter. We accordingly dismiss this appeal making no order as to costs.

P.R./A.L.

Appeal dismissed.

1. Robert Watson & Co. v. Collector of Zilla Rajshahye, (1869-70) 18 M I A 160=3 Beng L R P O 48=12 W R 43 (P O).

2. Fateh Singh v. Jagannath Baksh Singh, A I R 1925 P O 55=91 I O 280 = 52 I A 100 = 47 All 158=27 O O 894 (P O).

A. I. R. 1938 Lahore 55

COLDSTREAM AND JAI LAL JJ.

Mt. Nidh Kaur and another —
Defendants — Appellants.
v.

Gian Singh, Plaintiff and another,
Defendant — Respondents.

First Appeal No. 2255 of 1935, Decided on 19th February 1937, from decree of Sub-Judge, First Class, Gujrat, D/- 29th July 1935.

(a) Evidence Act (1872), S. 90—Presumption applies even to fact that testator was in sound disposing state of mind.

The presumption under S. 90 applies even to the fact that the testator was in a sound disposing state of mind. Where a presumption has been raised by a trial Court under S. 90, a Court of Appeal will be slow to interfere with the exercise of its discretion: *A I R 1930 Mad 744, Rel. on.* [P 56 C 2]

(b) Custom (Punjab) — Evidence — Statements in *riwaj-i-am*—Evidentiary value of.

The statements of customs recorded in the *riwaj-i-am* of a tahsil or district regarding the customary law followed by the various tribes holding land in the tahsil in matters of succession are by themselves strong evidence of the customs followed by members of those tribes even if instances are not cited. [P 58 C 1]

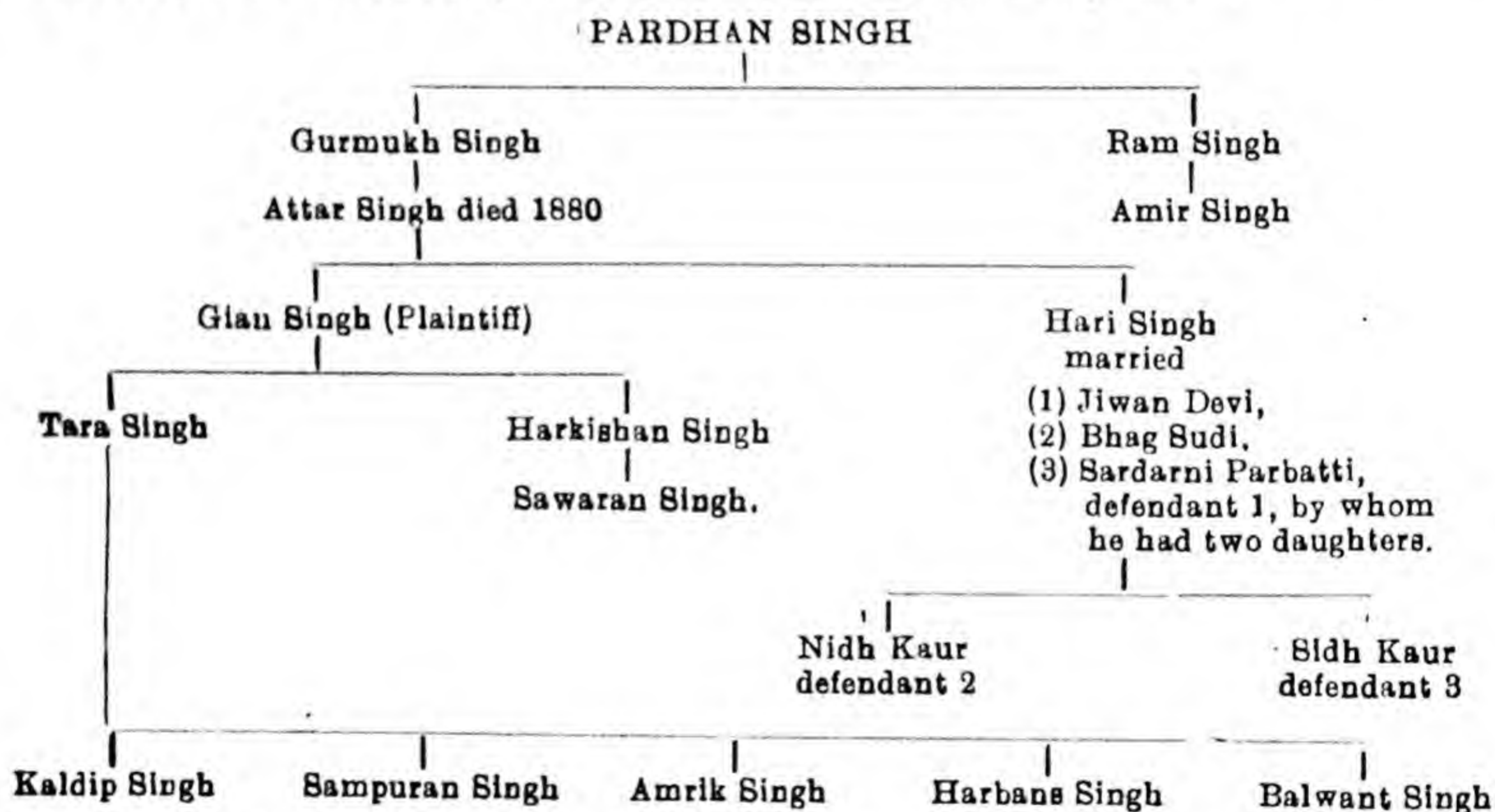
(c) Custom (Punjab) — Khatri of Phalia tahsil of Gujrat District — Succession—Ancestral property — Daughter.

Khatri of Phalia tahsil of Gujrat District follow custom according to which daughter cannot inherit ancestral property in presence of her father's collaterals. [P 56 C 1; P 60 C 1]

Mehr Chand Mahajan, Qabul Chand, Dev Raj Sawhney and Shamair Chand — *for Appellants.*

Achhru Ram, Amarnath Chona and M. M. Aslam Khan — *for Respondent (Plaintiff).*

Coldstream J.—The following pedigree-table will help to explain the nature of the dispute in this case. The family is Lamba Khatri by caste :



Hari Singh died on 20th November 1898, leaving extensive landed property in Kila Attar Singh (where he died), Pindi Lala and Chak Basawa and other places in Phalia tahsil of the Gujrat District, as well as houses at Lahore, Gujrat and elsewhere. His property passed into possession of his three widows Jiwan Devi, Bhag Sudi and Parbatti. On Jiwan Devi's death in 1899 Bhag Sudi and Parbatti remained in possession. In June 1932 Bhag Sudi died and Sardarni Parbatti held possession of the whole of it. On 17th July 1932 Sardarni Parbatti executed a deed which was registered on 22nd July relinquishing her rights in the property in favour of her daughters Nidh Kaur and Sidh Kaur.

Admittedly the deed in effect was one alienating the property.

On 29th April 1933 Hari Singh's brother Sardar Gian Singh instituted in Gujrat the suit from which this appeal arises against the Sardarni and her daughters praying for a declaration that the deed will not affect his right as a reversioner according to the customary rule followed by the family and as an heir appointed by a will (Ex. P-107) executed by Hari Singh on 19th November 1898. Some of the property to which the deed related, he claimed to be his own, having been acquired by himself. He also asked that a sum of Rs. 1,64,700 spent by himself and his sons on the construction and improve-

ment of certain house property be declared a first charge on that property if he were found not entitled to possession of it. Mt. Parbatti put in no written pleas. The daughters denied the existence of any valid will executed by Hari Singh and asserted that under the Hindu law which governed the succession to property in their family, they were entitled to the suit property as Hari Singh's heirs, that the property was all ancestral with the exception of a site at Dinga, and a house and a shop in Jhelum which the plaintiff had acquired and some land in Kot Umar which he had acquired together with Sardar Hari Singh.

The Subordinate Judge who decided the suit found the will produced by the plaintiff to be a genuine and effective testament. He also found it proved that the parties did not follow Hindu law but a custom by which daughters had no right to inherit ancestral property in the presence of collaterals. On these findings he granted the plaintiff a declaration that the deed of relinquishment would not affect his reversionary rights in the ancestral property and his proprietary rights in the property acquired by himself. Against this decree the daughters Nidh Kaur and Sidh Kaur have appealed.

It is contended before us that the lower Court's decisions, that the parties follow a custom by which daughters are excluded from inheriting their father's ancestral estate in the presence of a collateral, and that the will Ex. P-107 put forward by the plaintiff is a genuine and effective document, are not justified by the evidence. (After discussing the evidence, the judgment proceeded further.) After considering all the evidence I am satisfied that the document Ex. P-107 produced by the plaintiff was the will signed by Hari Singh on 19th November 1898. The question still remains whether the document was the will of a free and capable testator. Merely ability to sign a document is not evidence of the disposing mind requisite for a valid disposition. Here the only evidence as regards the condition of Hari Singh's mind is the statement made by Ram Chand on 14th April 1899 before the Assistant Collector that Sardar Hari Singh was in his senses at the time the will was written. In the present proceedings, no attempt was made to prove that when Hari Singh appended his signature to this document he

was acting in a responsible and independent manner. The learned Subordinate Judge, applying the rule in S. 90, Evidence Act, has found in the age of the document justification for a presumption that the will was executed by Hari Singh while he had a disposing mind. There is no doubt authority for the view that S. 90 allows such a presumption (*see A I R 1930 Mad 744*¹) and where a presumption has been raised by a trial Court under that section, a Court of Appeal will be slow to interfere with the exercise of its discretion; but in the present case the circumstances clearly called for definite proof of Hari Singh's mental capacity when the will was signed. The testator was on his death bed; he died 13 hours after the will was signed and could sign his name with great difficulty as the signature itself proves. There were quarrels going on between his wives, only one of whom had children. The will was written by another hand and some of it after it had been signed. Though it was obviously important to produce it at once, it was suppressed for months, and when it was produced after some prevarication about its existence, it was not acted upon by the revenue authorities.

All the persons who were present at the execution of the will were not dead and they could have been questioned about Hari Singh's mental condition. But no such question was put in the trial Court even to Ram Chand or Gian Singh. My conclusion is that the plaintiff has not proved that Hari Singh had a free disposing mind when he executed the will and that therefore the will cannot be accepted as an effective instrument. In view of this conclusion, it is unnecessary to decide exactly how the will ought to be construed. There is however in my mind no doubt whatever that its language can be interpreted any one way, that is to say it gave each of the widows a life-interest only in the property. Each was to be given Rs. 500 per annum as maintenance out of the estate, and Parbatti, because she was to maintain and arrange for the marriage of her children, was to have all the rest of the income. After the widows' death Gian Singh was to take the property. This is I think clear from the rest of the will, but all possible doubt is removed by the provision that the widows

1. *Kotayya v. K. Vardhamma*, A I R 1930 Mad 744 = 127 I C 619 = 59 M L J 461.

would have no power to alienate. This provision relates to the whole property and not to the residential houses (the translation printed at p. 14 of book 6 is incorrect at this place).

The learned Subordinate Judge has discussed at length the evidence produced by the parties on the question whether the parties follow Hindu law in matters of succession or whether, as asserted by the plaintiff, they are bound by a custom which excludes daughters from inheritance to ancestral property. The argument for the appellants is that the onus lay on the plaintiff to prove that the family followed the custom he alleged, that being Khatri there is a strong presumption that the family follows the Hindu law, that this presumption is strengthened by the history of the family whose profession has not been agriculture but money changing and service under Government and that the lower Court's decision is against the weight of the evidence.

The family is one of repute. Its history is given at p. 145 of Vol. '2 of the book 'Chiefs and Families of Note in the Punjab' (Edn. 1910), published under the authority of Government. The founder of its fortune was Gurmukh Singh, the grandfather of the plaintiff Gian Singh, and his brother Hari Singh. Gurmukh Singh's father Pardhan Singh is said to have been a money changer in Khiwa, a small town in the Phalia tahsil, but the authority for this statement is not mentioned. Gurmukh Singh was a playmate of Raja Ranjit Singh and later fought for him with success and distinction. For his services he was munificently rewarded by his master so that at one time the value of his estate amounted to nearly four lakhs. Subsequently hostile influences destroyed his power and divested him of most of his jagirs. The British Government confirmed his and his sons' remaining jagirs in their favour for their lives and a third of Gurmukh Singh's jagir in favour of his male heirs in perpetuity. Sardar Attar Singh died in 1880 and his jagir was divided between his sons Hari Singh and Gian Singh, and on Hari Singh's death Gian Singh succeeded to his jagir, his hereditary title of Sardar and his seat in Divisional Darbar.

The family is now closely related to that of the Bedi family of Bawa Sir Khem Singh Bedi (see p. 229 of the same volume of Punjab Chiefs and Families of Note).

Iqbal Singh and Man Singh, the grandsons of Bawa Sir Khem Singh through his son Hara Singh, are married to the defendants Nidh Kaur and Sidh Kaur. Sir Khem Singh had a brother Sampuran Singh and Sampuran Singh's granddaughters are married to Balwant Singh and Sawaran Singh, the plaintiff's grandsons. We have thus two parties of the Bedi family whose interests are opposed to each other in the present suit. Hari Singh served as a Naib Tahsildar for a brief term. The plaintiff was Sub-Registrar of Phalia. His grandson Balwant Singh is an officer in the army. Another grandson, Sampuran Singh, was a Sub-Inspector of Police, and Tara Singh the plaintiff's son was an Honorary Magistrate and Sub-Registrar. Kuldip Singh, Tara Singh's son, is also an Honorary Magistrate.

From this account it is clear that the family cannot be called one of agriculturists in the common sense of the term. But since the time of Gurmukh Singh they have subsisted mainly on the profits yielded by cultivation of their lands which lie in villages and is one of the most important among the landed gentry of the tehsil. Attar Singh who founded Kila Attar Singh in or about 1848 was lambardar of the revenue estate, as was Gian Singh after him, and the family has held the zaildari of Pindi Lala. There is no evidence that Gurmukh Singh's ancestors were money-lenders except the statement in the historical book to which I have referred that Pardhan Singh was a money changer. But it is by no means rare to find that Hindus who deal in money but are settled in agricultural villages, have adopted customs in the matter of succession to land followed by the agricultural tribes among whom they live. From 1868 onwards very large areas of land owned by the family in Basawa Rakh Gurmukh Singh (exclusively owned by the family), Pindi Lala and Kila Attar Singh have been recorded as khudkasht, that is to say cultivated under the direct supervision of the owners, though not necessarily with the owners' own hands, and from 1856 until 1910 members of the family lived from time to time in these villages. In 1856 Gurmukh Singh described himself as resident of Pindi Lala (p. 55) as did Attar Singh in 1877 (p. 52). Gian Singh resided in Pindi Lala in 1898 (p. 21). In 1903 Bhag Sudi and Mt. Parbatti resided in Kila Attar Singh and Gian Singh in Pindi Lala (p. 24). It would

not therefore be surprising to find that the family did not follow Hindu law as do presumably Hindu gentry of non-agriculturist families living in large towns. Here I may notice that Gurmukh Singh was not the first of his family to hold land in Pindi Lala. The note on the pedigree-table of the proprietors of that village prepared for the settlement of 1868 mentions that Nand Lal, his ancestor, had settled in the village some eight generations before his time. Later this village was deserted and resettled. It was because it was his ancestral home that Gurmukh Singh took it as a jagir from Raja Ranjit Singh : see Ex. P.30.

On the question whether the parties followed Hindu law or the custom alleged by the plaintiff in the matter of succession, the parties called a very large number of witnesses who merely gave their opinions in favour of the party calling them or stated what they had heard. The bare statements of these witnesses have no value as evidence in this case. Counsel have not relied on them and it is greatly to be regretted that so much of the lower Court's time was wasted in recording them. One of the defendants' witnesses Thakar Singh, D. W. 4, mentioned that the estate of one Jit Singh, a Lamba Khatri of Dinga, passed to his daughter on his death, and that another Lamba of Dinga, Gulab Singh, gifted his estate to his daughter. According to Megh Raj, D. W. 5, Jit Singh had a brother Bhagat Singh who went to Africa but the witness really knows nothing about the family and does not know in what circumstances Jit Singh's daughter took possession of the property.

It is now well established that statements of customs recorded in the *riwaj-i-am* of a tahsil or district regarding the customary law followed by the various tribes holding land in the tahsil in matters of succession are by themselves strong evidence of the customs followed by members of those tribes even if instances are not cited. In this case the *riwaj-i-am* clearly supports the plaintiff. Khatri of Phalia tahsil were consulted when the *riwaj-i-am* of Gujrat district was compiled in 1892. Question 15 in the abstract of the *riwaj-i-am* on p. V of the compilation is :

If a landowner dying leaves only an unmarried daughter or daughters, what share in the property are they entitled to receive ?

The answer given for Hindus generally is:

A daughter cannot inherit in presence of her father's collaterals but in their absence she inherits.

It is to be presumed that this statement relates only to ancestral property, in the absence of any indication that it also relates to property self-acquired. The corresponding entry in the publication of 1922 is in the answer to question 60 which is for all tribes that

As regards ancestral immovable property, daughters inherit in the absence of male lineal descendants through males, the widow and collaterals of the fifth degree. As regards acquired property they exclude collaterals however near.

From the answer to question 28 in this manual, it is clear that Khatri were consulted by the compiler for the Khatri and Brahmins are shown there to have given a reply to that question different from the reply given by Aroras and other Hindu tribes. Going further back, we find in the notes attached to the pedigree-table of Attar Singh, the sole proprietor of Kila Attar Singh, a statement that "the terms relating to partition of the heritage which are recorded about our caste in the *dastur-ul-amal-i-am* shall be acted upon" (by the proprietors of course). Now this *dastur-ul-amal-i-am* can only be the *riwaj-i-am* of the district drawn up in 1868. That compilation was drawn up after enquiry from members of no less than fourteen sub-castes of Khatri, one of them being the Lamba sub-caste. According to the statement in that book (question 15) the Khatri asserted that a daughter does not succeed in the presence of collaterals. To go still further back, we have in the *wajib-ul-arz* of Kila Attar Singh of 1857 a declaration by the proprietor (Attar Singh) that after his death his sons shall inherit in equal shares—a daughter does not inherit property left by her father. This can only mean that a daughter will not inherit even if there are collaterals. In deciding that this is so, in 45 All 413² their Lordships of the Privy Council went on to observe that the record in a *wajib-ul-arz* of a custom is most valuable evidence of the custom, much more reliable evidence than subsequent oral evidence given after a dispute as to the custom has arisen.

The statement of custom in the *riwaj-i-am* of 1868 has been found correct in res-

2. Balgobind v. Badri Prasad, A I R 1923 P O 70 = 74 I O 449 = 45 All 413 = 50 I A 196 = 26 O O 217 (P O).

pect of two other sub-castes of Khatris — the Sobti and the Wadhawan Khatris in 5 P R 1915³ and A I R 1927 Lah 345,⁴ independently of the evidence of the riwaj-i-am itself and in respect of Brahmins in 116 P R 1893⁵ and A I R 1929 Lah 261.⁶ The appellant's counsel has drawn attention to two rulings in which Khatris and Brahmins of Dinga have been held not to follow custom : 64 I C 264⁷ and 6 Lah 524.⁸ The first relates to Sibal Khatris, a sub-caste not consulted when the first riwaj-i-am was compiled. In the second case the riwaj-i-am was it seems not produced in evidence. In another case (Civil Appeal No. 2453 of 1920) this Court decided against the custom in the riwaj-i-am that Khatris of Jalalpur Jattan in Gujrat District were governed by Hindu law. This is one instance in favour of the defendants. The judgment was delivered at a time when the importance of a riwaj-i-am as evidence had been lost sight of, an importance emphasized by the Privy Council in 45 P R 1917⁹ to which judgment attention was strongly drawn by Campbell and Fforde JJ. in 8 Lah 281.¹⁰

The plaintiff relied on two judicial instances. On 22nd February 1931 Gian Singh sold a house to Ram Chand. His grandsons brought a suit to have the alienation set aside alleging that the property was ancestral and the alienation void for want of consideration and necessity. The suit was dismissed by the Senior Subordinate Judge as the property was found to be self-acquired, but the greater part of the judgment was devoted to the question whether the plaintiff's family were governed by customary law in matters of alienation (Ex P. 78). It was held that the family followed customary law. The judgment was pronounced during the trial of this suit. As the defendants succeeded

on the ground that the property was not ancestral, they had no occasion to appeal against the decision on the point of custom and this decision is not a weighty piece of evidence.

In another suit which was brought by Raman Shah to recover Rs. 17,680 from the sons of Tara Singh on the basis of a promissory note, the issue arose whether the defendants followed the customary law, the question being material for a decision regarding the extent of their liability. It was held that the defendants did not follow Hindu law but a rule of custom (Ex. P. 143). The suit was instituted after the present suit and decided before the judgment under appeal was delivered. An appeal was dismissed by this Court in the judgment published in A I R 1936 Lah 986.¹¹ That litigation did not decide anything about the rights of daughters to inherit. More important evidence is to be found in the litigation in 1903 between Mt. Bhag Sudi and Mt. Parbatti on the one side and Gian Singh on the other after the death of Mt. Jiwani. The widows wanted to partition the land but this application was resisted by Gian Singh who objected on the ground that partition would result in injury to the property in which he had a reversionary right. The application was dismissed. In petitioning for revision (Ex. P. 14) the widows did not take the point that Gian Singh was not their reversioner and the Collector's judgment dismissing the petition (Ex. P. 113) shows that his status as such was not questioned.

Equally important is the notice (Ex. P. 81) given by Mt. Parbatti to Gian Singh on 9th February 1907 calling on him to pay Rs. 7,000 for the expenses of Mt. Parbatti's daughters. In the notice Parbatti stated : "You are given eight days' notice because you are the heir of the property of Sardar Hari Singh." I do not think that the right was conceded because of the will, for that will had not been acted upon by the revenue authorities and was presumably regarded by Mt. Parbatti as of no account. Another notice was sent to Gian Singh on 13th February (Ex. D.24). In this again Mt. Parbatti informed Gian Singh that he was bound to find money for the marriage of Sidh Kaur "as he will be the reversionary heir after her death".

3. Mt. Ishar Devi v. Bindraban, A I R 1914 Lah 212=26 I C 686=5 P R 1915=137 P L R 1915.

4. Mt. Ram Rakhi v. Mula Singh, A I R 1927 Lah 845=101 I C 194.

5. Prabh Dial v. Devi Dial, (1893) 116 P R 1893.

6. Mt. Maya Devi v. Badri Nath, A I R 1929 Lah 261=114 I C 49.

7. Lachman Das v. Gangaram, (1921) 64 I C 264.

8. Khazan Chand v. Paras Ram, A I R 1925 Lah 646=90 I C 1045=6 Lah 524=26 P L R 627.

9. Beg v. Allah Ditta, A I R 1916 P C 129=38 I C 54=44 I A 89=44 Cal 749=45 P R 1917 (P C).

10. Labh Singh v. Mt. Mango, A I R 1927 Lah 241=100 I C 924=8 Lah 281=29 P L R 586.

11. Raman Shah v. Kuldip Singh, A I R 1936 Lah 986=168 I C 557=88 P L R 984.

These are clear admissions of Gian Singh's status as reversioner. As against these admissions, we have first an admission by Gian Singh in the suit which he instituted after these notices to restrain Mt. Parbati from giving Sidh Kaur in marriage without his permission, that he followed Hindu law. But the question of daughters' rights to succeed was not in dispute and the law to which Gian Singh referred was that governing the right to give Sidh Kaur in marriage. The suit failed.

In a deed by which he sold a house in 1926 (Ex. D.5) Sardar Gian Singh declared that he was manager and administrator of a joint Hindu family. His son Harkishan Singh sued him and the vendee to have the alienation declared ineffective against his reversionary rights. The suit ended in a compromise by which Harkishan Singh was to get the property back if he paid for the price paid by the vendee with interest and Rs. 1,000 costs, that is to say the compromise gave him what he wanted. A similar assertion was made by Gian Singh when on 30th September 1929 he mortgaged to Ram Chand the house which he sold to him on 24th February 1931 and described himself in the deed as proprietor and manager of a joint Hindu family: Ex. D.4. As already mentioned, the sale of this house was attacked by Bhag Sudhi's grandsons and it was held by the Court that he did not follow Hindu law. These statements by the plaintiff were I believe false. It is not the case of the appellants that the family was a joint Hindu family. If the family was a joint Hindu family they are out of Court, for their mother, as widow of Hari Singh, was entitled to no more than her maintenance.

My conclusion is that the lower Court has rightly decided that by rule of custom the plaintiff inherits his brother's ancestral property to the exclusion of his brother's daughters. It is conceded by the plaintiff's counsel that according to the custom binding upon the parties, the daughters of Hari Singh are the heirs to his self-acquired estate. The trial Court has found that only part of the suit property which was acquired by Hari Singh is some land at Umar Kot bought by him and the plaintiff on 3rd April 1869, and the correctness of this finding is not disputed before us. Hari Singh's share in this parcel of land must go to his daughters. The result is that with the exception of Hari Singh's share

in the land at Umar Kot, bought in 1869, in respect of which the plaintiff's claim is rejected and the lower Court's decree set aside, this appeal is dismissed. The respondent will be paid his costs by Nidh Kaur and Sidh Kaur.

Jai Lal J.—I agree.

P.R./D.S.

Appeal dismissed.

*** A. I. R. 1938 Lahore 60**

JAI LAL AND BHIDE JJ.

Indar Singh and another
Appellants.

v.

Emperor.

Criminal Case No. 1397 of 1936, Decided on 9th April 1937, from order of Sess. Judge, Montgomery at Lahore, D/- 30th October 1936.

* Penal Code (1860), S. 104—Scope — Accused obtaining unlawful possession of land in peaceful possession of his co-sharer — Possession of accused only for couple of hours — Co-sharer trying to eject accused — Co-sharer and not accused has right of private defence.

Where the accused, entitled to joint possession of certain land along with the deceased and his brothers, obtains unlawful possession of a part of such land and remains in possession thereof only for a couple of hours and the persons already in possession try to eject the accused, the possession of the accused is no better than that of a mere trespasser and cannot give him the right of private defence. On the other hand, the persons already in possession have a right to inflict any necessary injury, short of death, in the exercise of right of private defence of property under S. 104 and have a right to maintain the possession and eject the accused. [P 62 C 1]

Jai Gopal Sethi — *for Appellants.*

Des Raj Sawhney — *for the Crown.*

Bhide J. — Hazara Singh and Lakha Singh, two brothers, and Banta Singh and Indar Singh, their respective sons, were charged under S. 302, I. P. C., read with S. 34, I. P. C., with the murder of one Arjan Singh. Hazara Singh was acquitted. Indar Singh was convicted under S. 302, I. P. C., and sentenced to transportation for life. Banta Singh was convicted under S. 324, I. P. C., and sentenced to rigorous imprisonment for one year while Lakha Singh was convicted under S. 323, I. P. C., and sentenced to rigorous imprisonment for six months. Indar Singh and Lakha Singh have filed a joint appeal. The material facts of the case were briefly as follows: One Baga Singh had seven sons, namely, Hazara Singh, Lakha Singh,

Arjan Singh, Amar Singh, Gajjan Singh, Sajjan Singh and Sarwan Singh. He owned 96 ghumaons of land which he divided into eight shares. He kept one share for himself and gave one share to each of his seven sons. After the death of Baga Singh his share was inherited by his wife Mt. Dani. This share was cultivated by four of the sons of Baga Singh, namely, Arjan Singh, Amar Singh, Gajjan Singh and Sarwan Singh during the lifetime of Mt. Dani. Mt. Dani died in 1935 and the land was mutated in favour of all the sons jointly. The aforesaid four sons however continued in possession of the land. On the day of the occurrence Hazara Singh, Lakha Singh, Banta Singh and Indar Singh went to this land and started irrigating two killas out of it which they claimed to have been allotted to them by a panchayat. Arjan Singh and Amar Singh coming to know about this went to the land and protested against the conduct of Hazara Singh, etc. This led to a fight in the course of which Arjan Singh was given blows with a sela on the chest and on the neck by Indar Singh, resulting in injuries to which he succumbed later. Lakha Singh also inflicted a blow on his head with a gandhali while Banta Singh inflicted another blow with a chhavi on his arm. Amar Singh, who tried to interfere, was also given some blows with the sela by Indar Singh. Gajjan Singh, Sajjan Singh and Sarwan Singh arrived shortly afterwards and then the fight ended. The matter was reported to the police and after investigation Hazara Singh, Lakha Singh, Banta Singh and Indar Singh were challaned.

The appellants admitted the fight, but their plea was that they had taken possession of the land in pursuance of a decision of the panchayat and while they were in peaceful possession, they were attacked by Arjan Singh, Amar Singh, Gajjan Singh, Sajjan Singh and Sarwan Singh and that the injuries to Arjan Singh and Amar Singh were caused by them in the exercise of their right of private defence. The learned Sessions Judge found that the appellants had failed to prove that the land in question had been allotted to them by any panchayat and that they had no justification for taking possession of the land and irrigating it, as they had done. They had therefore no right of private defence. The learned Judge however found that it was not proved that the fatal injuries to Arjan

Singh were caused in furtherance of a common intention and therefore he convicted Indar Singh alone, who was responsible for those injuries, under S. 302, I. P. C., and sentenced him to transportation for life. Lakha Singh, who had given only one blow with the gandhali on the head of Arjan Singh, was convicted under S. 323, I. P. C., and sentenced to rigorous imprisonment for six months only.

The medical evidence shows that the four accused, namely Hazara Singh, Lakha Singh, Banta Singh and Indar Singh were all injured, the total number of injuries received by them being about fourteen. The prosecution witnesses failed to give any explanation of these injuries but one of the prosecution witnesses, namely, Mohammad Din, had stated before the police that Arjan Singh and Amar Singh had come armed with a lance and a chhavi and that Gajjan Singh was also armed with a gandhali and that the accused persons had been injured in the fight. Although the prosecution witnesses have denied in the Sessions Court that the injuries to the accused persons had been inflicted at the time of the fight, it seems that they are not telling the truth in this respect. It may be safely assumed, in the circumstances of the case, that the injuries on the persons of the accused, nine out of which at any rate could not be self-inflicted according to the medical evidence, were inflicted in the fight.

The main point which requires consideration in the case is whether the appellants can be held to have been acting in the exercise of their right of private defence, as contended on their behalf by their learned counsel. The allegation of the appellants that the land in question had been allotted to them by a panchayat is not supported by any evidence worth consideration. Only one witness, Prithi Singh Zaildar, has deposed in the course of cross-examination that a panchayat was held and that the land was allotted to Hazara Singh, etc., but the alleged decision was not reduced to writing nor was it ever reported to the Revenue Officer. If the parties had referred the matter to a panchayat and accepted the decision of the panchayat, as alleged by the appellants, there is no reason why Arjan Singh and others should have objected to their irrigating the land. I hold, in agreement with the view of the learned Sessions Judge, that the story

about the decision of the panchayat is not established. It follows that the appellants had no right to take possession of land without the consent of Arjan Singh and others who were admittedly in possession ever since the lifetime of Mt. Dani. It is true that the land had been mutated in favour of the seven brothers, but this would not give them any right to eject the co-sharers, who were already in peaceful possession, without their consent. The proper course for the appellants was to go to a Civil Court or to apply for partition of the land. The appellants themselves appear to have been conscious of this fact and it was apparently for this very reason that they alleged that the matter had been referred to a panchayat and that the land in dispute had been allotted to them by the panchayat.

The learned counsel for the appellants contended that as the appellants were entitled to the joint possession of the land in any case and had succeeded in obtaining peaceful possession, they had a right of private defence; but this contention cannot be upheld in the circumstances of the case. The appellants had been in possession only for a couple of hours or so and the possession had never been acquiesced in by Arjan Singh and others. The possession was therefore nothing better than mere trespass and could not give them any right of private defence. Arjan Singh and his companions had, on the other hand, a right to maintain their possession and to eject the appellants. If the appellants were beaten, it must have been because they refused to vacate the land. According to the provisions of S. 104, I. P. C., Arjan Singh and others had a right to inflict any necessary injury, short of death, in the exercise of their right of private defence of property and in the circumstances of the case it cannot be said that Arjan Singh and others exceeded their right of private defence. The appellants on the other hand committed a double wrong, firstly, by trying to take unlawful possession of the land and secondly by resisting Arjan Singh and others when they tried to eject them from the land.

From the evidence it appears that Indar Singh inflicted with his sela several injuries on the vital parts of Arjan Singh which resulted in his death. In doing so he must at least be presumed to have had the knowledge that his act was so imminently dangerous as to result in death.

Indar Singh has stated that he came subsequently when his party was being beaten; but this statement is not supported by any evidence and I see no good reason to doubt that he accompanied Hazara Singh, Lakha Singh and Banta Singh when they went to the land to take possession and attacked Arjan Singh in the manner alleged by the prosecution. In my opinion he has been rightly convicted under S. 302, I. P. C., in view of all the circumstances, and his conviction and sentence must therefore be maintained. Lakha Singh gave only one injury on the head of Arjan Singh, but he and Hazara Singh were apparently the persons principally interested in the land and were presumably responsible for the commission of this offence. Lakha Singh has been given only six months' rigorous imprisonment and the sentence cannot be considered to be excessive in view of all the facts. I would therefore dismiss the appeal.

Jai Lal J.—I agree.

W.D./A.L.

Appeal dismissed.

A. I. R. 1938 Lahore 62

DALIP SINGH AND SKEMP JJ.

Sardar Parampal Singh — Defendant
— Appellant.

v.

Sardar Budh Singh, Plaintiff and
another, Defendant — Respondents.

Second Appeal No. 981 of 1936, Decided on 9th April 1937, from decree of Addl. District Judge, Lyallpur, D/- 4th June 1936.

Contract Act (1872), S. 74—Contract of lease—Lessee paying certain sum in advance and agreeing to pay balance by certain date—Contract providing that in case of failure to pay balance by appointed date, advance would be forfeited—Stipulation held not by way of penalty—Advance held could not be recovered on failure of lessee.

In a contract of lease for three years at Rupees 5,000 per annum, the lessee paid Rs. 1,000 in advance as a guarantee for carrying out the terms of a contract and agreed to pay the balance on an appointed date. The contract contained a clause that if the balance was not paid by the appointed date, the money already paid would be forfeited. On breach of contract, the lessee brought a suit claiming the refund of advance:

Held that the clause of forfeiture was not a 'stipulation by way of penalty' within meaning of S. 74 but a clause for forfeiture of a deposit already made, which was not of a penal character.

[P 69 C 1]

Held further that the lessee could have no lien for money which he had paid, as he failed to

perform his contract : (1882) 21 Ch D 243 ; (1874) 9 C P 107 and A I R 1927 Lah 721, *Rel. on.*
[P 68 C 2]

Amar Singh — *for Appellant.*

Harbhajan Das —

for Respondent (Plaintiff).

Skemp J.—The facts leading to this second appeal are not now in dispute. On 14th March 1931 the defendant Sardar Parampal Singh contracted to lease 20 squares of land to the plaintiff Budh Singh for three years at Rs. 5,000 per annum. Budh Singh paid Rs. 1,000 in advance to Parampal Singh on the date of the agreement, 14th March 1931. He agreed to pay a further Rs. 2,000 by 1st April 1931 and the balance of Rs. 2,000 by 30th April 1931. The contract contained a clause that if the final Rs. 2,000 were not paid by 30th April 1931, then the amount already paid (*zari peshgi*) should be forfeited. Budh Singh did not carry out the contract; all he could do was to pay Rs. 780 on 30th of June. Parampal Singh then appears to have resumed the lease. Budh Singh then brought the present suit for recovery of the sum of Rs. 1,780, which he had paid together with interest at Rs. 18.0 per cent. The total sum sued for was Rs. 2,428. Parampal Singh pleaded that under the contract he was entitled to retain everything that had been paid. The trial Judge found that :

It is obvious that the term of forfeiture is of a penal nature. Even if the plaintiff had paid Rs. 4,999 by the end of April 1933, still the lease would be cancelled and the amount would be forfeited to the lessor. I find this issue in the affirmative.

That is all he said on this point. The argument is defective because if defendant had paid Rs. 4,999 by the specified date, there would have been substantial performance of the contract. The trial Judge proceeded to hold that the defendant was only entitled to damages for the actual loss suffered. The evidence on this point was scanty and unsatisfactory and he assessed them at Rs. 280. He granted the plaintiff a decree for Rs. 1780—280 = Rs. 1,500. The defendant appealed and in a brief judgment, the learned District Judge dismissed the appeal finding that the Rupees 1,000 was part of the rental which was paid in advance and that the term regarding the forfeiture of this was clearly of a penal nature. The defendant has lodged a second appeal. After some discussion his counsel stated that he now claimed not to withhold Rs. 1,780, as originally pleaded,

but only Rs. 1,000 forfeited under the contract and Rs. 280 damages. It is quite clear that the contract did not justify the defendant in retaining everything paid under it but only the first deposit of Rs. 1,000.

The main point for determination is whether the provision for forfeiture of the Rs. 1,000, if the total amount were not paid by 30th April, is a penalty or not. In my opinion it is not a "stipulation by way of penalty" within the meaning of S. 74, Contract Act, but a clause for forfeiture of a deposit already made, which is not of a penal character. This has been repeatedly held with regard to sales: *see for example*, (1882) 21 Ch D 243¹ at p. 248, where Fry J. said :

It appears to me on principle that a man who declines to perform his contract can have no lien for money which he has expended in part performance of it.

Fry J.'s judgment quotes earlier English rulings (1868) 3 C P 161² and (1874) 9 C P 107,³ at page 116 to the same effect. In India this has also been held, *see for example* A I R 1927 Lah 721,⁴ and I do not see why this principle should not equally extend to money actually paid in advance on account of a lease. The money in this instance was paid in advance as a guarantee for carrying out the terms of a contract to lease. In my opinion therefore the defendant-appellant is entitled to retain the sum of Rs. 1,000; but he cannot have it both ways and have the Rs. 1,000 forfeited under the terms of the contract and also damages on the finding that this sum is a penalty which ought not to be enforced. I would accept this appeal and hold that the defendant is entitled to retain Rupees 1,000 instead of Rs. 280. The result is that the decree for Rs. 1,500 which has been granted to the plaintiff will be modified to one for Rs. 780. The parties are to bear their own costs throughout.

Dalip Singh J.—I agree.

P.R./D.S.

Decree modified.

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1. Wallis v. Smith, (1882) 21 Ch D 243 = 47 L T 389 = 52 L J Ch 145 = 31 W R 214.
 2. Hinton v. Sparkes, (1868) 3 C P 161 = 37 L J C P 81 = 17 L T 600 = 16 W R 360.
 3. Magee v. Lavell, (1874) 9 C P 107 = 43 L J C P 131 = 30 L T 169 = 22 W R 334.
 4. S. V. Vipper & Co. v. Sewat Ram Parshad Mills & Co. A I R 1927 Lah 721 = 101 IC 686.

A. I. R. 1938 Lahore 64

BHIDE J.

Kishen Chand—Plaintiff—Appellant.
v.*Nanda Mal and another—Defendants*
— Respondents.Second Appeal No. 440 of 1937, Decided
on 6th October 1937.(a) Custom (Punjab)—Pre-emption—Abadi
of recent growth — Custom of pre-emption
cannot be proved.A custom must be ancient and immemorial.
Therefore a custom of pre-emption cannot possi-
bly be proved in an abadi which is of recent
growth : *A I R 1937 Lah 451 (F B), Rel. on.*

[P 64 C 2]

(b) Punjab Pre-emption Act (1 of 1913),
S. 3 (3)—Government notification declaring
certain place as town — No implication that
custom of pre-emption prevails in that town.When Government issues a notification declar-
ing that a certain place should be considered to be
a town for the purposes of the Pre-emption Act, it
does not mean that custom of pre-emption prevails
in that town. It has got to be established by the
person alleging it. [P 65 C 1]Nihal Singh — *for Appellant.*Shamair Chand — *for Respondents.*

Judgment.—This is a suit for pre-emption with respect to a house situated in abadi Kishan Ganj, which was described as a part of Hazro town. The defendants denied that the custom of pre-emption prevailed in the town of Hazro or that Kishan Ganj was a part of the abadi of Hazro. The trial Court held that the plaintiff had failed to prove the custom relied on and dismissed the suit. On appeal the learned District Judge relying chiefly on a judgment reported in 75 I C 910,¹ came to a contrary conclusion and decreed the suit on payment of Rs. 2,000. From this decision, the plaintiff has appealed challenging the decision on the ground that the suit should have been decreed on payment of Rs. 1,090 only as a sum of Rs. 910 was due to the plaintiff on account of a prior mortgage. The defendants have, on the other hand, filed cross-objections challenging the decision on the question of custom and praying that the suit should be dismissed.

It will be convenient to deal with the cross-objections first. The main point for decision in the case was whether the plaintiff had proved the custom of pre-emption in Kishan Ganj. The plaintiff only relied on the oral evidence of five

witnesses in this respect: not a single judgment in which the custom was held to be proved was cited. The learned counsel for the appellant wanted to produce an unreported judgment of this Court in support of his case, but there was no ground for allowing him to produce additional evidence at this stage. The oral evidence of the witnesses produced by the plaintiff was of little value. The defendants on the other hand produced three copies of judgments in which it was held that the custom of pre-emption in the abadi of Kishan Ganj was not proved. From two of these judgments it appears that the village Abdul stood at the site where the Kishan Ganj abadi is now situated. But the plaintiff's case is based on the ground that Kishan Ganj is now a part of Hazro town and not on the ground that Kishan Ganj is a village. If Kishan Ganj were a village, the plaintiff would have had to show that he was entitled to pre-empt on grounds different to that relied on by him in the present case. Therefore, even if the custom of pre-emption prevailed in the village Abdul, that cannot help the plaintiff in the present case. The note of inspection by the learned Judge shows that Kishan Ganj is separate from Hazro town by the circular road and fields. It is apparently a recent out-growth and it was therefore necessary for the plaintiff to prove that the custom of pre-emption obtained in this locality. It has been held by a Full Bench of this Court recently (*A I R 1937 Lah 451*²), that a custom must be ancient and immemorial and in the circumstances I fail to see how a custom of pre-emption can possibly be proved in a comparatively recent abadi like that of Kishan Ganj. The ruling relied on by the learned District Judge does not appear to be in point. In that case expansion had occurred in a sub-division of Multan city and the parties had admitted in the Court below that the custom of pre-emption prevailed in that sub-division. On the other hand 84 P R 1910,³ 2 Lah 83⁴ and 75 I C 610⁵ are

2. *Bahadur v. Nihal Kaur*, (1937) 24 A I R Lah 451=169 I C 909=39 P L R 349 (F B).

3. *Allah Ditta v. Mohamed Nazir*, (1910) 84 P R 1910=7 I C 716.

4. *Imperial Oil, Soap and General Mills Co. Ltd. Delhi v. Misbahruddin*, (1921) 8 A I R Lah 69 = 61 I C 325 = 2 Lah 83 = 70 P L R 1921.

5. *Diwan Chand v. Nizam Din*, (1923) 10 A I R Lah 443=75 I C 610.

1. *Ahmad Shah v. Church Missionary Trust Association*, London, (1924) 11 A I R Lah 700=75 I C 910.

analogous cases which have been relied on for the respondents and these show that it was incumbent on the plaintiff to prove the custom of pre-emption in the new abadi of Kishan Ganj.

The learned counsel for the appellant stated that a notification had been issued by Government that Hazro would be considered to be a town for the purpose of the Pre-emption Act. But the notification does not mean that the custom of pre-emption obtains in the town of Hazro. This fact had to be established by the plaintiff who relied on the custom. In my opinion the plaintiff has failed to prove in this case that the custom of pre-emption obtains either in Hazro or in Kishan Ganj. I therefore dismiss the appeal and accepting the cross-objections dismiss the plaintiff's suit with costs throughout. It may be mentioned here that the sum of Rs. 910, which was claimed by the plaintiff in his appeal, was stated to be lying in deposit in the Court below. It was not taken by the defendants according to the statement made by the learned counsel appearing on their behalf. The defendants of course will have to refund the amount paid by the plaintiff in pursuance of the decree of the learned District Judge if it has been taken away by them.

B.D./R.K. *Appeal dismissed.*

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ADDISON AND DIN MOHAMMAD JJ.

Barkat Ram — Judgment-debtor — Appellant.

v.

Sardar Bhagwan Singh, Decree-holder and others — Respondents.

Letters Patent Appeal No. 134 of 1936, Decided on 25th February 1937, against judgment of Coldstream J., D/- 16th July 1936.

(a) Civil P. C. (1908), O. 21, R. 49—Interest of partner in partnership assets is moveable.

An interest of a partner in partnership assets is intended to be treated as moveable under R. 49 of O. 21; *Case law referred.* [P 67 C 1; P 68 C 1]

(b) General Clauses Act (1897), S. 3 — Immovable property — Whether interest of partner in partnership assets consisting of land, can be described as benefit arising out of land (*Quaere*).

It is doubtful whether the interest of a partner in partnership assets consisting, among other things, of land can be rightly described as a benefit arising out of land within the definition of immovable property in S. 3. [P 67 C 2]

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(c) Civil P. C. (1908), O. 21, R. 66 — Objections—Objection to sale by judgment-debtor on ground of defect in proclamation—Objection dismissed on ground that remedy under O. 21, R. 90 is open—Such remedy not found available — Judgment-debtor is entitled to claim adjudication upon earlier objection.

Where the judgment-debtor objects to the order of sale on the ground of material defect in the sale proclamation at a time when he was not prevented under law from raising such objection, but the application is dismissed solely on the ground that the remedy under O. 21, R. 90 is open to him and if it is eventually found that that remedy is not available to him under the law, the judgment-debtor is entitled to claim an adjudication upon the objections taken by him at an earlier stage: *A I R 1925 Lah 507 and A I R 1921 P C 11, Ref.* [P 68 C 2]

Mehr Chand Mahajan and Ram Lal Anand II — for Appellant.

Achhru Ram and N. L. Sadana — for Respondents.

Din Mohammad J. — This Letters Patent appeal has arisen in the following circumstances: Under R. 49 of O. 21, Civil P. C., the interest of the judgment-debtor appellant in the property belonging to a partnership was charged with payment of the amount due under a decree on the application of the decree-holder against him. On 23rd March 1935 the Senior Subordinate Judge gave notice to the judgment-debtor's counsel under sub.r. 2 of R. 66 of O. 21, Civil P. C., to furnish the necessary particulars within a time fixed by him. On 1st April 1935 the judgment-debtor expressed his inability to supply the necessary particulars within the time allowed. Thereupon the Court caused the proclamation for sale to be made and ordered the sale to be held on 3rd May 1935. This proclamation was duly published in some newspapers. But as the sale was postponed under the orders of this Court on a certain petition filed by the judgment-debtor, it could not be held on the day originally fixed for it and eventually on 21st August the sale was ordered to be held on 21st October. On 19th October the judgment-debtor put in objections, pointing out certain defects in the proclamation, as also the fact that some of the assets of the partnership were in the form of immovable property and that the judgment-debtor's share in the stocks, machinery, tools, etc. in various places was worth more than the decretal amount.

This application was however dismissed by the Senior Subordinate Judge on 21st

October 1935 mainly on the ground that the judgment-debtor would have ample opportunity to raise the question of irregularities in the publication or the conduct of the sale under R. 90 of O. 21, and that the application should not be entertained at that stage inasmuch as other remedies were open to the judgment-debtor. It was also stated by the Subordinate Judge that the decree-holder did not deny this right to the judgment-debtor. The sale was accordingly held on the prescribed date, and the judgment-debtor then submitted an application under S. 151, Civil P. C., read with R. 90 of O. 21, asking for the sale to be set aside on the ground of material irregularities in publishing and conducting it. In the meantime, the Senior Subordinate Judge, who had made the order on 21st October reserving to the judgment-debtor the right to challenge the sale under R. 90 of O. 21, had been succeeded by another Senior Subordinate Judge and the latter Judge dismissed the application, mainly on the ground that the property sold being moveable, no objection could be taken to the sale thereof on the grounds alleged as laid down in R. 78 of O. 21. On appeal to this Court the order made by the Senior Subordinate Judge was confirmed by Coldstream J. The judgment-debtor has appealed.

On behalf of the judgment-debtor Mr. Mehr Chand Mahajan has raised two points: (i) that a part of the property sold was immovable and not moveable, and (ii) that the order of the Senior Subordinate Judge, dated 21st October, debarred his successor from denying to the judgment-debtor the right to raise the question of irregularities after the sale. Counsel for the judgment-debtor contends that inasmuch as the partnership assets admittedly consisted of certain items which could not but be termed immovable, the judgment-debtor's interest in those assets did not lose its original character merely on account of the fact that it was being charged under Rule 49 of O. 21. He however admits that this Rule is based on S. 23, English Partnership Act, S. 22 of which clearly lays down that where land or any heritable interest therein has become partnership property, it shall, unless the contrary intention appears, be treated as between the partners (including the representatives of a deceased partner), and also as between

the heirs of a deceased partner and his executors or administrators, as personal or moveable and not real or heritable estate. But he urges that S. 22 is limited in its scope and applies only to those cases which are specified therein, and that consequently as between a partner and a stranger, his interests in the partnership assets, if they consist of land or any interest in land, retain their original character. In this connexion, Counsel refers to Lindley on Partnership, pp. 419 to 422. At p. 419 the following passage appears:

From the principle that a share of a partner is nothing more than his proportion of the partnership assets after they have been turned into money and applied in liquidation of the partnership debts, it necessarily follows that, in equity, a share in a partnership, whether its property consists of land or not, must, as between the real and personal representatives of a deceased partner, be deemed to be personal and not real estate, unless indeed such conversion is inconsistent with the agreement between the parties.

At page 420 the learned author says:

The rule contained in the section now under consideration only applies in the absence of any intention to the contrary; and it is apprehended that the rule will be excluded by an agreement, express or implied, to the effect that the land shall not be sold. The principle of law upon which the section (S. 22) is based excludes its application in such a case. Upon this ground it was held in a difficult case that a farm and quarry worked by co-owners in partnership and additional lands bought by them out of their profits for the purposes of their business, were not to be treated as converted into money It may be doubted whether the partners can by agreement alter the character of their equitable interests except by putting an end to them by a partition of the land.

At p. 421 the following passage occurs:

The doctrine of conversion of partnership property merely amounts to this, that on the death of a partner, his share in the partnership property is to be treated as money and not as land as between those who claim his share under him.

Counsel particularly draws our attention to the fact that the marginal reference to this paragraph is couched in the following words: "Doctrine of conversion has only a restricted application." At p. 422 the question of a partner's share in partnership real estate qualifying him for voting on elections is discussed and it is remarked:

It is settled that if a partner has no interest in partnership realty as distinguished from the money arising from its sale, his interest in it does not confer a qualification; but unless this is the case, the equitable doctrine of conversion, which has no practical operation until his death, does not deprive him of the qualification which he would otherwise have as a joint tenant or tenant-in-common.

It would be obvious from the above quotations that though this doctrine "of conversion into money" is a legal fiction and is restricted in its scope, the principle on which it is based, viz: "that a share of a partner is nothing more than his proportion of the partnership assets after they have been turned into money and applied in liquidation of the partnership debts" is of general application. The Indian Legislature while importing S. 23, Partnership Act, 1890, had full knowledge of all its implications and in interpreting it, it is not possible to detach it from its original context. As already stated, S. 22 of that Act had expressly declared such interest to be moveable and it was as such that this interest had been treated in S. 23. In our opinion therefore the same incidence will hold good in Rule 49 of O. 21, Civil P. C., and the interest referred to therein shall have to be treated as moveable property.

Counsel for the judgment-debtor has placed his reliance on 17 Bom 235¹ which has since been quoted with approval in 55 Mad 72.² That was a case under the Registration Act, and the question at issue was whether the transfer by means of three letters by a partner of his share in the partnership, which consisted among other things of an interest in land, was compulsorily registrable. Telang J. discussed various authorities, English and Indian, on the subject and came to the conclusion that he would have been disposed to hold if necessary that the letters in question not being registered were rightly treated by the Court below as being inadmissible in evidence to prove directly a transfer of the share of the transferring partner in the partnership to the transferee. The case in 55 Mad 72,² which followed this judgment, was also a case under S. 17 read with S. 49, Registration Act. It may however be noted that S. 17 is very wide in its application and comprises in its fold all non-testamentary instruments which purport or operate to create, declare, assign, limit, or extinguish whether in present or in future any right, title or interest to or in immovable property, while R. 90 of O. 21, Civil P. C., merely refers to immovable property and not to any right, title or interest therein.

Counsel meets this situation by referring to the definition of "immovable property" as given in S. 3, General Clauses Act, 1897. It includes land, benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth. It is however doubtful whether the interest of a partner in partnership assets consisting, among other things, of land can be rightly described as a benefit arising out of land. It is also urged on behalf of the judgment-debtor that if he himself had voluntarily sold his share in the partnership assets, he could not have treated it as moveable property inasmuch as it consisted of property admittedly immovable in the form of quarries, etc., and that a compulsory sale of the same property will not alter its character. This argument is also open to the same objection to which we have adverted above. Considerations arising from the Registration Act are of no avail in solving the problem before us.

Counsel for the decree-holder has relied on 26 Bom 305,³ 18 P R 1909,⁴ 46 All 917,⁵ 41 All 513⁶ and A I R 1931 Lah 673.⁷ In 26 Bom 305³ a mortgage debt was held to be moveable property within the meaning of S. 268, Civil P. C., 1882 (corresponding to R. 46 of O. 21, Civil P. C., 1908). A similar decision was given in 18 P R 1909.⁴ In 46 All 917⁵ a Division Bench of the Allahabad High Court held that a simple hypothecation bond was moveable property, not only for the purposes of attachment in execution of a decree, but also for the purposes of sale. In 41 All 513⁶ a suit for the dissolution of partnership was not treated as a suit for the determination of any right to or interest in immovable property. In A I R 1931 Lah 673,⁷ a suit for accounts was not considered to be a suit for an interest in immovable property merely because the accounts related to a factory. It would however appear that none of these judgments touches the point awaiting decision before us. Counsel for the respondent has further argued that in view of the arrangement of O. 21 and the

3. *Bhola Natha v. Bai Kashi*, (1902) 26 Bom 305 = 4 Bom L R 18.

4. *Bantu v. Ganda Singh*, (1909) 18 P R 1909 = 1 I O 450 = 22 P W R 1909.

5. *Umrao Singh v. Lal Singh*, A I R 1924 All 796 = 80 I O 890 = 46 All 917 = 22 A L J 840.

6. *Durga Das v. Jainarain*, A I R 1919 All 850 = 50 I O 156 = 41 All 513 = 17 A L J 567.

7. *Nihal Chand v. Jairam Das*, A I R 1931 Lah 678 = 132 I O 218 = 32 P L R 464.

1. *Joharmal v. Tejram Jagrup*, (1893) 17 Bom 235.

2. *Samuvier v. Ramasubbier*, A I R 1931 Mad 560 = 182 I O 805 = 55 Mad 72 = 60 M L J 527.

place given to R. 49 therein, which precedes R. 54 dealing with immovable property and is located among those Rules which deal with moveable property alone, it can be safely inferred that it was intended by the Legislature that an interest in partnership assets should be treated as moveable property and not as immovable property. There appears to be some force in this argument but the mere fact of the insertion of R. 49 in the place where it exists is not conclusive on the point that the property dealt with therein is moveable property. For instance in 1 Rang 360⁸ a money decree was not held to be moveable property, which shows that everything dealt with before R. 54 is not necessarily moveable.

From this discussion of the subject it would be clear that the question is not free from difficulty and one cannot be sure of the correctness of one's decision, whichever way one may lean. For the reasons stated above we are on the whole disposed to think that an interest of a partner in partnership assets is intended to be treated as moveable under R. 49, O. 21, Civil P. C. In support of the second point mentioned above, counsel has relied on A I R 1925 Lah 507⁹ and 48 Cal 499.¹⁰ In A I R 1925 Lah 507⁹ Jai Lal J. in an execution case remarked as follows :

On general grounds when a definite decision has been given between the parties on any matter in controversy and such decision purports finally to adjudicate on such matter, it is not competent to the same Judge or his successor in office to set aside the former decision. The parties, if they consider themselves aggrieved, have their remedy by review or appeal to superior Courts.

In 48 Cal 499¹⁰ their Lordships of the Privy Council observed that S. 11, Civil P. C., 1908, was not exhaustive of the circumstances in which an issue was *res judicata*. Where in an administration suit in the High Court during the life of the last surviving annuitant a contention on behalf of the next-of-kin that the gift-over was invalid as creating a perpetuity, was rejected, in further proceedings in the suit after the annuitant's death the same contention raised on behalf of the next-of-kin was held to be barred under the rule of

res judicata. In the course of their judgment their Lordships relying on an earlier judgment of their own quoted with approval the following remarks of Sir Barnes Peacock :

"The binding force of such a judgment in such a case as the present depends not upon S. 18 of Act 10 of 1877" (now replaced by S. 11, Civil P. C., 1908), "but upon general principles of law. If it were not binding, there would be no end to litigation".

Counsel for the respondent, on the other hand, urges that those judgments have no bearing on the present case inasmuch as in this case the point at issue was not finally determined by the order of the Subordinate Judge dated 21st October 1935, and consequently the plea of *res judicata*, real or constructive, does not obtain in this matter. This may or may not be so, but the fact remains that certain objections were raised at a time when the law did not prevent them from being raised and were left undetermined on account of a mistaken notion of law. The judgment-debtor has strenuously urged that the non-determination of the points raised by him has resulted in serious prejudice to his case, but without expressing any opinion as to the merits of his case we consider that he had been deprived of an opportunity to redress his grievances if possible. The Senior Subordinate Judge did not apply his mind to the merits of the judgment-debtor's application solely on the ground that the remedy under R. 90 of O. 21 was open to him, and if it is eventually found that that remedy is not available to him under the law, the judgment-debtor is entitled to claim an adjudication upon the objections taken by him at an earlier stage. The property in suit is considerable and consists of various items situated at various places. It was absolutely essential therefore that the proclamation for its sale should have been issued in the manner in which the law required it to be issued, and if the judgment-debtor had intimated to the Court in time that the proclamation was defective, the Senior Subordinate Judge should have disposed of his objections on the merits.

The result is that we accept the appeal and send the case back to the trial Court with direction to dispose of the objections raised by the judgment-debtor on 19th October in accordance with law. If the objections succeed, the sale will be can-

8. *Mg. Lun Bye v. Mg. Po Nyun*, A I R 1924 Rang 21=76 I C 679=1 Rang 360=2 Bur L J 171.

9. *Sher Khan v. Prabh Dayal*, A I R 1925 Lah 507=90 I O 688=26 P L R 587.

10. *G. H. Hook v. Administrator-General of Bengal*, A I R 1921 P O 11=60 I O 681=48 I A 187=48 Cal 499 (P O).

celled, otherwise the sale shall stand confirmed. Costs in this appeal will abide the event.

K.B./A.L.

Appeal allowed.

A. I. R. 1938 Lahore 69

DALIP SINGH AND SKEMP JJ.

Amir Chand — Plaintiff — Appellant.
v.

Des Raj and others — Defendants — Respondents.

Second Appeal No. 1282 of 1936, Decided on 6th April 1937, from order of Dist. Judge, Gujranwala, D/. 27th August 1936.

Execution—Compromise—Executing Court is bound to record compromise between parties—It can be admitted in evidence without registration in suit relating to property comprised in compromise.

The executing Court is bound to record the compromise between the parties and the question whether such compromise extinguishes the old decree or whether it does not intend to extinguish the old decree, is entirely beside the question as to whether or not the Court has jurisdiction to record it.
[P 70 C 1]

Such compromise can be received in evidence, without registration, in a suit which relates to the property comprised in such compromise.
[P 70 C 1]

Shamair Chand — *for Appellant.*

L. Achhru Ram — *for Respondent*
(*Des Raj*).

Dalip Singh J. — Haveli Shah and Sardari Lal had a mortgage decree against Hari Singh. In execution thereof a compromise was entered into between the parties on 27th January 1927. It was reduced to writing and a copy of it is Ex. D. A. By this compromise the amount due under the mortgage decree was calculated with interest and costs up to the date of the compromise. Interest on this new amount was fixed at annas eight per cent. per mensem and instalments of Rs. 1,000 due every month were fixed for payment of this new sum, Rs. 1,000 being due and payable, immediately. Certain properties, other than the mortgaged properties, including three shops were to be considered as security for the payment of these instalments and it was further provided that on failure to pay any one of these instalments the mortgagee-decreeholders could recover the entire sum then falling due from the old mortgaged property as well as the new mortgaged property. The new mortgaged property consisted of three shops; two of these

were mortgaged by the mortgagor-judgment-debtor, Hari Singh, to one Amir Chand on 2nd January 1931. The judgment-debtor made default in making payment of these instalments. Haveli Shah and Sardari Lal proceeded in execution and got the two shops sold on 9th July 1934 to one Des Raj. Amir Chand then brought a suit for a declaration that the shops in question had been mortgaged to him and could only be sold in execution subject to his prior mortgage of January 1931.

Various questions arose in the suit which do not now concern us. The Appellate Court held that the compromise had mortgaged the two shops in favour of the decree-holders, Haveli Shah and Sardari Lal, and consequently, they could be sold in execution of their decree without any reference to the subsequent mortgage in favour of Amir Chand. As regards a certain site, which was not included in the compromise, he held that Amir Chand's mortgage was prior and the said site could not be sold free of the encumbrance created by Amir Chand's mortgage. He left the parties to bear their own costs and dismissed Amir Chand's suit with respect to the two shops and gave him the declaration required with respect to the site. Amir Chand has come in second appeal and his learned counsel contends that the Court below was wrong in holding that the compromise could be admitted in evidence at all. In order to establish this the first contention was that the executing Court could not have recorded such a compromise as contained in Ex. D. A. in execution at all. For this purpose he relied on A I R 1931 Lah 608,¹ a Letters Patent appeal, A I R 1935 Lah 589,² another Letters Patent Appeal and A I R 1933 Lah 732,³ a decision by a single Judge. I am unable to see how these rulings help the learned counsel for the appellant at all. The Letters Patent Appeal, A I R 1931 Lah 608,¹ has been considerably modified in the subsequent Letters Patent appeal decision in A I R 1935 Lah 589,² the chief point in dispute

1. Bakshi Ram v. Des Raj, A I R 1931 Lah 608 = 132 I O 670 = 32 P L R 365.

2. Jagan Nath Charan Das v. Thakur Das Kalian Das, A I R 1935 Lah 589 = 158 I O 701 = 37 P L R 288.

3. Thakur Das Kalayan Das v. Jagan Nath Charan Das, A I R 1933 Lah 732 = 150 I O 237.

being as to whether an executory contract could or could not form the adjustment of a decree. However the case may be as to that point, the question here before us is a different one. The question is whether the present compromise recorded in Ex. D. A. could or could not have been recorded by the Court in execution.

There seems to me no doubt possible that it could be recorded and the question, whether it extinguished the old decree or whether it did not intend to extinguish the old decree, is entirely beside the question as to whether or not the Court had jurisdiction to record it. It appears to me that the Court was bound to record the compromise and at any subsequent stage it might have been a matter open to decision as to whether a compromise having extinguished the old decree, the old decree could be no longer executed and the remedy of the party was by a fresh suit on the basis of the new compromise, or whether the new compromise had not extinguished the old decree and the decree could still be executed when the conditions of the new compromise had failed by default of any of the parties thereto. This question therefore could not touch the question of the jurisdiction of the Court to record the compromise. The Court may have erred in law in the view it took as to the nature of the compromise, or the remedies arising therefrom, but this is a totally different question. In my opinion therefore the compromise was duly recorded by the Court, and this being so, the compromise could be received in evidence in this present suit without registration. This practically ends the only point seriously urged by the learned counsel. He also contended that the appeal filed by the appellant's counsel was not a proper appeal inasmuch as the power of attorney did not specifically empower the counsel to file an appeal. On this point however O. 3, R. 4, sub-rules (2) and (3), Civil P. C., are perfectly clear. The power of attorney, as remarked by the Appellate Court, empowered the counsel to do everything connected with the suit, and under O. 3, R. 4 (3) an appeal is a part of the proceedings in the suit. I see therefore no force in this contention either. I would accordingly dismiss the appeal with costs.

Skemp J.—I agree.

W.D./A.L.

Appeal dismissed.

A. I. R. 1938 Lahore 70

BHIDE J.

Pala Singh — Defendant — Appellant.
v.

Mt. Harnami, Plaintiff and others,
Defendants — Respondents.

Second Appeal No. 541 of 1937, Decided on 4th October 1937, from decree of Addl. Dist. Judge, Ludhiana, D/- 19th March 1937.

Appeal—Necessary party impleaded in suit but not in appeal — Appeal should be dismissed — Such party has right of second appeal.

Where a necessary party is impleaded in a suit but not impleaded in first appeal, such a party has a right of second appeal as he is interested in its right decision. An appeal should be dismissed if a necessary party is not impleaded : *A I R 1923 Pat 404, Disting.* ; *A I R 1932 Rang 16, Rel. on.* [P 70 C 2]

Vishnu Datta — *for Appellant.*

Tek Chand — *for Respondent*

(*Plaintiff*).

Judgment.—Plaintiff sued in this case for a declaration that a house which had been sold in execution of a decree to the appellant Pala Singh belonged to her. She failed in the trial Court, but succeeded in appeal. The appellant was however not impleaded in that appeal. He has now come up in second appeal and it is contended on his behalf that he was a necessary party to the first appeal and as he was not joined as a party, the suit should be dismissed. The learned counsel for the respondent urged that the decree passed by the lower Appellate Court does not affect the appellant's rights as he was not made a party to that appeal and that he has therefore no right of appeal. No authority in point was cited. The appellant was a party to the suit and he is obviously a person who was a necessary party to the litigation and interested in its right decision. *A I R 1923 Pat 404*,¹ cited for the plaintiff respondent, does not appear to me to help her. On the other hand *9 Rang 624*,² cited for the appellant, clearly shows that as the appellant was not impleaded as a party to the first appeal, that appeal should have been dismissed as he was a necessary party.

No reason is given as to why the appellant was not made a party to the first

1. *Dasi Chamar v. Ram Autar Singh*, (1923) 10 *A I R Pat 404*=71 *I O 475*.

2. *Ma Thaw May v. Mahomed Eusoof*, (1932) 19 *A I R Rang 16*=195 *I O 645*=9 *Rang 624*.

appeal and I see no adequate ground for impleading him now under O. 41, R. 20, Civil P. C., and remanding the case, as suggested by the learned counsel for the respondent. I accept the appeal and dismiss the suit with costs throughout.

S.O./R.K.

Appeal accepted.

A. I. R. 1938 Lahore 71

BHIDE J.

Tej Raj—Defendant—Appellant.

v.

Ram Lal, Plaintiff and others, Defendants—Respondents.

Second Appeal No. 379 of 1937, Decided on 1st October 1937, from decree of Addl. Dist. Judge, Hoshiarpur, D/- 18th December 1936.

Practice — Relief — Suit for compensation on express agreement—No relief under S. 70, Contract Act, asked — Court cannot decree suit on principles of S. 70.

Where a person brings a suit for compensation relying on an express agreement to that effect and does not ask for any relief under S. 70, Contract Act, the Court cannot grant a decree on the principles laid down in S. 70 : 11 I C 820; A I R 1930 All 545 and A I R 1933 Mad 344, *Rel. on*; A I R 1937 P C 50, *Disting.* [P 71 C 1]

M. O. Mahajan—for Appellant.

H. Bustomji—for Respondent

(Plaintiff).

Judgment.—This second appeal arises out of a suit for recovery of Rs. 880. The plaintiff alleged that he had agreed to the execution of a mortgage deed regarding some joint land by defendant Tej Raj, who is his uncle, on the understanding that he would either himself redeem the land or compensate plaintiff by the payment of half the mortgage money with interest. The Court below found that the alleged agreement was not proved. The trial Court dismissed the suit but on appeal the learned Additional District Judge held that the plaintiff was entitled to recover Rs. 880 on the principles laid down in S. 70, Contract Act. The learned counsel for the appellant (Tej Raj, defendant) has contended that the plaintiff having relied on the express agreement and not having asked for any relief under S. 70, Contract Act, it was not open to the learned Additional District Judge to grant him the decree passed against the appellant. In support of this contention the learned

counsel cited 11 I C 820¹ at p. 825, A I R 1930 All 545² at p. 549 and A I R 1933 Mad 344.³ The learned counsel for the respondent was not able to cite any authority laying down a contrary proposition. He referred to A I R 1937 P C 50⁴ and other rulings in which relief was granted under S. 70, Contract Act, but in none of these cases had any express agreement been first relied on.

In 145 I C 687⁵ on which some stress was laid by the learned counsel for the respondent, it was found that goods in excess of the quantity ordered had been supplied to the Municipal Committee; the only defence of the Committee was that the plaintiff was entitled to the return of the goods and not to the price thereof. It was held that the defendants had been resisting the amendment of the plaint in this respect in the first instance and therefore they were not entitled to claim at the last stage that the plaintiff was not entitled to the price of the goods.

In view of the authorities cited, it seems to me that the contention of the learned counsel for the appellant must be upheld. On merits also the plaintiff's case appears to me to be very weak. He is a nephew of the defendant, and the mortgage was to be without possession. In the circumstances, there was nothing improbable in his having consented to the mortgage even without any consideration. If the question of consideration were present to his mind, he would probably have taken some agreement in writing. In view of the above facts, I accept the appeal and dismiss the suit but leave the parties to bear their costs throughout.

S.O./R.K.

Appeal allowed.

1. Krishna Prosad Singha v. Purnendu Sinha, (1911) 11 I C 820=15 O L J 40=16 O W N 753.
2. Roopji & Sons v. Dyer Meaken & Co. Ltd., (1930) 17 A I R All 545=124 I O 35=52 All 688=1930 A L J 673.
3. Sathivel Pillai v. Sivasami Pillai, (1939) 20 A I R Mad 344=142 I O 683.
4. Palanivelu Mudaliar v. Neelavathi Ammal, (1937) 24 A I R P C 50=167 I O 5 (P O).
5. Ram Chand Lotia & Sons v. Municipal Committee, Lahore, (1933) 20 A I R Lah 14=145 I C 687.

* A. I. R. 1938 Lahore 72

BHIDE J.

Sant Ram—Decree-holder—Appellant.
v.*Buta Khan — Judgment-debtor —*
Respondent.

Second Appeal No. 1660 of 1936, Decided on 10th May 1937, from order of Dist. Judge, Gujranwala, D/- 24th August 1936.

* Civil P. C. (1908), S. 60 (c)—'Agriculturist' means person who carries on and makes living by tillage and not mere owner of land.

The term 'agriculturist' as used in S. 60 must be strictly construed. It denotes a husbandman and a person who carries on and makes his living by tillage and not a mere owner of land: 47 P R 1897, *Foll.*; Case law discussed. [P 72 C 1]

D. N. Aggarwal — for Appellant.

Abdul Karim — for Respondent.

Judgment.—Four houses of the judgment-debtor Buta Khan having been attached in execution, he claimed exemption under S. 60 (c) as an agriculturist. The executing Court held that he did not himself cultivate any land and was not an agriculturist within the meaning of that section and dismissed the objection. He preferred an appeal to the District Judge, who affirmed the finding that Buta Khan did not till any land 'with his own hands', but considered that this was not necessary and held him to be an 'agriculturist' on the ground that his main source of livelihood was agriculture. He accordingly upheld the objection and ordered the houses to be released from attachment. From this decision, Sant Ram has appealed. The word 'agriculturist' has not been defined in S. 60 (c), Civil P. C., and must be understood in its dictionary sense. It was held in 47 P R 1897¹ that the term 'agriculturist' as used in the section must be strictly construed and that it denoted a husbandman and a person who carries on and makes his living by tillage and not a mere owner of land. This view has been I believe consistently followed in this province and not been dissented from. A similar interpretation was placed on the word by a learned Judge of this Court recently in 38 P L R 333.²

The learned District Judge has relied on A I R 1928 Lah 132,³ A I R 1923 Bom 12⁴ and A I R 1936 Lah 532⁵ in support of his view that a person whose main source of income is agriculture is an agriculturist even if he did not till the land himself. But I do not think these rulings lay down any proposition contrary to that laid down in 47 P R 1897.¹ The latter ruling was in fact relied upon in A I R 1928 Lah 132.³ A I R 1923 Bom 12⁴ was also relied upon in the same ruling, but the head-note appears to be somewhat misleading. In A I R 1923 Bom 12⁴ the judgment-debtor had leased 150 acres of land, some of which he had let out again to tenants and some he tilled by the aid of his servants. One of the witnesses stated that the judgment-debtor used to supervise cultivation. But it was held that this did not justify a finding that he was personally engaged in agricultural labour. The lower Court had held in that case that the defendant's only business was agriculture, but it was held that this was not sufficient. In A I R 1936 Lah 532⁵ it was found that the judgment-debtor had not even proved that his main source of income was agriculture. But this did not mean that if the main source of livelihood was agriculture, this would have been sufficient to declare the judgment-debtor to be an agriculturist within the meaning of S. 60, Civil P. C. In fact the learned Judge who decided that case relied in the course of his judgment on the fact that the judgment-debtor did not cultivate the land himself and also referred to Madras and Bombay High Court rulings in 49 Mad 227⁶ and 12 Bom 363⁷ in which it was held that the term 'agriculturist' must be interpreted in the strictest sense for the purpose of the exemption under S. 60, Civil P. C., and that a large landed proprietor, even though his sole income is from land, is not an agriculturist within the meaning of Cl. (c) of that section. In the present case, it has been found that the judgment-

3. Abdullah v. Anjuman Dehi, A I R 1928 Lah 132=106 I O 45.

4. Rubine v. Balwantrao Ramnarayan, A I R 1923 Bom 12=105 I O 795.

5. Mahomed Akbar v. Harbans Singh, A I R 1936 Lah 532=161 I O 16.

6. Muthuvenkatarama Reddiar v. Official Receiver, South Arcot, A I R 1926 Mad 350=92 I O 398=49 Mad 227=50 M L J 90.

7. Jiwan Bhaga v. Hiray Bhaiji, (1888) 12 Bom 868.

1. Bawa Gurbakhsh Singh v. Ghulam Qadir, (1897) 47 P R 1897.

2. Gurbakhsh Singh v. Lal Chand Darshan Lal, A I R 1936 Lah 787=164 I O 690=38 P L R 333.

debtor does not cultivate land himself. His statement shows that he owns houses in two places and he has kept his two wives in one village and a mistress in another. He apparently owned a considerable area of land, but he is said to have gifted some of it to his sons. His statement also shows that he was for some time carrying on some business in United Provinces. In view of these facts, the decision of the trial Court was in my opinion correct. I accept the appeal and restore the order of the trial Court with costs throughout.

S.C./D.S.

Appeal allowed.

* A. I. R. 1938 Lahore 73

BHIDE J.

Basharat Ali Shah — Appellant.

v.

Ram Rattan (Official Receiver) and others — Respondents.

Second Appeals Nos. 15 and 17 of 1937, Decided on 2nd June 1937, from order of Addl. Dist. Judge, Hoshiarpur, D/- 5th December 1936.

* (a) Provincial Insolvency Act (1920), Ss. 4 and 53 — Powers of Insolvency Court—Transfer by insolvent more than two years before his adjudication — Transfer can be set aside under S. 4 and not under S. 53 — Insolvency Court can deal with question according to principles which govern a suit for avoidance of transfer under ordinary law.

Section 4 only empowers the Insolvency Court for the sake of convenience to decide any questions of title, priority, etc. which arise in the course of insolvency proceedings. It is open to the Insolvency Court to try such questions or leave them to be decided by an ordinary Civil Court, if it chooses to do so. [P 75 C 1]

Where a transfer is made by a person more than two years before his adjudication as insolvent, it can be set aside under S. 4 of the Act and not under S. 53 and the Insolvency Court can deal with the question according to the same principles which would have governed a suit for avoidance of the transfer under the ordinary law : *A I R 1934 Lah 365* ; *A I R 1929 All 105 (b B)* ; *A I R 1929 Sind 94* and *A I R 1928 Lah 556, Rel. on.* [P 75 C 1]

(b) Transfer of Property Act (1882), S. 53—Fraudulent transfer by insolvent in favour of his wife more than two years before his adjudication—*B* purchasing property in execution of mortgage decree against her — Application by Official Receiver to avoid transfer—Transfer in favour of wife held voidable and could be set aside under S. 53 but only subject to *B*'s rights—Transfer in favour of *B* held could not be set aside.

A Mahomedan transferred certain properties to his wife in lieu of dower but more than two years before his adjudication as insolvent. The property was mortgaged by the wife and in execution of the mortgage decree it was purchased by *B*. It was found that the transfer in favour of the wife was fraudulent. The Official Receiver thereafter applied to avoid the transfer :

Held that the transfer in favour of the wife was voidable and not void and was liable to be set aside under S. 53, but only without impairing the rights of a bona fide transferee for valuable consideration. As the rights of *B* had come into existence before the application for avoiding the transfer in favour of the wife was made by the Receiver, the transfer in his favour must stand.

[P 75 C 2]

F. C. Mittal for Achhru Ram —

*for Appellant.*J. N. Aggarwal — *for Respondents.*

Judgment.—Second Appeals from Order Nos. 15 and 17 of 1937 are connected and can be conveniently disposed of together. These appeals arise out of an application made by the Official Receiver in insolvency proceedings to avoid an alienation of property made by the insolvent Inayat Ali Shah in favour of his wives in lieu of dower. Inayat Ali Shah was adjudged insolvent on his own petition on 27th July 1933. The alienation had been effected by him in favour of his wives on 12th September 1929, i. e. more than two years before the adjudication. The Insolvency Court dealt with the matter under S. 4, Insolvency Act, and found that the alienation had been effected fraudulently in order to defeat the creditors and was therefore inoperative against the Official Receiver. From this decision an appeal was preferred to the Additional District Judge who confirmed the finding of the Insolvency Court and dismissed the appeal. An appeal against this decision has been presented (1) by the two wives of the insolvent, Mt. Walait Bibi and the legal representatives of Mt. Ghulam Fatima (who has died) ; and (2) by Sayed Basharat Ali Shah who purchased a portion of the property subsequently at a sale in execution of a decree against Mt. Walait Bibi and Mt. Ghulam Fatima.

The points raised by the learned counsel for the appellants in both the appeals were as follows : (1) that the onus of proving that the alienation was not binding on the Receiver lay upon him and the learned Additional District Judge has erred in deciding the case as though the onus lay on the transferees ; (2) that the trial Court erred in not giving sufficient

opportunity to Mt. Walait Bibi and Mt. Ghulam Fatima to produce their oral and documentary evidence; (3) that Basharat Ali Shah was protected in respect of the alienation in his favour as the Courts below have found that he was a bona fide transferee who had paid valuable consideration; (4) that the Receiver was estopped from challenging the alienation as he himself sold a portion of the property in execution of the decree which was purchased by Basharat Ali Shah.

I shall deal with these points in the above order. As regards point No. (1), the onus had been wrongly placed on the transferees, but the trial Court corrected the onus and re-framed the issue as follows: Is the transfer in favour of the wives a void transaction and therefore inoperative against the Official Receiver? The onus being thus correctly placed and both parties having led their evidence, there is no force in the contention of the learned counsel that the case has not been judged from the proper stand-point by the learned Additional District Judge. The learned Additional District Judge has no doubt considered mainly the question whether the alienation was effected in lieu of a genuine debt of a dower, but this was probably because that was the point mainly agitated before him. The learned Judge of the trial Court has discussed at length the oral and documentary evidence which showed that the insolvent was in straitened circumstances at the time when the alienation in favour of Mt. Walait Bibi and Ghulam Fatima was effected in the year 1929. The learned counsel for the appellants did not challenge the correctness of the evidence relied on by the learned Judge of the trial Court. This evidence was in my opinion sufficient to shift the initial onus placed on the Receiver to the transferees. The finding of the learned District Judge on the point seems to me to be correct and I see no good ground for interference with it in second appeal.

As to the second point, an affidavit is produced by Mt. Walait Bibi that this point was urged before the learned Additional District Judge but he did not notice it in his judgment. The affidavit is however of the appellant Mt. Walait Bibi. The affidavit should have been at any rate of the learned counsel who appeared before the learned Additional District

Judge. The learned Additional District Judge has considered at length the points which were urged before him and I am not prepared to believe merely on the above affidavit that he omitted any point which was pressed before him.

As to the third point, the learned Judges of the Courts below have held that Basharat Ali Shah was a bona fide transferee for valuable consideration. The learned counsel for the respondents pointed out that Basharat Ali Shah is the brother of the insolvent Inayat Ali Shah and that he could not have been unaware of the true nature of the alienation. The fact that Basharat Ali Shah is the brother of the insolvent is noticed by the learned Additional District Judge in his judgment, but in view of the other circumstances, the learned Judge came to the conclusion that he was a bona fide transferee for valuable consideration. This finding must I think be accepted as a finding of fact for the purpose of this second appeal.

The main contention urged by the learned counsel for Basharat Ali Shah was that the alienation had been effected more than two years before the adjudication, and it could only be dealt with according to the principles laid down in S. 53, T. P. Act. According to that section, a bona fide transferee for valuable consideration is protected even if the original transaction is fraudulent. It was therefore contended that even if the transfer in favour of Mt. Walait Bibi and Mt. Ghulam Fatima was fraudulent, the transfer in favour of Basharat Ali Shah should have been maintained on the finding arrived at by the Courts below, viz. that he was a bona fide transferee for valuable consideration. No authority directly in point was cited. The learned Additional District Judge has relied on A I R 1935 Lah 368¹ and A I R 1934 Lah 101,² but the question of the position of a bona fide transferee does not appear to have been considered in these cases. All that was decided was that if the original transfer was held to be fraudulent and avoidable, the subsequent transfer founded on it also fell with it. The contention urged in these cases was that the subsequent transfer could not be dealt

1. *Ata Muhammad v. Mehr Chand*, A I R 1935 Lah 368 = 156 I C 1018 = 16 Lah 1013 = 88 P L R 24.

2. *Dit Ram Mal v. Hans Raj*, A I R 1934 Lah 101 = 148 I C 1013 = 15 Lah 849.

with at all under S. 53, Provincial Insolvency Act; but this contention was repelled and it was held that the subsequent transfer could be annulled under S. 4 if not technically under S. 53, Provincial Insolvency Act.

In the present case, it is beyond dispute that the alienation in favour of Mt. Walait Bibi and Mt. Ghulam Fatima was made more than two years before the adjudication of the insolvent and it could be set aside under S. 4 and not under S. 53, Provincial Insolvency Act. That section only empowers the Insolvency Court for the sake of convenience to decide any questions of title, priority, etc., which arise in the course of insolvency proceedings. It is open to the Insolvency Court to try such questions or leave them to be decided by an ordinary Civil Court, if it chooses to do so (*see* 15 Lah 294³ and 51 All 550⁴). It would appear to follow from this that the Insolvency Court could only deal with the question according to the same principles which would have governed a suit for avoidance of the transfer under the ordinary law (*cf.* A I R 1929 Sind 94⁵ and A I R 1928 Lah 556⁶). These principles, so far as the point at issue is concerned, are to be found in S. 53, T. P. Act. According to this section, a transfer of immovable property made with intent to defeat or delay the creditors of the transferor is voidable at the option of the creditor so defeated or delayed, but it is at the same time clearly provided that nothing in the section would impair the rights of a transferee in good faith and for consideration.

The Receiver in the present case, as representing the creditors of the insolvent, had the right to get the transfer in favour of Mt. Walait Bibi and Mt. Ghulam Fatima set aside, as it has been found that it was made fraudulently to defeat and delay the creditors of the insolvent. But as it has been also found that Basharat Ali Shah was a bona fide transferee for consideration, his rights cannot be affected

(46 Mad 478⁷). It was urged that the property vested in the Receiver from the date of adjudication under S. 28, Provincial Insolvency Act, and as the original transfer in favour of Mt. Ghulam Fatima and Mt. Walait Bibi has been found to be fraudulent, they had no saleable interest which could be passed in favour of Basharat Ali Shah as the transfer in his favour took place after the adjudication of Inayat Ali. But this contention also seems to have no force. The transfer in favour of Mt. Walait Bibi and Mt. Ghulam Fatima was voidable and not void. After the transfer, they had mortgaged the property and it was in execution of the mortgage-decree that Basharat Ali Shah purchased the property. The transfer in favour of Mt. Walait Bibi and Mt. Ghulam Fatima was liable to be set aside under S. 53, T. P. Act, but only without impairing the rights of a bona fide transferee for valuable consideration. As the rights of Basharat Ali Shah had come into existence before the application was made by the Receiver for avoiding the transfer in favour of Mt. Walait Bibi and Mt. Ghulam Fatima, it seems to me that the transfer in his favour must stand.

On the above finding it is unnecessary to consider the fourth point, viz. as regards the question of estoppel. I may however note that there seems to be no force in it, as the Receiver sold the property not in his capacity as a Receiver, but because he happened to be also a Court-auctioneer and was ordered by the executing Court to sell the property. I accordingly accept the appeal of Basharat Ali Shah (C. A. No. 15 of 1937) and set aside the decree of the Courts below as regards that portion of the property in dispute which was purchased by him. He will have his costs throughout. The other appeal is dismissed with costs throughout.

K.B./R.K. *Appeal No. 15 of 1937 accepted;*
Appeal No. 17 of 1937 dismissed.

3. *Ram Ditta Mal v. Official Receiver, Lahore*, A I R 1934 Lah 865=147 I O 1026=15 Lah 294=35 P L R 271.

4. *Anwar Khan v. Mohammad Khan*, A I R 1929 All 105=113 I O 819=51 All 550=1929 A L J 155 (F B).

5. *Atmaram Udhavdas v. Dayaram Sawney*, A I R 1929 Sind 94=115 I O 880.

6. *Ghani Muhammad v. Dina Nath*, A I R 1928 Lah 556=108 I O 602.

7. *Kunhu Pothanassiar v. Raru Nair*, A I R 1923 Mad 558=72 I O 727=46 Mad 478=44 M L J 527.

A. I. R. 1938 Lahore 76

COLDSTREAM AND JAI LAL JJ.

Local Committee of Gurdwaras, Lahore
—Objector — Appellant.

v.

Sardul Singh and another, Contesting objectors and another, Petitioner and others, Pro forma objectors — Respondents.

First Appeal No. 2328 of 1935, Decided on 19th February 1937, from decree of Sikh Gurdwaras Tribunal, Lahore, D/- 23rd September 1935.

(a) Civil P. C. (1908), O. 41, R. 1—Amendment or correction of mistake in decree but not review of judgment—Whether supersedes original decree necessitating dismissal of appeal presented with copy of original decree (*Quære*).

Where an application for review of judgment is granted, no appeal is competent against the original decree as that decree must be deemed to have been superseded and therefore non-existent. But it is doubtful whether an amendment in the decree, apart from the review of the judgment, to however slight an extent, and even a correction of a mistake under S. 152, Civil P. C., in the decree, have the effect of superseding the original decree so as to necessitate the dismissal of an appeal, which is presented with a copy of the original decree : *Case law discussed.* [P 78 O 1, 2]

(b) Punjab Sikh Gurdwaras Act (8 of 1925), S. 2 (a)—Followers of Baba Ram Rai are not Sikhs.

There is an essential difference both in belief and in practice between the Sikhs as defined in the Sikh Gurdwaras Act and the followers of Baba Ram Rai. Baba Ram Rai never became a follower of the 8th, 9th or the 10th Guru ; on the other hand, he was their rival and established an institution of his own at Dehra Dun ; neither he nor his followers therefore can be styled as the followers of the 10 Gurus, or believers in the 10 Gurus.

[P 79 O 2 ; P 80 O 1]

Badri Das, Manohar Lal Mehra, Kartar Singh, Amar Nath Grover and Harnam Singh — *for Appellant.*

Achhru Ram, Jagan Nath Aggarwal, Bhagat Singh, Kahan Chand and R. P. Khosla — *for Respondents.*

Jai Lal J.—On a petition being made by the prescribed number of persons under S. 7, Sikh Gurdwaras Act, 1925, claiming that an institution known as 'Gurdwara Chobacha Guru Ram Rai' situated within the limits of Moghalpura, Lahore, be declared to be a Sikh Gurdwara, the Local Government issued the usual notification under that section, whereupon the respondent Bachan Das claiming to be the Mahant of the alleged Gurdwara made an application under S. 8 of the Act praying that

the institution be not declared to be a Sikh Gurdwara. This petition was opposed by the appellants, who are some of the applicants under S. 7 of the Act, and who style themselves as the Local Committee of the Gurdwaras at Lahore. The remaining respondents before us are some of the worshippers of the shrine. It may be noted at this stage that from the commencement of the proceedings the Shromani Gurdwara Parbhandak Committee declined to be a party to the proceedings before the Sikh Gurdwaras Tribunal. The case was consequently heard by the Gurdwaras Tribunal and the learned President and one of the Members, Rai Bahadur Dwarka Parshad, were of opinion that the institution was not a Sikh Gurdwara and should not therefore be declared as such. The other member, Sardar Man Singh, however, differed from this view and recorded a separate dissenting judgment holding that the institution was a Sikh Gurdwara and should be declared as such, but the opinion of the majority of the members of the Tribunal prevailed and consequently the petition presented under S. 8, Sikh Gurdwaras Act, was granted with costs and the institution declared not to be a Sikh Gurdwara. The Local Committee of the Gurdwaras at Lahore have preferred this appeal.

At the commencement of the hearing of the appeal, a preliminary objection was taken by Mr. Achhru Ram, Advocate, on behalf of the respondents that this appeal is incompetent and should not therefore be entertained. It appears that in consequence of the judgment of the majority of the members of the Tribunal, a decree sheet was prepared in which the judgment of the Tribunal was incorporated, but in the memorandum of costs the amount payable by the appellants to the respondent on account of subsistence for witnesses was mentioned to be Rs. 1,095-4-0. An application was then made on behalf of the appellants on 1st November 1935 objecting to this amount. This application was under O. 47, R. 1, Civil P. C., for review of the judgment of the Tribunal as well as the decree dated 23rd September 1935. The application was granted on 20th December 1935, the Gurdwaras Tribunal having held that the amount payable by the appellants as subsistence for witnesses was Rs. 731 and that the decree should be amended accordingly. This order is signed by the three members of the Tribunal and was given effect to on the same day by means

of a correction of the original decree sheet in which the amount originally mentioned was reduced and the alteration initialled by the Clerk of Court of the Tribunal but not by any of the three members thereof. In the meantime the present appeal had been presented on 18th December 1935, that is to say two days before the order accepting the application of the appellants and altering the amount of costs as mentioned in the decree. With the memorandum of appeal a copy of the decree sheet as originally framed was filed and no attempt was, up to the hearing of the appeal, made to file a copy of the decree sheet as amended in pursuance of the order of the Tribunal. The learned counsel for the respondents contends that the decree sheet having been amended, no appeal is competent against the decree as originally framed which has now ceased to exist, and as the amendment was made on an application made by the appellants, they have no reasonable excuse for the omission, and are not therefore entitled to any extension of time.

A number of cases have been cited in support of this preliminary objection in which it has been laid down that where a decree has been amended, an appeal can be preferred only against the amended decree and not against the original decree. Under O. 41, R. 1, it is imperative that the memorandum of appeal should be accompanied by a copy of the decree appealed from and no discretion is given to the Court to dispense with the filing of such a copy. In 140 P R 1919¹ it was held that where a decree passed on 18th January 1915 had been set aside on 6th May 1915 on an application made by one of the parties, who was a respondent before the Chief Court, an appeal filed on 5th March 1915 against the original decree was not competent and must be dismissed. It appears however that in that case the original decree had been set aside by the order of 6th May 1915 on an application for review and a further inquiry had been ordered by the Court, therefore no decree existed on 6th May 1915. The learned Judges followed 28 All 240² and 34 All 282.³ The head-note of the former is :

1. Basheshar Nath v. Ram Kishan Das, A I R 1920 Lah 333=54 I O 966=140 P R 1919.
2. Kanhaiya Lal v. Baldeo Prasad, (1905) 28 All 240=1905 A W N 265.
3. Birghasi Lal v. Salig Ram, (1912) 34 All 282=14 I O 472=9 A L J 183.

Where an application for review of judgment is granted, the result is a new decree superseding the original decree, and not merely some amendment thereof. An appeal was filed pending an application for review of judgment in the Court below ; the review was granted, and an order passed which purported merely to amend the decree then under appeal : *Held* that the order of review superseded the original decree ; the decree under appeal had ceased to exist and the appeal could not be heard.

From the body of the judgment it appears that the application was for review of judgment and the decree was modified in important particulars and a new decree passed ; and it was held that the order passed on review amounted to a new decree, superseding the old decree, and therefore the decree against which the appeal had been preferred did not exist and the appeal could not be heard. The same view was expressed in the second Allahabad judgment relied upon by the learned Judges of the Chief Court. In that case also, it was the judgment which had been reviewed by the trial Court and consequently it was held that the order of review superseded the original decree which had ceased to exist. A I R 1918 Cal 530⁴ only indirectly supports the contention of the respondents. In that case, after the appeal had been preferred, the decree was amended. But an application made to the High Court to attach to the memorandum of appeal a copy of the decree as amended was granted and the appeal was heard on the merits. It was observed that from the moment the application to attach a copy of the amended decree to the memorandum of appeal was granted, the appeal became an appeal against the amended decree. In A I R 1931 Cal 323⁵ it was held that :

If a decree is modified in review, to however slight an extent it may be, the modified decree is the final decree for the purposes of an appeal and the fact that no decree is drawn up or that a decree was drawn up to the extent of the modification does not affect the question. Consequently an appeal against a decree anterior to review filed pending the review, without any appeal from the amended decree, is not competent.

This case fully supports the contention of the respondents. 6 Cal 22⁶ only indirectly supports the respondents' contention, because in that case the objection of

4. Sadupadhya Umeshanand Oja v. Ravaneshwar Prosad Singh, A I R 1918 Cal 530=48 I O 772.
5. Aditya Kumar v. Abinash Chandra, A I R 1931 Cal 323=131 I O 258=34 C W N 1002.
6. Joykishen Mookerjee v. Ataoor Rohoman, (1881) 6 Cal 22=6 C L R 575.

the respondent was that the appeal preferred within the prescribed time from the date of the amendment of the decree, but after the expiry of the prescribed time from the passing of the original decree, was barred by time. This objection was repelled by the High Court. Ratio decidendi in this case supports the respondents. In A I R 1931 Cal 578,⁷ it was held that if a decree is amended either by way of review or under S. 206, that is, S. 152 of the present Code, the decree to be appealed against is the amended decree and not the original decree. But in that particular case, the learned Judges held that the case was a fit one for extension of time under S. 5, Limitation Act. On behalf of the appellants reliance was placed on A I R 1926 Cal 1166⁸ where it was held that :

Where, after the appeal is filed, a few words are added to a decree appealed from by the Court passing the decree in order to make it clear, the addition does not render the appeal incompetent in the absence of a copy of the decree after the addition.

This judgment does not in my opinion materially affect the question before us. An examination of the case-law on the subject as enumerated above shows that there can be no manner of doubt that where an application for review of judgment is granted and the decree is consequently amended, no appeal is competent against the original decree as that decree must be deemed to have been superseded and therefore non-existent. But it is a question whether in cases where no question of review or any amendment in the original judgment has been raised by either of the parties and there is a mistake in the decree either due to a miscalculation of the amount or due to its not conforming to the judgment and the decree is subsequently altered so as to bring it in conformity with the judgment, the same rule applies. Two of the Calcutta cases seem to hold that it would. Speaking for myself, I feel hesitation in adopting the view taken by the learned Judges that an amendment in the decree, apart from the review of the judgment, to however slight an extent, and even a correction of a mistake under S. 152, Civil P. C., in the decree, have the effect of superseding the

original decree so as to necessitate the dismissal of an appeal, which was presented with a copy of the original decree. I need not however pursue this matter further because in my opinion even if it be held that the appeal should have been against the amended decree, as in the present case the memorandum of appeal was accompanied by the decree as it existed on the date of the presentation of the appeal and the alteration is only on the question of calculation of costs and no fresh decree sheet has been prepared, but an alteration has been made in the original decree in the amount of costs which is not signed by any of the members of the Tribunal, this is a fit case in which the appellants should be permitted to file a copy of the decree sheet as amended, provided they pay Rs. 50 as costs of this hearing to the respondents. A copy of the amended decree has been filed in Court and Rs. 50 have been paid to the respondents in pursuance of an order passed by us at the hearing of the appeal, and consequently we have heard the appeal on the merits.

There is not much doubt as to the history of the institution in dispute; it is called 'Chobacha Guru Ram Rai.' There is no evidence that the word 'Gurdwara' is affixed to it. 'Chobacha' means a pool of water or a small tank of water. Baba Ram Rai was the eldest son of the 7th Guru, Guru Har Rai. Owing to his conduct at the Court of Emperor Aurangzeb, where he had been deputed by his father, in returning a prevaricatory reply to a question of the Emperor relating to the observations of Guru Nanak about the Muslims, Baba Ram Rai was considered by his father to have fallen from the standard of veracity and conduct expected from a Guru, and was consequently banished by him. He was not allowed to go in his presence and was ordered to proceed in the direction in which he was facing; when the orders were communicated to him, he happened to be facing towards Lahore and consequently he came to Lahore. It was not apparently known to the followers of the Guru in Lahore that Baba Ram Rai had been banished by the Guru and consequently they misunderstood the injunction of the Guru not to give him kauri or paisa and presented him with silver and gold. Baba Ram Rai established his quarters near the shrine of Pir Mianmir in the vicinity of Lahore. But

7. Soudamini Das v. Nabalak Mia Bhulya, A I R 1931 Cal 578=139 I O 571=85 C W N 251.

8. Birendra Nath Ray v. Satis Chandra, A I R 1926 Cal 1166=97 I O 1008=44 C L J 121.

it is said that he had difficulty about water because the Muslims used to pollute the existing sources of water by throwing bones in the same. Consequently, he dug a small tank with his own hands and at a comparatively short distance from the surface of the ground water was obtained. This is called the 'Chobacha Sahib.' Baba Ram Rai was able to obtain water from this pool for a year or so after which it is said to have dried up. It used to be covered up during the night, and apparently guarded, in order to save it from pollution by the Muslims when its water was required for drinking. When subsequently Baba Ram Rai left Lahore and went to reside in Dehra Dun where his principal shrine now exists, he left the place near Mianmir in charge of his disciple Shah Ji. When the pool dried up, it used to be filled with water brought from other sources and this is apparently done up to this time.

On behalf of the appellants it is further contended—and on this point there is controversy between the two parties—that the tank was dug up by Baba Ram Rai with a chhuri which was given to him by Pir Mianmir and that this chhuri originally belonged to Guru Nanak and was in the custody of the Pir. It is also contended—and again this contention is controverted by the respondents—that the particular spot was selected by Baba Ram Rai for the tank and for his residence because Guru Nanak had previously stayed at the same spot. Historically both these incidents do not appear to be correct. But if it is established that this is the belief of the followers of Baba Ram Rai, or the worshippers of the shrine, then it would be an important tradition connected with the life of Guru Nanak; and if it further be established that the place is worshipped on account of these two incidents on which there is a controversy, then, whether the incidents are historically correct or not, the place would be an object of respect and worship on account of the tradition. To this aspect of the case I will advert hereafter.

There has been a considerable controversy before us whether Baba Ram Rai was a Sikh and whether his followers can be called Sikhs. We are not however directly concerned with this question, because we have to deal with the definition of the term "Sikh" as contained in

the Sikh Gurdwaras Act. In the popular sense, probably people would call Baba Ram Rai to be a Sikh and also his followers, but, as I will show presently, there is an essential difference both in belief and in practice between the Sikhs as defined in the Sikh Gurdwaras Act and the followers of Baba Ram Rai. I have already stated that Baba Ram Rai was banished by his father, the 7th Guru, and the latter was succeeded by his second son who became the 8th Guru. Now, it is beyond controversy that Baba Ram Rai throughout aspired to the gaddi of his father and was a rival of the 8th and the 9th Gurus. He never accepted their lead; on the other hand, he established himself in Dehra Dun where he had his own followers and supporters: not only that, he even intrigued against the 9th Guru and attempted to have him violently removed. There was, it appears, an interview between him and the 10th Guru, Guru Gobind Singh, on the river Jumna and apparently they parted as friends. But it does not follow, and it is not a fact, that Baba Ram Rai accepted Guru Gobind Singh as the Guru. The fact that Guru Gobind Singh admired him and called him a *sacha Guru* and his followers as *bad people* only shows that Guru Gobind Singh liked his kinsmen personally and subsequently protected his widows from the tyranny of the Masands, that is to say collectors of dues on behalf of Baba Ram Rai. But the fact remains, and there is ample authority on this matter, that Guru Gobind Singh subsequent to the death of Baba Ram Rai prohibited his followers from having any marital or social connexion with the followers of Baba Ram Rai. This injunction is an essential creed of the Sikhs and cannot be ignored in deciding the matter before us.

A "Sikh", according to the Sikh Gurdwaras Act, means a person who professes the Sikh religion and if any question arises as to whether any person is or is not a Sikh, he shall be deemed respectively to be or not to be a Sikh according as he makes or refuses to make in such manner as the Local Government may prescribe the following declaration: "I solemnly affirm that I am a Sikh, that I believe in the Guru Granth Sahib, that I believe in the Ten Gurus, and that I have no other religion". Now I have shown that Baba Ram Rai never became a follower of the 8th, 9th or 10th Guru; on

the other hand he was their rival and established an institution of his own at Dehra Dun; neither he nor his followers therefore can be styled as the followers of the 10 Gurus, or believers in the 10 Gurus. Some evidence was led in this case to show that the followers of Baba Ram Rai do not believe in the Granth Sahib. It is not necessary to give any finding on this question. The evidence is interested on both sides and unsatisfactory both on this question and on other questions involved. But it is not unlikely that they do not believe in the Granth Sahib as it now exists. The Granth Sahib, as it existed before Baba Ram Rai was banished by his father, has been added to by the succeeding Gurus to whom he owed no allegiance and it may be that for that reason the Ram Rayias do not believe in the Granth Sahib.

One of the questions however that we have to determine in this case is whether the Granth Sahib is the object of worship predominantly by the Sikhs in the institution in question and has been before the presentation of the application. I have no hesitation in agreeing with the learned President and Rai Bahadur Dwarka Parshad that it has not been established that the Granth Sahib is predominantly the object of worship in this institution. There is evidence on the record from which it appears that when some quarters were built near the Chobacha Sahib, a room was converted into a Gurdwara for the worship of the Granth Sahib and that other Gurdwaras for the same purpose exist in the vicinity of the institution. It also appears that the followers of Baba Ram Rai shave their heads and smoke and this institution is used for the ceremony of shaving the heads, a practice which is strictly prohibited in the case of Sikhs as that term is now understood. There is also evidence that there is an idol of Baba Siri Chand kept in the institution and worshipped. If the Granth Sahib is read at all in the institution, it is not by way of public worship but as private study by the Mahant.

The place in my opinion has been rightly held by the majority of the members of the Tribunal to be intended and to be used primarily for worship of the Chobacha Sahib, that is to say, the tank which was dug with his own hands by Baba Ram Rai, the founder of the sect. None of the

5 clauses of S. 16 applies to the facts of this case. It was not established by or in the memory of any of the 10 Gurus or in commemoration of the life of any of the 10 Gurus, nor was it used before or at the time of the presentation of the petition for public worship by the Sikhs. It was, on the other hand, established by Baba Ram Rai in order to procure water from the tank and not in commemoration of the alleged visit of Guru Nanak to this place and, as I have already stated, it was not used for public worship by the Sikhs. Cl. (i) has therefore no application to the case. Similarly Cl. (ii) does not apply because it is not used for public worship predominantly by the Sikhs and further any worship that takes place is not owing to the alleged traditions mentioned above connected with Guru Nanak, even if we assume that the existence of that tradition has been proved. This disposes of Cl. (ii) of S. 16. Cl. (iii) would apply if the institution had been established for use by Sikhs for the purposes of public worship and had been used for such worship by the Sikhs. This matter also has been disposed of by the discussion under the previous clauses. Cls. (iv) and (v) also do not apply because the place has not been used for public worship by the Sikhs. The main ground therefore on which the appeal must fail is that it has not been established that the institution in question has been used by the Sikhs for public worship. Agreeing therefore with the majority of the members of the Gurdwaras Tribunal, I would dismiss this appeal with costs.

Coldstream J.—I agree.

S.O./D.S.

Appeal dismissed.

A. I. R. 1938 Lahore 80

BHIDE J.

Peoples Bank of Northern India, Ltd.
— Plaintiff — Petitioner.

v.

Kanaya Lal and others — Defendants
— Respondents.

Civil Revn. No. 156 of 1937, Decided on 11th May 1937, from order of Sub Judge, First Class, Lahore, D/- 18th February 1937.

Revision — Competency — No revision lies from order of Court calling upon plaintiff to make good deficiency in court-fees either under Civil P. C., S. 115 or Government of India Act (1935), S. 224.

Where the trial Court requires the plaintiff to make good the deficiency in court-fees, no revision lies against such order either under S. 115, Civil P. C., as, on rejection of the plaint on non-compliance with such order, an appeal lies or under S. 224, Government of India Act 1935, as the High Court cannot interfere with the judicial order in the exercise of its administrative functions under that section: *A I R 1924 Lah 425 (F B)*; *A I R 1936 Oudh 22 (F B)* and *A I R 1934 All 620 (F B)*, *Rel. on.* [P 81 C 1]

D. C. Balli — *for Petitioner.*

Kishori Lal and P. A. Bharadwaj —
for Respondents.

Order — This is a petition for revision of the order of the Subordinate Judge, 1st Class, Lahore, holding that the plaint in this case was not properly stamped and requiring the plaintiff to make up the court-fees.

A preliminary objection is raised that no revision lies, the order in question being an interlocutory one. Reliance is placed on 5 Lah 288¹; *A I R 1936 Oudh 22²* and *A I R 1934 All 620³*. The learned counsel for the petitioner requests that the order may be revised under S. 107, Government of India Act. In the first place the petitioner is not without a remedy in this case, as he can appeal from the order rejecting the plaint if he does not pay the court-fees. I am also doubtful if S. 107, Government of India Act, can be held to be properly applicable to a case of this type and it is significant that in the recently enacted Government of India Act of 1935, it is made clear that the High Court cannot interfere with judicial orders in the exercise of its administrative functions under S. 224 which corresponds to the old S. 107, old Government of India Act of 1919. I uphold the preliminary objection and dismiss the petition, but in view of all the circumstances I leave the parties to bear their costs.

K.B./A L. *Petition dismissed.*

1. Lalchand Mangal Sen v. Beharilal Mehr Chand, *A I R 1924 Lah 425=84 I C 259=5 Lah 488 (F B)*.
2. Parasnath v. Ran Bahadur, *A I R 1936 Oudh 22=158 I C 949=11 Luck 529=1936 O W N 1158 (F B)*.
3. Gupta & Co v. Kirpa Ram Brothers, *A I R 1934 All 620=149 I C 1183=1934 A L J 381 (F B)*.

A. I. R. 1938 Lahore 81

BHIDE J.

Amrit Lal and others — Plaintiffs —
Appellants.

v.

Phool Chand and others — Defendants
— Respondents.

First Appeal No. 34 of 1937, Decided on 17th May 1937.

Limitation Act (1908), S. 5—Mistake of pleader—Mistaken advice of counsel is not sufficient to justify extension unless advice is given in good faith—Held on facts that counsel did not act in good faith and no extension could be granted under S 5.

A mistaken advice of counsel is not sufficient to justify extension of time being granted under S. 5 unless the advice was given in good faith that is, with due care and attention. [P 82 C 1]

In a case the value of the subject matter of the suit clearly showed that an appeal lay to the High Court and not to the District Judge but an appeal was preferred to the District Judge, under the advice of a counsel. The appeal was once dismissed for default and even though an objection was raised by opposite party at the time of the restoration that no appeal lay to the District Judge, the counsel did not care to examine the question but persisted in continuing it. The appeal was then presented to the High Court but was then time-barred. No reasonable explanation was given by the counsel as to why he thought that the appeal lay to the District Judge:

Held that the counsel had not acted in good faith and no extension could be granted under S. 5: 118 P R 1908; A I R 1918 Lah 67 and A I R 1933 Lah 568, Rel. on. [P 82 C 2]

A. R. Aggarwal for J. N. Aggarwal and J. N. Aggarwal—*for Appellants.*

Pt. Nanak Chand and P. N. Bhardwaj
—*for Respondents.*

Judgment.—This is an appeal from the order of the Subordinate Judge, First Class, Hissar, dismissing an application for filing an award under paras. 17 and 20 of Sch. 2, Civil P. C. The decision of the learned Subordinate Judge is dated 28th August 1935, while the appeal was presented to this Court on 18th February 1937. A preliminary objection was raised that the appeal was barred by time. The learned counsel for the appellants urged that extension of time should be granted under S. 5, Limitation Act, as the appellants had presented an appeal in the first instance to the District Judge, Hissar, under advice given by a local pleader. The learned counsel for the respondent contended in reply that the advice given by counsel in the circumstances of the present case could not be considered to have been given bona fide, that is, with

due care and attention, and did not, therefore, constitute sufficient justification for granting an extension of time under S. 5, Limitation Act. The learned counsel for the appellants urged that it was the bona fides of the appellants and not that of the counsel which was to be considered. In support of this contention, he relied mainly on 43 Bom 376,¹ 45 Cal 94² and 14 Lah 206.³ None of these rulings, however, appears to me to go to the length of saying that mistaken advice of counsel even if it is not given in good faith, that is, with due care and attention, is sufficient to allow extension of time. In 43 Bom 376¹ there is only a brief remark to the effect that the defendants were not precluded from showing that it was due to their reliance on the evidence of the counsel that they had not presented their appeal to the Court of the District Judge within the prescribed period of limitation. 45 Cal 94², another ruling of their Lordships of the Privy Council, was referred to, but in that ruling the question whether counsel had acted in good faith in presenting an application for review was considered. In 14 Lah 206,³ the learned Judges were apparently of opinion that the leading counsel at Mianwali had acted in good faith in giving his advice on the strength of certain rulings of the Allahabad High Court. These cases thus appear to have been decided on their own facts and do not lay down any general proposition that advice of counsel is in itself sufficient to justify extension of time being granted to an appellant who has acted on that advice, even if that advice were given without due care and attention.

The view appears to have been consistently taken in this High Court as well as the Punjab Chief Court that mistaken advice of counsel is not sufficient to justify extension of time being granted under S. 5, Limitation Act, unless the advice was given in 'good faith', that is with due care and attention. I need only refer in this respect to 118 P R 1908,⁴ A I R 1918 Lah

67⁵ and A I R 1933 Lah 568.⁶ In the present instance, no attempt was made to show that the learned counsel who advised presentation of the appeal to the District Judge had acted in 'good faith'. The question of forum of appeal was not a difficult one. The subject matter of the award was property worth Rs. 9,000 and Rs. 10,000 had also been fixed by the award as a penalty for failure to comply with certain conditions. The appeal thus lay *prima facie* to the High Court. The learned counsel for the appellants who advised them to appeal to the District Judge has not given any reasonable explanation in his affidavit as to why he considered that the appeal lay to the District Judge and not to the High Court. The natural inference therefore is that he did not trouble to examine the question with any care. It appears further that the appeal to the learned District Judge was once dismissed in default and the respondents pointed out in their application opposing the restoration of the appeal that no appeal lay to the District Judge. In spite of this the appellants persisted in proceeding with the application for restoration of their appeal before the District Judge. The learned counsel for the appellants apparently did not even then take the trouble of examining the question whether an appeal lay to the District Judge. In view of all the circumstances, it seems to me impossible to hold that the learned counsel on whose advice the appellants presented their appeal to the District Judge, Hissar, in the first instance, had acted in good faith. I therefore uphold the preliminary objection and dismiss this appeal with costs.

S.O./R.K.

Appeal dismissed.

5. Resal Singh v. Shadi, A I R 1918 Lah 67=48
I O 817=95 P R 1917=13 P L R 1918.

6. Uttam Chand v. Vishan Das Bhagwan Das,
A I R 1933 Lah 568=144 I O 627.

A. I. R. 1933 Lahore 82

BHIDE J.

Ujagar Singh and another — Plaintiffs
v.

Gora and others — Defendants.

Civil Refs. Nos. 16 and 17 of 1937,
Decided on 29th September 1937, made
by Commissioner, Lahore Division, D/-
10th May 1937.

1. Sunderbai v. Collector of Belgaum, A I R 1918 P C 185=52 I O 897=46 I A 15=43 Bom 376 (P O).

2. Brij Indar Singh v. Kanshi Ram, A I R 1917 P O 156=42 I O 48=44 I A 218=104 P R 1917=45 Cal 94 (P O).

3. Ghulam Muhammad v. Usman, A I R 1933 Lah 541=149 I O 968=14 Lah 206=84 P L R 554.

4. Sant Singh v. Qaim, (1908) 118 P R 1908.

Punjab Tenancy Act (16 of 1887), Ss. 45, 50 and 50-A—Tenant ejected under S. 45—Suit by him for possession on ground of title by adverse possession is cognizable by Revenue Court and not by Civil Court.

Section 50 or S. 50-A does not restrict the grounds on which the liability to ejectment may be contested. Where therefore a tenant ejected under S. 45 institutes a suit for possession on the ground that he had acquired title by adverse possession, such suit is cognizable by a Revenue Court and not by a Civil Court: *A I R 1935 Lah 719, Rel. on.* [P 83 O 1]

Ganesh Datta — *for Plaintiffs.*

Order.—The facts giving rise to Civil References Nos. 16 and 17 of 1937 are similar. The suits in question were instituted by persons who were ejected under S. 45 of Punjab Tenancy Act, to recover possession of the land on the ground that they had acquired title by adverse possession over 12 years. The learned Subordinate Judge in whose Court the suits were first instituted held that the suits fell under S. 50, Punjab Tenancy Act, and were triable by a Revenue Court. But the Assistant Collector, to whose Court the suits were then taken, took a contrary view and held that the suits were triable by a Civil Court, as the plaintiffs based their claim on title by adverse possession. A reference has therefore been made to this Court under S. 99, Punjab Tenancy Act, for decision of the question of jurisdiction.

The learned Assistant Collector has relied on *A I R 1927 Lah 35¹* in support of his view, but in that case the suit was held to be cognizable by a Revenue Court and the case does not appear to support his view. In view of the provisions of Ss. 50 and 50-A, Punjab Tenancy Act, the present suits appear to be clearly cognizable by a Revenue Court and not by a Civil Court. S. 50 or S. 50-A does not restrict the grounds on which liability to ejectment may be contested. A similar view has been taken in *A I R 1935 Lah 719²*, the facts of which were analogous. I accordingly direct the suits to be tried by the Assistant Collector. Records to be returned.

S.C./R.K.

Reference answered.

1. *Harl Shankar v. Nazir Khan*, *A I R 1927 Lah 35=98 I O 875.*

2. *Mehar Khan v. Atta Muhammad Shah*, *A I R 1935 Lah 719=156 I O 592=16 Lah 1086=87 P L R 507.*

A. I. R. 1938 Lahore 83

BHIDE J.

*Administrator, Lahore Municipality —
Defendant — Petitioner.*
v.

Siraj Din — Plaintiff — Respondent.

Civil Revn. Petn. No. 222 of 1937, Decided on 11th June 1937, from order of Small Cause Court Judge, Lahore, D/- 11th January 1937.

Decree—Validity of—Suit against Municipality—Municipality superseded by Government and administrator appointed before passing of decree—Administrator not brought on record—Decree passed against Municipality is nullity and cannot be executed against any property in hands of administrator.

A suit was brought against a Municipality to recover certain amount. Before the decree was passed the Municipality was superseded by the Government and an administrator was appointed. Neither the administrator nor any other legal representative of the Municipality was brought on record. A decree was subsequently passed and the decree-holder tried to execute it against the property in the hands of the administrator. Administrator raised an objection:

Held that the decree was a nullity as the legal representative of the Municipality was not brought on record and could not be executed against any property in the hands of the administrator: *A I R 1930 Cal 388, Disting.* [P 84 O 1]

S. C. Chatterji — *for Petitioner.*

B. C. Verma — *for Respondent.*

Order.—The respondent Siraj Din instituted a suit for recovery of Rs. 266 against the Municipal Committee of Lahore and obtained a decree on 4th November 1936. Before the date of the decree, however, the Municipal Committee was superseded by the Local Government under S. 238, Punjab Municipal Act, and an administrator was appointed to carry on the duties of the Committee. The plaintiff took no steps to bring the administrator or any other person as the legal representative of the Municipal Committee on the record before the decree was passed. When the decree was sought to be executed against the property in the hands of the administrator, he raised an objection that the decree was a nullity. The learned Judge of the Court below has disallowed this objection and has ordered the execution proceedings to continue. The administrator has preferred a petition for revision of this order.

The fact that the plaintiff had taken no steps to bring any legal representative of the Municipal Committee on the record

after the supersession of the Committee is not disputed. The learned counsel for the plaintiff-respondent, however, contends that under O. 22, R. 10, Civil P. C., it was discretionary with the plaintiff to bring the legal representative of the defendant on the record and his failure to do so does not render the decree a nullity. The learned counsel referred to A I R 1930 Cal 388,¹ in which it was remarked that no duty was cast upon the plaintiff to bring an assignee or trustee on the record and that it was discretionary with the Court to allow such an application. But the facts of that case were different. One of the defendants had become an insolvent and the case could proceed against the other. The learned Judges, however, were careful to point out in the latter portion of the judgment that if the absence of the legal representative of the insolvent defendant vitiated the constitution of the suit, the plaintiff would have to take the risk of it. In the present instance as there was only one defendant and as the plaintiff did not take steps to bring any legal representative of the defendant on the record, it seems to my mind clear that the decree must be looked upon as a nullity. It follows that it cannot be executed against any property in the hands of the petitioner.

I accept the petition for revision and setting aside the order of the learned Judge of the Small Cause Court, disallow the application of the plaintiff for execution of the decree. In the peculiar circumstances of the case, I leave the parties to bear their costs throughout.

S.O./R.K.

Petition allowed.

1. Prince Victor N. Narayan v. Bhairabendra Narayan Deb, A I R 1930 Cal 388=125 I O 851=34 C W N 53.

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COLDSTREAM J.

Mt. Nazir Begam — Appellant.

v.

Ghulam Qadir Khan and others — Respondents.

First Appeal No. 122 of 1937, Decided on 8th July 1937, from order of Guardian Judge, Multan, D/. 5th May 1937.

Guardians and Wards Act (1890), Ss. 25, 4 (5) (b) (ii), 12—Application by mother for appointment as guardian of her minor daughter, who left jurisdiction of Court only few weeks before application, granted on

ground that minor ordinarily resided within jurisdiction — Subsequent application soon after for custody of child to same Court — Court held could not entertain application as minor for the time being did not reside within jurisdiction—S. 12 held had no application.

Where the mother's application of 14th May 1935 for being appointed guardian of her minor daughter, who was removed from the Court's jurisdiction only a few weeks before the application, was granted on 7th January 1937 on the ground that the child ordinarily resided in the Court's jurisdiction and on 2nd February 1937 the mother applied to the same Court for the custody of her daughter :

Held that minor was not for the time being residing within the jurisdiction of the Court and hence the application could not be granted : A I R 1929 Rang 129, Rel. on ; A I R 1936 All 267, Ref. [P 84 C 2]

Held also that S. 12 was not applicable, as it applied to proceedings before the appointment of a guardian : A I R 1929 Lah 487, Rel. on. [P 85 C 1]

Muhammad Amin (Sheikh) —

for Appellant.

Mehr Chand Mahajan —

for Respondents.

Judgment. — The appellant Mt. Nazir Begam applied to the Guardian Judge, Multan, on 14th May 1935 to be appointed guardian of her daughter Fahmida Khanam who was born in August 1933. The Judge rejected her application, one of the grounds being that he had no jurisdiction as the minor did not ordinarily reside in Multan District (S. 9. Guardians and Wards Act), but had been removed from his jurisdiction into Bahawalpur State a few weeks before the application was made. On appeal to this Court Skemp J. holding that as the minor had resided with her mother for all her life until she was taken to Bahawalpur, she 'ordinarily resided' in the Multan District, and the Guardian Judge therefore had jurisdiction to entertain the application, he appointed the appellant to be guardian by his order of 7th January 1937 accepting the appeal (First Appeal No. 255 of 1936¹). On 2nd February 1937 the appellant applied to the Guardian Judge for custody of her daughter. The Judge has refused to entertain it holding that the minor was not "for the time being" residing within his jurisdiction (S. 4 (5) (b) (ii) of the Act).

The present appeal is by Nazir Begam against this order and it is contended on

1. Mt. Nazir Begam v. Ghulam Qadir Khan, Reported in A I R 1937 Lah 797=I L R (1937) Lah 426=39 P L R 640.

her behalf that Cl. 5 (b) (ii) of S. 4 of the Act does not deprive the Guardian Judge of the general jurisdiction conferred on him by Cl. 5 (b) (i). He has no authority to cite in support of this contention, which does not appear to me to have force. Had this been the intention of the Act it would presumably had been made clear. The use of the word 'or' at the end of Cl. 5 (b) (i) cannot mean that both the Court described in (i) and the Court described in (ii) may exercise jurisdiction, for the word occurs again at the end of (ii) and it is obvious that where a case has been transferred under S. 4-A, both the original Court and the Court to which the proceedings have been transferred cannot have jurisdiction to continue the proceedings.

This view is in accordance with that taken by the Rangoon Court in A I R 1929 Rang 129.² S. 12 is not applicable. It applies to proceedings before the appointment of a guardian: see 119 I C 423.³ It may be that, as held by Collister J. in 161 I C 816,⁴ a ward must be deemed to be in the constructive custody of his or her guardian from the time of the latter's appointment and a refusal to deliver custody of the ward be regarded as amounting to a 'removal' of the ward for the purpose of S. 25, but this interpretation of that section does not remove the difficulty presented by S. 4 (5) (b) (ii). It was not suggested apparently in the lower Court that Fahmida Khanam was as a fact 'ordinarily' residing 'for the time being' in Multan District. It seems that she has been in Bahawalpur since April 1935. I dismiss the appeal but make no order as to costs.

V B.B./R K.

Appeal dismissed.

2. Ba Thein Mg. v. Ma Than Kin, A I R 1929 Rang 129=118 I C 415.

3. Indar Singh v. Kartar Kaur, A I R 1929 Lah 487=119 I C 423.

4. Mt. Sheo Kumari v. Mathura Ram, A I R 1936 All 267=161 I C 816=1936 A L J 211.

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DALIP SINGH AND SKEMP JJ.

Gurdwara Dharmasala Doda —

Appellants.

v.

Mahant Gobind Dass and others —

Respondents.

First Appeal No. 191 of 1936, Decided on 7th April 1937, from order of Sub. Judge, Gurdaspur, D/. 24th June 1936.

Punjab Sikh Gurdwaras Act (8 of 1925), S. 25-A — Scope — S. 25-A is only enabling section — It does not exclude jurisdiction of ordinary Courts — Party declared owner of certain property by Tribunal can sue for possession of such property in ordinary Civil Court.

Section 25-A is an enabling section and not an excluding section. It is intended to give the parties a quicker remedy on a cheap stamp within a year of decision, before the Tribunal itself. It however does not exclude the jurisdiction of the ordinary Courts. The party in whose favour a declaration has been made by the Tribunal as to the ownership of the property can therefore sue for its possession in ordinary Civil Courts.

[P 85 C 2 ; P 86 C 1]

Sardar Charan Singh — *for Appellants.*

Sardar Bhagat Singh —

for Respondents.

Skemp J. — This appeal is against an order of a Subordinate Judge that he had not jurisdiction to try a suit. The suit was brought by the Gurdwara Doda, a notified Sikh Gurdwara, through the President of the Committee, for possession of properties on the ground that they belonged to the Gurdwara and also for a declaration. A petition under S. 7, Sikh Gurdwaras Act, was made in October 1926 and the list of properties attached with this petition included the properties now in dispute. The present defendant, Mahant Gobind Dass, lodged a petition under S. 10 of the Act claiming that the properties were his. After the Gurdwara had been declared to be a Sikh Gurdwara, Mahant Gobind Dass withdrew his petition under S. 10 and by order of the Tribunal it was dismissed with costs on 30th May 1935. On these facts the learned Senior Subordinate Judge held that his Court had no jurisdiction to try the suit but that it lay only under S. 25-A, Sikh Gurdwaras Act, before the Sikh Gurdwaras Tribunal.

In our opinion the Senior Subordinate Judge had jurisdiction to try this case on the simple ground that whatever the effect otherwise of the proceedings before the Tribunal—a point on which we express no opinion—S. 25-A is an enabling and not an excluding section. Before the Act was amended by the introduction of that section, the practice was that the party in whose favour the declaration had been made by the Tribunal as to the ownership of property brought a suit for possession before the Civil Court. S. 25-A was intended to give the parties a quicker remedy on a cheap stamp within a period of one year before the Tribunal itself. In our

opinion it does not exclude the jurisdiction of the ordinary Courts. This point is sufficient for the decision of the appeal which must be accepted with costs. The case is returned to the Court of the Senior Subordinate Judge, Gurdaspur, for procedure in accordance with law. The parties have been informed that they are to appear in the Court of the Senior Subordinate Judge on 5th May 1937 for further orders.

W.D./A.L.

Appeal accepted.

A. I. R. 1938 Lahore 86

COLDSTREAM AND DIN MOHAMMAD JJ.

Shori Lal — Plaintiff — Appellant.

v.

*Damodar Das and another —**Defendants — Respondents.*

First Appeal No. 310 of 1936, Decided on 28th April 1937, from decree of Sub-Judge, First Class, D/- 11th June. 1936.

Transfer of Property Act (1882), S. 41—Scope—S. 41 applies even when person consenting to transfer has no knowledge of his title.

Consent mentioned in S. 41 includes a consent which is based on a mistake. Hence S. 41 applies even to a case where the person consenting to the transfer has no knowledge of his title to the property at the time of giving his consent: *20 Cal 296; A I R 1922 Nag 79 and A I R 1919 Oudh 398, Rel. on; 8 A L J 534, Dissent.* [P 87 C 2]

M. L. Puri and Qabul Chand —

for Appellant.

J. G. Sethi and M. L. Sethi —

for Respondent (No. 1).

Coldstream J.—The property in dispute in this case, a shop in Amritsar, was the self-acquired property of one Bagh Mal, the maternal grandfather of Shori Lal, the plaintiff in the suit from which the appeal arises, and his brother Thakar Das, defendant 2. Thakar Das who was born about 1882 was adopted by Bagh Mal in 1888. About four years later Shori Lal was born. Bagh Mal died in 1904 and his daughter Mt. Melo with her sons, Thakar Das and Shori Lal lived together in the shop until Mt. Melo died in August 1934. On 23rd October 1920 Thakar Das mortgaged the shop in favour of Damodar Das for Rupees 4,000 by deed registered the same day. A sum of Rs. 3,000 was paid before the Sub-Registrar. The deed was witnessed by Shori Lal who also identified his brother and Damodar Das when the deed was registered. Damodar Das let the shop on rent to Thakar Das. In August 1934

Damodar Das obtained a final mortgage decree against Thakar Das for sale of the house. On 3rd December 1934 Shori Lal instituted in the Court of the Subordinate Judge, First Class, Amritsar, the suit giving rise to this appeal for a declaration that half the shop was not liable to sale in execution of the decree because it belonged to him, his allegation being that on 23rd January 1903 Bagh Mal had made a will (Ex. P-1) which was registered the same day, leaving the whole of his property to his two grand-sons in equal shares. Of the execution and existence of this will, Shori Lal, so he stated, had been unaware until he found the will among his mother's papers after her death, that is to say, until about four months before he brought the suit.

The Subordinate Judge found it proved that the will was genuine and effective in favour of Shori Lal, that Shori Lal was in fact ignorant of its existence but honestly believed until four months before the suit that his brother Thakar Das was the exclusive owner of the shop as Bagh Mal's adopted son and that he had witnessed the mortgage deed and the rent deed in this belief. He further held that, as it was not Shori Lal's attestation of the mortgage deed that had induced Damodar Das to accept the mortgage of the shop, Shori Lal was not estopped from asserting his claim to half the shop. Nor in his view was Shori Lal estopped by his conduct in not challenging the mortgage for so long, as he was unaware of his rights. But finding that Damodar Das was a mortgagee in good faith for consideration with the consent of the real owner and applying the principle embodied in S. 41, T. P. Act, he decided that the mortgage was not voidable at Shori Lal's instance and he dismissed the suit.

Against this decision Shori Lal has appealed. It is contended on his behalf that the learned Subordinate Judge was wrong in extending the principle of S. 41, T. P. Act, to a case where the consenting owner was unaware of his interest in the property transferred. Counsel for the respondents, while supporting the lower Court's application of S. 41, T. P. Act, argues further that the evidence does not justify its decision that Shori Lal was ignorant of his grandfather's will and asks us to dismiss the appeal on the ground that his consent was given with knowledge of his rights under it and with the inten-

tion of cheating the mortgagee. It is not disputed that if Shori Lal was aware of the will when he consented to the mortgage he is estopped from challenging the validity of the transfer by S. 115, Evidence Act, as well as by S. 41, T. P. Act.

There can be no question of the good faith of Damodar Das whose evidence has been accepted by the lower Court and is not attacked before us. It shows that his suspicions having been aroused by the fact that when repaying a previous mortgage loan Thakar Das had recorded his repayments on the mortgage deed untruly as being made by Shori Lal, he insisted on Shori Lal attesting the mortgage deed of 23rd October 1920, in corroboration of his assurance that he had no concern with the property. From the evidence it is established that Damodar Das accepted the mortgage after making proper and sufficient enquiry and relying on the assurance of Shori Lal that the shop belonged to Thakar Das alone. I find force in respondent's counsel's objection to the lower Court's decision that Shori Lal was ignorant of the will in his favour until 1934. Shori Lal was eleven years old when the will was executed. Durga Das and Ruldu Ram, neighbours of Bagh Mal, identified him as the testator before the Sub-Registrar and Thakar Das who was present there, was described as legatee. It is highly improbable that the contents of the will were not known. Ruldu Ram and Durga Das, P. W. 2, heard the will read out to Bagh Mal when it was executed. The will must have been handed over to Mt. Melo or Thakar Das and there is the strongest presumption in my opinion that some time during the thirty years while they lived with Shori Lal they told Shori Lal of his legacy. It is true that when litigation was going on in 1907-08 between Thakar Das and Hari Ram about a house which had belonged partly to Bagh Mal and partly to Hari Mal, Shori Lal was not made a party. Nor did Shori Lal object to two mortgages of the shop effected by Thakar Das in 1909. A possible explanation of his omission to claim his rights then is to be found in the fact that there were collaterals of Bagh Mal in existence, see the judgment of 31st March 1908 at p. 55 of the printed book, and the two brothers thought it safest to rely on the adoption and not disclose the bequest to Shori Lal.

The suit by Damodar Das was instituted on 11th January 1934, and obtained a preliminary decree on 3rd March 1934. It is significant that in December 1933 Shori Lal got a rent deed of part of the shop from a tenant Budhu Ram in which he was described as owner of the shop. In a rent deed dated 20th March 1934, Shori Lal was again described as owner of the shop (P/2) although the tenant seems to have executed another deed in favour of Thakar Das three days later (see D-11 and evidence of P. W. 8). On 14th December 1934 Shori Lal let the shop on rent as if it were his. These deeds strongly suggest that he was creating evidence for the present suit. My conclusion is that Shori Lal's suit is barred by S. 115, Evidence Act. It is clear that Shori Lal acknowledged Thakar Das as sole heir and that by his conduct throughout as well as his admission to Damodar Das at the time of the mortgage of 1920 he consented to Thakar Das being the ostensible owner of the whole shop and to his mortgage of it. Assuming that his consent was without knowledge of his title under the will, I think that S. 41, T. P. Act, has been rightly applied by the trial Court. The only clear authority against this view to which our attention has been drawn is the Single Bench decision of the Allahabad Court in 3 A L J 534.¹

On the other hand the proposition that the consent mentioned in S. 41, T. P. Act, includes a consent which is based on a mistake receives strong support from the judgment of the Privy Council in 20 Cal 296.² That judgment dealt only with S. 115, Evidence Act, but as noticed in 65 I C 477³ it appears to me to apply equally to S. 41, T. P. Act. 65 I C 477³ is directly applicable to the present case as also 53 I C 970⁴ where the learned Judges have remarked that in their opinion

in order to invoke S. 41 it is not necessary to prove an intention to deceive... The object of S. 41 is to protect a bona fide transferee for good consideration who has made proper enquiries from being prejudiced by the conduct, however innocent, of the real owner in allowing the world at

1. *Dungaria v. Nand Lal*, (1906) 3 A L J 534 = 1906 A W N 182.

2. *Sarat Chundar Dev v. Gopal Chundar Laha*, (1893) 20 Cal 296 = 19 I A 203 = 6 Sar 224 (P O).

3. *Ramparsad v. Mt. Imratbal*, A I R 1922 Nag 79 = 65 I C 477 = 18 N L R 27.

4. *Aziz-un-Nisa v. Ahsan Ashraf*, A I R 1919 Oudh 398 = 58 I C 970 = 22 O O 248.

large to think some one else the owner of the property.

The suit was rightly dismissed and I would accordingly dismiss the appeal with costs.

Din Mohammad J.—I agree.

K.B./A.L.

Appeal dismissed.

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SKEMP J.

Mapal and others — Plaintiffs —
Appellants.

v.

Rana and another — Defendants —
Respondents.

Second Appeal No. 1374 of 1936, Decided on 31st March 1937, from decree of Dist. Judge, Jhang at Sargodha, D/- 6th June 1936.

Estoppel—Outlay of money on another person's land — Acquiescence of true owner — Essentials to estop true owner stated.

In the case of an outlay of money by a person on another's land the following essentials must co-exist in order to constitute acquiescence which would estop the true owner :

In the first place the person incurring expenditure must have made a mistake as to his legal rights. Secondly he must have spent some money or must have done some act on the faith of his mistaken belief. Thirdly the true owner must know the existence of his legal right which is inconsistent with the right claimed by person incurring expenditure. Fourthly the true owner must know of the mistaken belief of the person incurring expenditure. Lastly the true owner must have encouraged the person incurring expenditure in his expenditure or in other acts which he has done, either directly or by abstaining from asserting his legal right : (1880) 15 Ch D 96, *Foll.* ; *Case law referred.* [P 89 C 2]

S. L. Puri — *for Appellants.*

Ghulam Mohy-ud-Din —

for Respondents.

Judgment. — This second appeal has arisen from a suit lodged as far back as 1932 for possession of 19 marlas of land on the ground that the defendants had taken an unlawful possession two or three years previously by sinking a well therein. The plaintiffs who were about 20 in number including three minors set forth in the plaint that they were the owners and that the defendants had forcibly and without right made a new well. The defendants knew that they were sinking the well in the land of the plaintiffs, that they did everything forcibly and without right. Hence the plaintiffs were entitled to possession. In a statement before issues the plaintiffs' pleader said :

The land is the property of the plaintiffs. They gave no permission to sink the well. They objected at the time of sinking the well.

The defendants pleaded that they were owners by adverse possession, that they had spent Rs. 1,200 on sinking the well, that the operation continued for a long time and that the plaintiffs were barred by estoppel from bringing the suit. They also pleaded that it was formerly part of the shamilat and that by the terms of the wajibularz they had become owners by sinking a well. The suit was decided and remanded for misjoinder of parties. At the retrial the Subordinate Judge found that the plaintiffs were the owners of the land, that the defendants were not in adverse possession, that the defendants could not benefit by the entry in the wajibularz as the land was not shamilat, and that the plaintiffs were not barred by estoppel. He said :

There is no doubt that the well continued to be constructed for several months together and that the plaintiffs did not object. But the reason is clear that the plaintiffs thought that the defendants were constructing a well in their own land while the defendants were under the impression that the plot formed part of the area in their possession. Both the parties were under a mistake of fact and therefore there can be no estoppel under S. 115, Evidence Act.

The Subordinate Judge therefore found that the plaintiffs were entitled to possession of the land in suit but he further held that equitably the defendants were entitled to the cost of constructing the well which was assessed by a commissioner at Rs. 550. He decreed accordingly. The defendants appealed as the learned District Judge held that the suit was barred by estoppel. He decided no other point except that he refused to allow the defendants to raise the point of limitation. The material part of the District Judge's finding is

The defendants led evidence which establishes that the well was dug openly and publicly, that the work took several months and people collected to watch the work. Rana defendant has deposed in the witness-box that he sunk the well in this case and that the reason it was sunk was that he honestly believed that it was land in which he was entitled to do this. It is a fact that he is in possession of a certain shamilat land which borders on the little patch in suit, and that if the shamilat area had included the patch in suit he would have a claim to the sinking of this well. . . The learned Subordinate Judge has rightly held that the plaintiffs never objected to the sinking of the well, a finding which involves the rejection of the case for the plaintiffs as put in their pleadings and their own counsel's statement before issues.

He then quoted the finding of the Subordinate Judge as to estoppel but proceeded :

I can find no justification for the learned Subordinate Judge's conclusion that the plaintiffs thought that the defendants were constructing the well in their own land. Not one of the plaintiffs has ever gone into the witness-box to tell the Court what he thought although they had two opportunities to do so.

The District Judge's finding on this point has not been criticised and it is, in any case, a finding of fact by which I am bound. The findings of fact then are that the land belonged to the plaintiffs, that the defendants sunk the well in this small area in the bona fide belief that they had a right to do so, that it was sunk openly and publicly and that the plaintiffs had knowledge that the well was being constructed but did not object. The District Judge then cited five rulings, A I R 1925 Cal 288;¹ A I R 1929 Lah 625;² 94 I C 168;³ 64 I C 520⁴ and 97 I C 441⁵ in support of his finding that the plaintiffs were barred by estoppel. He said that in the first two rulings it was laid down that for a party's acquiescence to amount to estoppel he must know of the infringement of the right to which he acquiesces, but in this case the plaintiffs did know. The real owner was estopped from challenging if there were special circumstances amounting to a standing-by so as to induce the belief that the owner intended to forego his right or to acquiesce in his building on his land. In A I R 1925 Cal 288¹ Mukerji J. quoted Lord Campbell in *Cairncross v. Lorimer*⁶:

Generally speaking if a party having an interest to prevent an act being done has full notice of its being done and acquiesces in it so as to induce a reasonable belief that he consents to it and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license.

But (he proceeded) "mere quiescence or absence of interference is not sufficient to create an estoppel" and

In the present case no act or conduct by the plaintiff has been proved which could induce the

defendants reasonably to believe that he consented to their act nor any which could reasonably induce them to give credit to his sincerity, nor again any but for which they would have abstained from doing what they did.

In A I R 1929 Lah 625² Tek Chand J. referred to (1880) 15 Ch D 96⁷ where Fry L. J. laid down that to constitute acquiescence which would estop the plaintiff the following essentials must co-exist:

In the first place the plaintiff must have made a mistake as to his legal rights. Secondly the plaintiff must have spent some money or must have done some act on the faith of his mistaken belief. Thirdly the defendant, the possessor of the legal right, must know of the existence of his legal right which is inconsistent with the right claimed by the plaintiff. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it but, in my judgment, nothing short of this will do.

(1880) 15 Ch D 96⁷ was a case in which the plaintiff pleaded estoppel and the defendant possessed the legal right; in the present case the situation is reversed. These two cases and some others were quoted before me and in my opinion the plaintiffs on the facts found are not barred by estoppel because the fifth condition laid down by Fry L. J. is not established. There is no evidence that the plaintiffs encouraged the defendants in their expenditure of money or in sinking the well either directly or by abstaining from asserting their right. The District Judge said he had no doubt that Rana dug the well believing that he had a right to do so and that he had no doubt that many of the plaintiffs who were joint owners of the site saw him do so. In cross-examination the mason who sunk the well did depose that he never saw Mapal plaintiff while he was working, and Rana defendant said that he did not remember if the Bharwanas who were two of the plaintiffs ever came. I cannot find that there is any evidence that the plaintiffs' action was such as to encourage the defendants in what they did. In 94 I C 168³ the proposition was laid down which has been cited by the learned District Judge; but the facts of that case were that the owner had deliberately built on the land of another and of course it was held that

1. Baneswar v. Amulya Charan, A I R 1925 Cal 288=82 I C 809.

2. Amritsarya Ram v. Diwan Chand, A I R 1929 Lah 625=114 I C 70.

3. Karim Bakhsh v. Mahomed Shafi, A I R 1926 Lah 354=94 I C 168.

4. Dhanpat Rai v. Guran Ditta Mal, A I R 1921 Lah 110=64 I C 520=2 Lah 258=10 P L R 1922.

5. Hari Bhushan v. Sheikh Abdul, A I R 1927 Cal 54=97 I C 441.

6. (1860) 7 Jur (N S) 149=8 Macq H L 827=8 L T 180.

7. Willmott v. Barber, (1880) 15 Ch D 96=28 W R 911=48 L T 95.

the owner was not estopped. In 64 I O 520⁴ the facts were peculiar. One of the coparceners sold land belonging to the joint family without the consent of the remaining coparceners. The vendee erected a costly building and four years later sold the house. Seven years after the first sale the other brothers of the vendor brought their suit and were held to be estopped, relying on (1880) 15 Ch D 96.⁷ In 97 I O 441⁶ the rule of estoppel was stated as follows:

Where a person in bona fide belief that a certain property belongs to him, spends money upon it and the true owner stands by and allows him to spend the money and make improvements upon his lands, the true owner is estopped from asserting his title as against the person making improvements in the bona fide belief.

I think the rule is somewhat loosely stated, a fact of no importance in that case, where it was held that the rule did not apply but that the plaintiffs had given notice to the defendants to desist from building. Mr. S. L. Puri also referred to A I R 1930 Lah 392,⁸ a Division Bench ruling of this Court where it was held that the mere fact that the plaintiffs living in the neighbourhood of a factory must have seen it being built by the defendant is not sufficient to establish the plea of acquiescence where there is nothing in the evidence indicating that the plaintiffs encouraged the defendants to build. The appellants' counsel also referred to 67 I O 744⁹ a long judgment by a Letters Patent Bench of the Patna High Court. This refers to 19 I A 203,¹⁰ which points out that the question of estoppel is to be determined by S. 115, Evidence Act, and that the law of estoppel in India is the same as in England—so that the Courts are justified in following English cases. In 67 I O 744⁹ the facts were much stronger than the present facts, because the plaintiff's agent assured the defendant before he built that the lease on which the defendant erroneously relied was a permanent lease and put this assurance in writing. In discussing the law the Bench cited S. 115, Evidence Act, which runs:

When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and

to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

The Bench said:

In the case of a mere omission, no such intention can well be imputed unless the true facts are known to the person whose omission is in question.

In the present case according to the finding of the learned District Judge the plaintiffs had knowledge of the true facts and the question is whether by their omission they intentionally permitted the defendants to believe that they were sinking the well on their own land. I can find no indication that they had such intent. I think that the judgment of the learned District Judge must be set aside and that on the wording of S. 115 and on the principle of (1880) 15 Ch D 96⁷ cited in two of the above cases and A I R 1925 Cal 288¹ and A I R 1930 Lah 392,⁸ this appeal must be accepted and the case remitted to the Court of the District Judge for findings on the other points in appeal. Costs of this appeal are to be costs in the case. This case is obviously a case for compromise if possible and the case has twice been adjourned in the High Court in the hope of a compromise, once by Dalip Singh J. and once by me, but the parties have not attended.

P.R./D.S.

Case remanded.

A. I. R. 1938 Lahore 90

BHIDE J.

*Ladha Ram Lakhi Ram Arora —
Defendant — Appellant.*

v.

*Hari Chand and others — Plaintiffs—
Respondents.*

Second Appeal No. 323 of 1937, Decided on 17th June 1937, from decree of Senior Sub-Judge, Montgomery, D/- 1st February 1937.

(a) Evidence Act (1872), S. 89 — Presumption under — Question whether plaintiff mortgagor and defendant mortgagee—Plaintiff alleging entry as to mortgage made in mortgagee's bahi and calling upon defendant to produce it — Defendant denying to be in possession of it—Plaintiff's evidence showing entry made in ordinary bahi and not on stamped paper—No evidence by plaintiff to show that defendant possessed bahi and withheld it—Presumption under S. 89 held could not be drawn.

In a suit for redemption, the question was whether the plaintiff was the mortgagor and the defendant the mortgagee. The plaintiff alleged

8. Banarsi Das v. Sital Singh, A I R 1930 Lah 392=121 I O 295=81 P L R 88.

9. Ralli v. A. H. Forbes, A I R 1922 Pat 258=67 I O 744=1 Pat 717=8 P L T 467.

10. Sarat Chunder Dey v. Gopal Chunder Laha, (1892) 20 Cal 298 = 19 I A 203, = 6 Sar 224 (P O).

that the mortgage was executed 50 years ago and that the entry as regards mortgage was made in the mortgagee's bahi and called upon the defendant to produce it. The defendant denied that he possessed any such bahi. The plaintiff's evidence showed that the entry was made in ordinary bahi and not on stamped paper though required by law as such. Moreover there was no evidence by plaintiff to show that the defendant was in possession of the bahi and was withholding it though called upon to produce it :

Held that no presumption under S. 89 could be drawn under the circumstances and as the entry was made in the ordinary bahi and not on stamped paper, no question of presumption arose in such case. [P 91 C 2]

(b) Stamp Act (1899), S. 35 — Secondary evidence — Entry as to mortgage made in ordinary bahi not duly stamped—Secondary evidence of such entry is inadmissible.

Where the entry as to a mortgage is made in an ordinary bahi and is not duly stamped though required by the Stamp Act, the secondary evidence of the contents of the entry is wholly inadmissible : *A I R 1922 Lah 401, Rel. on.*

[P 92 C 1]

Achhru Ram — *for Appellant.*

Shamair Chand — *for Respondents.*

Judgment.—This second appeal arises out of a suit for possession of a house by redemption of a mortgage on payment of Rs. 50. The plaintiffs, who are the descendants of one Godha, alleged that the house was mortgaged by Godha in favour of Hazari Mal some fifty years before the suit. The house was stated to be in possession of the defendants as the heirs of Hazari Mal. Out of the defendants, Ladha Ram defendant claimed that he was the owner of the house and denied the mortgage altogether. The other defendants, who were the descendants of Hazari Mal, stated that they had nothing to do with the house and their names were thereafter struck off. The main issue in the case was whether the plaintiffs were mortgagors and the defendant Ladha Ram the 'mortgagee' of the house in dispute. The trial Court held that the mortgage was not proved and dismissed the suit. On appeal however the learned Senior Subordinate Judge came to a contrary conclusion and decreed the suit. From this decision the present appeal has been preferred.

The decision of the learned Senior Subordinate Judge as regards the existence of the mortgage is based on the oral testimony of Mohri Mal and certain other witnesses and some documentary evidence. This evidence was of a secondary character. The plaintiffs did not state in the plaint whether there was any mort-

gage deed or any other documentary evidence in support of the alleged mortgage. Later on however they stated that an entry had been made with respect to the mortgage in a bahi belonging to the mortgagee Hazari Mal. The defendant Ladha Ram was called upon to produce the bahi but he stated that no such bahi was in his possession. Thereupon secondary evidence was led by the plaintiffs to prove the mortgage. According to the statement of Mohri Mal who professes to have been an attesting witness to the entry, the mortgage was duly entered in the bahi and attested and the learned Senior Subordinate Judge has accepted his testimony. It appears however clear from the statement of Mohri Mal that the entry with regard to the mortgage was written in an ordinary bahi and not on a stamped paper as required by law. At the time when mortgage was executed, the Indian Stamp Act of 1879 was in force and the mortgage should have been executed on a stamped paper. The learned Senior Subordinate Judge has held that as the bahi containing the entry with reference to the mortgage had not been produced by defendant 1, there was a presumption under S. 89, Evidence Act, that the document was duly stamped and executed. In the first place there is no reliable evidence to show that the bahi was in possession of Ladha Ram, defendant, and was withheld by him. The learned Senior Subordinate Judge has not referred to any evidence showing that the bahi was actually in the possession of the defendant. The learned counsel for the plaintiff-respondents referred in this connection to the evidence of Shankar Das P. W. 9; but this witness appears to be clearly inimical to defendant 1. In the absence of any reliable evidence to show that the bahi was in possession of defendant 1 and was being intentionally withheld by him, no presumption could be drawn under S. 89, Evidence Act. Moreover it is clear from the plaintiffs' own evidence, as already stated, that the entry with respect to mortgage was made in an ordinary bahi, and consequently no question of any presumption arises in this case.

The next point which requires consideration is whether when the entry with reference to the mortgage was not duly stamped and was not produced, any secondary evidence was admissible. The learned counsel for the appellant contended that secondary evidence was not

admissible at all in the circumstances and relied on 3 Lah 282,¹ which supports him. The learned counsel for the respondents urged in reply that no objection as to the admissibility of the secondary evidence was taken when Mohri Mal's evidence was recorded and hence the objection as to admissibility cannot now be entertained. It appears that the objection was taken in the trial Court itself at the later stage and was upheld by the trial Court on the strength of the above mentioned ruling. But apart from this, as in the present case, the original bahi entry was not duly stamped, secondary evidence of the contents of the entry seems to be wholly inadmissible in view of the above mentioned ruling. The original is not forthcoming and no question of curing the defect by payment of penalty arises. Consequently, the fact that objection was not taken when Mohri Mal was examined is immaterial. In 3 Lah 282¹ the original had been lost and the secondary evidence had been admitted without objection and even penalty had been levied; yet the secondary evidence was excluded as the original document was not stamped according to law and was not forthcoming.

The learned counsel for the plaintiff-respondents attempted to get over this difficulty by contending that it was not proved that the entry in the bahi was signed by the mortgagor and was therefore not tantamount to a mortgage deed. This position was however never taken up in the Courts below, and it appears from the judgments of both the Courts that it was admitted all along that the entry in the bahi of Hazari Mal was tantamount to a mortgage deed. I am, therefore, of opinion that the trial Court was right in holding that secondary evidence as to the execution of the mortgage in the dispute was wholly inadmissible in this case. The plaintiffs' suit must therefore fail on this short ground.

There are, however, other points also which go against the plaintiffs. The plaintiffs alleged that the defendant Ladha Ram had inherited the mortgagee rights of Hazari Mal. The defendant had denied this fact and it was incumbent on the plaintiffs to show that these rights had devolved upon Ladha Ram. Ladha Ram is a nephew of Hazari Mal. Hazari Mal's

own descendants are living and there is no evidence to show why the mortgagee rights of Hazari Mal should have devolved upon Ladha Ram rather than his own descendants. The learned Senior Subordinate Judge has remarked that there was nothing strange or improbable if on a partition the mortgaged house was allowed to remain in the occupation of the defendant. This remark appears, however, to be purely conjectural and the learned counsel for the plaintiff-respondents was unable to point out any evidence on the record to support it.

Lastly, it may be pointed out that the learned Senior Subordinate Judge has relied on certain documents in addition to the testimony of Mohri Mal and other witnesses in support of his conclusion that the mortgage was duly executed by Godha Ram in favour of Hazari Mal: see for instance Exs. P. W. 3/1 and P. W. 4/1. But in interpreting these documents also he seems to have resorted to conjectures. For instance in respect of Ex. P. W. 3/1 he has assumed that certain persons shown in the pedigree table, Ex. P. 1, namely, Tahla, Godha, Phaban, Wazira, Hira, Sajjan, Gajjan and Sat Ram, were descended from a common ancestor. The pedigree table, however, does not show that they were so descended. As regards Ex. P. W. 4/1 he has assumed that the house in dispute was the one shown as mortgaged by Phaban and Sajjan in favour of Hazari Mal. There appears to be, however, no evidence on the record to prove the identity.

In view of all the facts stated above, the decision of the learned Senior Subordinate Judge cannot be upheld. In my opinion the trial Court's decision was correct. The trial Court has fully discussed the evidence and I find myself in agreement with its conclusions. I therefore set aside the decree of the learned Senior Subordinate Judge and restore that of the trial Court dismissing the plaintiffs' suit. In view of all the circumstances, however, I leave the parties to bear their costs throughout.

A.L./R.K.

Appeal allowed.

¹ Mohammad Ayub v. Rahim Bakhsh, A I R 1922 Lah 401=69 I C 728=8 Lah 282.

A. I. R. 1938 Lahore 93**BHIDE J.***Sunder Singh Giyani — Judgment-debtor — Appellant.*

v.

Lala Ganga Ram — Decree-holder — Respondent.

Exn. First Appeal No. 5 of 1937, Decided on 20th April 1937, from order of Senior Sub.Judge, Ambala, D/. 12th November 1936.

Receiver—Appointment of — Execution of decree against son on death of father—Court directing receiver to take possession of property in hands of son — Property situated in State — According to law of State son not shown to be not so liable — Order directing appointment of receiver is not ultra vires — Court in such case should direct son to hand over property to receiver.

On the death of the judgment-debtor, the decree-holder in execution of his decree against his son sought to make him personally liable to the extent of the assets of the deceased held by him. These assets consisted of certain immovable property in a State. The executing Court merely appointed a receiver to take its possession and realize the rents. It was contended by the son that the order directing a receiver to take possession of property in a foreign territory was ultra vires. It was not however shown that according to the law prevailing in that State the son could not be made liable for the debts of his father in respect of property in his hands :

Held that the order directing the appointment of receiver was not ultra vires. [P 94 C 1]

Held also that as the Court could only act in the exercise of its jurisdiction in personam over the defendant and could not empower the receiver to take possession of the property as it could in British India, the proper course would have been to direct the son (who was in possession of the property) to hand over the property to the receiver : 5 Bom 249 ; A I R 1921 Bom 460 and A I R 1934 Sind 123, *Ref.*; (1900) 1 Ch 602, *Rel. on.* [P 94 C 1]

M. C. Mahajan — for Appellant.

Asa Ram Aggarwal — for Respondent.

Judgment — The respondent, Rai Bahadur Lala Ganga Ram obtained a decree for Rs. 55,000 against Sardar Jhanda Singh, who is dead and is now represented by his son Sardar Bahadur Sunder Singh as his legal representative. Part of the decree is satisfied, but a sum of Rupees 28 000 still remains unpaid. The decree-holder sought to make the appellant Sardar Bahadur Sunder Singh personally liable to the extent of Rs. 20,000 alleging that he was in possession of the assets of the deceased worth that amount viz. furniture worth Rs. 2,000 and three bungalows left by the deceased at Salogra in the Bhagat State worth about Rs. 18,000. As

regards the furniture, the appellant alleged that the furniture was worth Rs. 150 only, but the Court found that the furniture was worth a good deal more and fixing its value at Rs. 750 held the appellant liable for that sum. As to the bungalows, the property being situated in an Indian State outside the jurisdiction of British Courts, the Court merely appointed a receiver to take possession of it and realize the rent and pay the proceeds after deducting necessary expenses, taxes, etc., in Court for satisfaction of the decree. From this decision the present appeal has been preferred.

There was reliable evidence produced on behalf of the decree-holder to show that the deceased left furniture of considerable value and its value as assessed by the Court (Rs. 750) is I think not at all unreasonable. As regards the appointment of a receiver, the learned counsel for the appellant contended that the jurisdiction of British Courts could not extend beyond the British territory to which alone the Code of Civil Procedure applies and that the order appointing a receiver to take charge of property in foreign territory was ultra vires. No authority directly in point was cited, but the learned counsel referred to 5 Bom 249¹ as an authority which supported his contention. The learned counsel for the respondent cited a number of authorities to support the view taken by the Court below. These also were not directly in point, but there are observations in some of them to show that the English Courts have held that the appointment of a receiver of property in foreign territory is justifiable in certain circumstances : see e. g. 45 Bom 1228² at p. 1231, and A I R 1934 Sind 123³ at p. 127. The subject was discussed in (1900) 1 Ch 602⁴ at pp. 610.11 and it was remarked therein, "It is well settled that the Court can appoint receiver over property out of its jurisdiction." This power, I apprehend, is based upon the doctrine that the Court acts in personam. The Court does not and cannot attempt by its order to put

1. Ghansham Lal v. Bhansali, (1880) 5 Bom 249.

2. Ismailji Haji Halimbhai v. Ismail Abdul Kadar, A I R 1921 Bom 460=63 I C 959=45 Bom 1228=23 Bom L R 543.

3. Dav Samaj Council, Lahore v. Amrit Lal Motilal, A I R 1934 Sind 123=155 I C 677=28 S L R 54.

4. In re Maudelay Sons and Field, (1900) 1 Ch 602=69 L J Ch 349=82 L T 378=48 W R 568=16 T L R 228.

its own officer in possession of foreign property, but it treats as guilty of contempt any party to the action in which the order is made who prevents the necessary steps being taken to enable its officer to take possession according to the laws of the foreign countries. The practice of English Courts as stated in the Exception to R. 53, Dicey's Conflict of Laws (Edn. 4, at p 219) and in Para. 172 of Westlake's Private International Law (Edn. 7, pp. 224-225) also appears to support the contention of the respondent's counsel. The latter Para. is as follows:

A proprietor of foreign immovables, or person interested in such, may be compelled by the English Court, if it has personal jurisdiction over him, to dispose of his property or interest in them so as to give effect to any obligation relating to them which arises from, or as from, his own contract or tort; and that obligation will not be measured by the *lex situs* of the foreign immovables to which it relates, but in accordance with the rules of private international law on obligations arising from, or as from, contract or tort. If indeed the law of the country where the land is situate should not permit, or not enable, the defendant to do what the Court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act, but when there is no such impediment the Courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situate or of the manner in which the Courts of such countries might deal with such equities.

It is not suggested that according to the law prevailing in the Bhagat State the property in question would not be liable for the debts of Sardar Jhanda Singh, in the hands of the appellant. I therefore see no good reason to hold that the appointment of a receiver was ultra vires in the circumstances of the case. The order of the learned Subordinate Judge, however, does not appear to be quite in order in so far as it directs the receiver to take possession of the property. The Court could only act in the exercise of its jurisdiction in personam over the defendant and could not I think empower the receiver to take possession of the property as it can in British India. In my opinion, the proper course would be to direct the appellant (who is admittedly in possession of the property, as pointed out by the learned Subordinate Judge) to hand over the property to the receiver. The order of the learned Subordinate Judge is also defective in so far as it does not state for what period it will remain in force.

I accordingly accept the appeal and modify the decree to the extent of directing that the appellant shall hand over possession of the bungalows in the Bhagat State to the receiver for administration of the property and payment of receipts in Court for satisfaction of the respondent's decree as directed by the lower Court. If the appellant fails to do so, he will be liable to be dealt with for contempt of Court or otherwise according to law. The appointment of receiver will remain in force till the decree is fully satisfied. In view of all the circumstances, I leave the parties to bear their costs.

K.B./A.L.

Decree modified.

* A. I. R. 1938 Lahore 94

BHIDE J.

Krishna Chandra — Plaintiff —
Appellant.

v.

Gopal Chand and others — Defendants
— Respondents.

Second Appeal No. 1534 of 1936, Decided on 11th May 1937, from decree of Dist. Judge, Hissar at Gurgaon, D/- 29th April 1936.

* Tort—Nuisance — Injunction — Door of latrine constituting nuisance only when kept open — Injunction should be granted requiring owner to put up spring door.

Where the door of the privy opens on the public street and constitutes a nuisance only when it is left open, an injunction should be granted requiring the owner to put up a suitable spring door for the latrine. [P 94 C 2; P 95 C 1]

Shamair Chand — *for Appellant.*F. C. Mittal — *for Respondents.*

Judgment. — This is a second appeal arising out of a suit by the plaintiff for joint possession of a site and in the alternative for an injunction restraining the defendants from using it for purposes of a latrine, which he alleged was a nuisance. The claim for joint possession was held to be not proved, but the trial Court gave an injunction requiring the defendants to close the door of the privy which opens on the public street, and requiring him to construct another door for the sweeper to clear the privy from inside. The learned District Judge however accepted the appeal and dismissed the suit, holding that it was not proved that the nuisance was actionable.

The learned District Judge has found that if the door of the privy is left open the privy constituted a nuisance, and there is evidence to show that it does cause

nuisance in this way. The defendant does not admit that the door is left open, but he is willing to have a spring door, so that there is no chance of the door being left open. This seems to me the best solution of the difficulty on the finding of the learned District Judge.

I accordingly accept the appeal and grant the plaintiff an injunction requiring the defendant to put up a suitable spring door for the latrine where it abuts the public street, which would automatically remain closed except when a person is entering or coming out. The parties to bear their costs of this appeal.

S.C./R.K.

Appeal allowed.

* A. I. R. 1938 Lahore 95

BHIDE J.

Kesho Das—Decree-holder—Petitioner.

v.

N. C. Goyal Co., Objector and another, Judgment-debtors—Respondents.

Civil Revn. Petn. No. 213 of 1937, Decided on 15th June 1937, from order of Dist. Judge, Lahore, D/- 20th February 1937.

(a) Civil P. C. (1908), Ss. 24, 115—Case transferred under S. 24—No revision lies—Petition for transfer not found to be bona fide—Case can be retransferred.

Where a case is transferred under S. 24, no revision lies from the order of transfer; but if it is found that the application for transfer is not bona fide one, the case can be retransferred. [P 95 C 2; P 96 C 1]

(b) Execution—Property attached—Objection by third party to attachment—Objection can be decided only by executing Court—Transfer of objection proceedings to another Court without transferring execution proceedings is illegal (*Obiter*).

Where in execution of a decree certain property of the judgment-debtor is attached and a third person files an objection to the attachment on the ground that the property belongs to him, the objection can be decided only by the executing Court and therefore the transfer of the objection proceedings alone to another Court without transferring the execution proceedings to that Court is not in accordance with law. [P 96 C 1]

Sardar Iqbal Singh — *for Petitioner.*Shamair Chand — *for Respondents.*

Order.—This is a petition for revision of the order of the District Judge transferring a civil suit from the Court of Lala Ganga Bishen, Subordinate Judge, to the Court of Lala Ram Purshotam, another Subordinate Judge. The material facts of the case are briefly as follows. In the execution proceedings taken by Lala Kesho Das against the proprietors of the Prince Talkies, Delhi, certain property was attach-

ed upon which N. C. Goyal Co., Paper Merchants, Lahore, put in an objection that the property belonged to them. This objection petition was presented in May 1936 and the enquiry appears to have taken a long time. Ultimately on 17th November 1936, the case was postponed for orders but no date was actually fixed for pronouncement of the orders. On 15th January 1937 an application was made to the District Judge, Lahore, on behalf of the objector stating that the objection petition had been pending for a long time, that the arguments had been heard on 7th August 1936 and yet no orders had been pronounced, that the decree-holder was a retired Extra Assistant Commissioner and was saying that the objections would be decided in his favour and the objector apprehended that justice would not be done to him. The objector therefore prayed for transfer of the objection proceedings to another Court. The learned District Judge thereupon called for a report from the Subordinate Judge concerned. The Subordinate Judge reported that the order was practically ready on 14th January 1937 and that on enquiry by the pleader for the objector he had told him that he was going to dismiss the objection and that a formal order would be recorded in the evening in the presence of the parties. It appears that the learned Subordinate Judge was engaged in hearing another case when the enquiry was made by the counsel for the objector.

On receiving this report the learned District Judge thought that the Subordinate Judge had been indiscreet in informing counsel for the objector as to the order he was going to pronounce before it was actually signed and pronounced in open Court to the parties and, in view of certain other circumstances, he was of opinion that the objector had reasonable grounds for apprehension that justice would not be done to him. He therefore transferred the case to the Court of Lala Ram Purshotam, Subordinate Judge.

A preliminary objection is raised on behalf of the respondent that the learned District Judge had discretion to transfer the case under S. 24, Civil P. C., and that no revision is competent. There is force in this contention; but the learned counsel for the petitioner has prayed that the case should be retransferred under the same section in view of all the circumstances of the case. He has pointed out that as a matter of fact the application by the objec-

tor was not a bona fide one as it was made after the counsel for the objector had been informed by the learned Subordinate Judge that the objection was going to be dismissed. This fact is not disputed on behalf of the respondents, although there is no reference in the application for transfer to the fact that the learned Subordinate Judge had already informed the counsel for the objector that the objection was going to be dismissed. Counsel for the objector evidently wanted to take undue advantage of the information given to him by the learned Subordinate Judge at his own request and to have the chance of getting the same matter decided by another Court. The learned Subordinate Judge may have been indiscreet in informing counsel for the objector as to the order he was going to pronounce, but the record does not show that the objector had any real apprehension that the case would not be decided on merits. If he had any such apprehension, the petition for transfer could have been made long before 15th January.

I am also doubtful as to whether the transfer of the objection proceedings by itself is in accordance with law. The objection could, in my opinion, only be decided by the execution Court. In the present instance the execution proceedings were not transferred and the objection petition alone was transferred to another Subordinate Judge. This might lead to complications. In view of the fact that the petition for transfer was not bona fide and the other circumstances referred to above, I re-transfer the objection proceedings to the Court of Lala Ganga Bishen, Subordinate Judge, and direct that the objection be decided on merits without any further delay. No order as to costs. Parties are directed to appear before Mr. Ganga Bishan, Subordinate Judge, on 24th June 1937.

D.S./R.K.

*Petition allowed.***A. I. R. 1938 Lahore 96****COLDSTREAM J.**

Sheikh Mohammad Ibrahim & Sons —
Plaintiffs—Petitioners.

v.

Behari Lal Beni Pershad—Defendants
—Respondents.

Civil Revn. Petn. No. 374 of 1937,
Decided on 15th July 1937.

Partnership Act (1932), S. 69—Suit by firm
—Plaint need not expressly note that firm is
registered—Neither defendant denying regis-

tration nor reference to it in evidence—Suit
cannot be dismissed on ground that registra-
tion was not proved.

The law does not require that a plaint by a firm
must expressly note that it has been registered.

[P 96 C 2]

Where therefore in a suit by a firm the defend-
ant does not deny registration and no reference
to registration or non-registration is made in the
evidence, the firm can assume that this objection
had not been taken and a suit cannot be dismissed
on the ground that the registration was not
proved.

[P 96 C 2]

Indar Dev — *for Petitioners.*Bishen Narain—*for Respondents.*

Order.—This is a petition by the Delhi
firm Mohammad Ibrahim and Sons against
a judgment of the Small Cause Court
Delhi dismissing a money suit by the firm
against a Hindu firm Behari Lal Beni
Parshad on the ground that the firm was
not proved to be registered under the
Partnership Act 1932. In their pleas the
respondent firm mentioned that the plaint
did not state that the firm was registered
and, in a separate paragraph, objected
that the suit could not proceed in the
name of the firm. The suit being a small
cause, no issues were struck but the
Judge in his judgment considered that
the first point for determination was whe-
ther the plaintiff's firm was registered and
finding it not proved that it was, he dis-
missed the suit as already mentioned.

Now the respondents never denied that
the plaintiff firm was registered as they
were bound to do if they opposed the suit
on this ground (O. 6, R. 6 and O. 8, R. 2,
Civil P. C.), and it was natural enough for
the plaintiffs to assume that this objec-
tion had not been taken. The law does
not require (and this is not disputed) that
a plaint by a firm must expressly note
that it has been registered. No reference
to registration or non-registration was
made in the evidence or it certainly ap-
pears that the plaintiffs were taken by
surprise as their counsel now alleges when
they found at the time of arguments that
the Judge was calling on them to show
that they were a registered firm.

The petitioners have produced a certi-
fied copy of an order by the Registrar of
Firms, Delhi, registering the firm Moham-
mad Ibrahim and Sons on 13th December
1933. I accept this petition, set aside
the lower Court's judgment and remand
the case for disposal according to law.
Costs to be costs in this case. Parties to
appear in the Court on 9th August.

S O./R.K.

Case remanded.

A. I. R. 1938 Lahore 97

BHIDE J.

Chuni Shah — Plaintiff — Appellant.
v.*Amar Singh — Defendant —*
Respondent.Second Appeals Nos. 151 and 152 of 1937,
Decided on 7th May 1937, from decree of
Dist. Judge, Sialkot, D/- 26th October 1936.

(a) Evidence—Attestation—Attesting witness cannot be presumed to have knowledge of contents of document.

An attesting witness cannot be presumed, from the mere fact of attestation, to be aware of the contents of the document, much less of a mere recital of boundaries: *A I R 1938 Lah 551, Rel. on.* [P 98 C 1, 2]

(b) Highway — Dedication—Long user by pedestrians of roofs of shop for access to public street does not raise presumption of dedication—Intention to dedicate is necessary.

Where the roofs of a shop have been used by pedestrians for access to the neighbouring public streets for a long time, such user does not necessarily raise a presumption as to dedication in every case. There must be an intention to dedicate, of which the user by the public is mere evidence and no more: (1914) *A C 388, Ref.*

[P 98 C 2]

(c) Highway—Dedication—Intention.

A single act of interruption is of much more weight on the question of intention to dedicate than many acts of enjoyment: (1843) *11 M & W 827, Ref.* [P 99 C 1]

Achhru Ram — for Appellant.

M. C. Mahajan — for Respondent.

Judgment.—Second Appeals Nos. 151 and 152 arise out of two suits of a similar character in which the main point for decision was the same, viz. whether the roofs of plaintiffs' shop along with those of certain adjoining shops situated in Sialkot town formed a public road. The plaintiffs sued to restrain the defendants from using the roofs of their shops as a public road and for certain other reliefs. The learned District Judge has held that the roofs in question were used as a public road, but he has given a decree restricting the right of user to a strip 10 feet in width adjoining defendants' houses. From this decision plaintiffs have appealed. The sole point argued in the appeals was whether the learned District Judge was right in holding that the roofs of the shops in question were part of a thoroughfare. It has been found that the roofs have not been under the management of the Municipal Committee of Sialkot and are not paved, cleaned, or lighted by that body. The roofs, however, give easy access to two

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public streets on either side through narrow entrances about 2 or 3 feet in width and have been used as a short-cut by pedestrians for a long time. On the basis of this long user the Courts below have presumed 'dedication' of the said roofs as a public thoroughfare.

The learned counsel for the appellants has urged that the learned District Judge has erred in: (a) not taking into consideration certain relevant documentary evidence viz. Ex. P/3 and a judgment dated 22nd October 1914 by Mr. Rose in Civil Appeal No. 306 of 1914; (b) in relying on some irrelevant evidence viz. Exs. D-4 and D-5; and (c) in drawing an inference as to dedication from mere long user, when there were salient facts militating against the existence of any intention to dedication. In my opinion there is much force in these contentions. As regards (a), the judgment by Mr. Rose was given in a suit instituted by Sher Singh, a predecessor-in-interest of Amar Singh defendant and another person in the year 1914, to prevent Ali Bux (P. W. 2) from building a second storey on the roof of his shop. It is not disputed that Ali Bux's shop is in the same line along with plaintiffs' shop, and the roofs of all these shops taken together are alleged to form a public road, giving access to public streets on either side. This suit of 1914 was dismissed on appeal and it appears from the judgment that the plaintiffs did not then claim that the roof of Ali Bux's shop was a part of a public road, but merely claimed a right to restrain Ali Bux from building the second storey on the ground that it would interfere with their right to take long 'dolis' etc., into the adjoining public street. The learned District Judge has treated this judgment as irrelevant on the ground that it related to the roof of a different shop and the principles of *res judicata* could not apply. But the learned District Judge seems to have overlooked the fact that the judgment is evidence of plaintiffs' admission in that appeal that one of the roofs in question did not form a public road and that he then claimed only a lesser relief which was inconsistent with his present claim. It is true that the dispute in that case was with respect to the roof of Ali Bux's house. But that roof is a part of the alleged public road and stands on exactly the same footing as the plaintiffs' own roofs. There could not be any public thoroughfare consisting of the roofs in question, unless

they were all used as a public road and thus could give access to the public streets on either side. In my opinion the judgment referred to above was relevant under S. 11, if not under S. 13, Evidence Act.

Another document relied on by the plaintiffs which was left out of consideration by the learned District Judge is Ex. P/3. This was an agreement between the predecessors-in-interest of the defendant Amar Singh and the plaintiff Chuni Lal. By this agreement Chuni Lal gave up his right of pre-emption while Sher Singh and Mehr Singh, the predecessors-in-interest of Amar Singh agreed to open no fresh doors or ventilators. Now, if the roofs of the plaintiffs' houses were a part of a public road as alleged by the defendant in the present case, there could be no dispute with Chuni Lal about any right to open door, windows etc. on such road. The agreement is thus inconsistent with the position taken up by the defendant in the present case and would be relevant under S. 11, Evidence Act.

I come now to the documents Exs. D.4 and D.5 which have been relied upon by the learned District Judge in addition to the oral evidence as regards the use of the roofs as a public road. Ex. D.4 is a sale deed by the predecessors-in-interest of defendant Amar Singh executed in his own favour. In this document, the roofs in question are mentioned as the boundary on one side of the house sold and are described as 'rasta hattan'. Now this is obviously a document between third parties and a mere description of boundaries therein cannot be considered to be a relevant piece of evidence as against the plaintiffs in this suit. It may however be mentioned that in this very document, another street, which formed the boundary of the house on another side was described as 'shara-e-am' (public thoroughfare), while the roofs are merely referred to as 'rasta hattan'. Evidently therefore, even the executants did not look upon the latter as a 'shara-e-am' (public thoroughfare).

The other document relied upon by the learned District Judge is a mortgage deed Ex. D.5, in which the roofs are similarly referred to as 'rasta hattan'. This document is attested by Gian Chand, one of the present plaintiffs. But it is well established that an attesting witness cannot be presumed, from the mere fact of attestation, to be aware of the contents of the document, much less to a mere recital of

boundaries: 14 Lah 369.¹ I am therefore of opinion that the learned District Judge has also erred in relying on Exs. D.4 and D.5.

Excluding Exs. D.4 and D.5 and taking into consideration the judgment of Mr. Rose of the year 1914, and P/3, the point for decision is whether the evidence in this case is sufficient to justify a finding that the roofs in question form a public thoroughfare. To prove that the roofs form a public thoroughfare, it is necessary to have evidence as to their dedication for public use, express or implied. Admittedly, there is no evidence of any express dedication in this case and the only question is whether the dedication should be inferred from mere user.

There is no doubt evidence of respectable witnesses on the record to the effect that the roofs in question have been used by pedestrians for access to the neighbouring public streets for a long time. But such user does not necessarily raise a presumption as to dedication in every case: see (1914) A C 338.² In every case of this type there must be an *animus dedicandi*, an intention to dedicate, of which the user by the public is mere evidence and no more: *of.* (1843) 11 M & W 827.³ The question must therefore be decided with due regard to all the circumstances of the case. The facts of the present case are very peculiar. The shops in question belong to different persons. There is no evidence to show that they belonged to one person at any time as suggested. Roofs of houses are not ordinarily meant to be used as a public road and it is difficult to presume or infer that the owners of those shops may have intended to dedicate the roofs for any such user. Any such user would be wholly inconsistent with the right of the owners to make use of the roofs for ordinary purposes and also for building an upper storey, etc., when required. In addition to these facts, we have also the evidence furnished by the judgment of Mr. Rose of the year 1914 and P/3, which show that even the predecessors of the defendant did not look upon these roofs as forming a thoroughfare, at the time of the litigation of 1914 and also in 1918, when P/3 was executed. It is not disputed that Ali Bux did build an

1. Fazal Hussain v. Jiwan Shah, A I R 1933 Lah 551=141 I O 454=14 Lah 369=84 P L R 196.

2. Folkestone Corporation v. Brookman, (1914) A C 338=83 L J K B 745=110 L T 834=78 J P 273=12 L G R 934=30 T L R 297.

3. Poole v. Huskinson, (1843) 11 M & W 827.

upper storey on his roof, and there was thus an interruption of the user of the alleged public road. A single act of interruption, it has been said, is of much more weight on the question of intention to dedicate than many acts of enjoyment: per Parke B in (1843) 11 M & W 827.³

After carefully considering all the facts, it seems to me that it would not be proper to infer dedication of the roofs for use as a public thoroughfare. I may note here that there was an issue as to easement, but no right of easement has now been relied on. I accordingly accept both the appeals and modify the decrees of the learned District Judge to the extent of adding a relief restraining the defendant from using the roofs of the plaintiffs' shops as a public road for giving access to the public streets on either side. In view of all the circumstances, I grant the plaintiffs in each case only half the costs throughout.

T.M./D.S.

Appeals accepted.

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ADDISON AND DIN MOHAMMAD JJ.

Jiwan Singh—Defendant—Appellant.
v.

Dewan Radhakishen, Plaintiff and another, Defendant—Respondents.

Letters Patent Appeal No. 80 of 1936, Decided on 1st February 1937, from decree of Jai Lal J., D/. 5th March 1936, reported in *A I R 1936 Lah 747*.

Limitation Act (1908), Arts. 61, 96 and 120—Promissory note by R and N in favour of J and M. J alone realizing whole amount—Subsequent suit by J and M on basis of promissory note—Suit decreed for M only to extent of his half share—Suit by R to recover from J amount paid to M—Suit held was governed by Art. 61 or Art. 120 but not by Art. 96.

R and N borrowed certain amount on a promissory note from J and M. J alone realized the amount. Subsequently J and M brought a suit against R and N on the basis of the promissory note. As J had no authority to receive payment on behalf of M, the suit was dismissed to the extent of half the claim but was decreed in favour of M to the extent of half the claim. Thereupon R brought a suit against J to recover the amount paid to M on the ground that he had been compelled to pay it twice:

Held that the suit fell under S. 70, Contract Act, and was governed by Art. 61 or Art. 120, Lim. Act, and not by Art. 96: *Case law discussed.*
[P 101 C 1]

Achhru Ram — for Appellant.

Mehr Chand Mahajan—for Respondents.

Addison J.—On 16th February 1919, Radha Kishen and Narain Kishen bor-

rowed Rs. 5,000 on a promissory note from Jiwan Singh and Milkhi Chand. On 27th May 1919, Jiwan Singh alone realized Rs. 5,000 on account of this promissory note from the debtors by means of a draft on them. In 1925 Jiwan Singh and Milkhi Chand sued Radha Kishen and Narain Kishen for recovery of Rs. 7,700 on the basis of the promissory note. The defence was that the promissory note had been discharged by the payment of 27th May 1919, and this defence was upheld. It was held however that Jiwan Singh had no authority to receive payment on behalf of Milkhi Chand. Consequently the suit by Jiwan Singh was dismissed to the extent of half the claim, while the suit so far as Milkhi Chand was concerned was decreed for half the amount in suit, the decree of the trial Court being dated 10th April 1926. There was an appeal to this Court which ended in dismissal on 29th January 1931. Milkhi Chand executed his decree to the extent of Rs. 1,200 up to October 1932. Thereupon the present suit was instituted by Radha Kishen to recover the sum of Rs. 1,200 from Jiwan Singh on the ground that he had been made to pay Rs. 1,200 twice over by reason of his action and was therefore entitled to a decree against him for that amount. The Courts below decreed the claim and there was an appeal to this Court on the question of limitation. A learned single Judge has held that the suit is not barred by time and dismissed the appeal. Against this decision Jiwan Singh has appealed under the Letters Patent.

The contention on behalf of the appellant is that Art. 96 applies. It is to the effect that there is three years' limitation from the date when the mistake becomes known to the plaintiff, when relief is sought on the ground of mistake. On the other hand the contention on behalf of the respondents is that Art. 61 or Art. 120 applies. Art. 61 gives three years from the date when the money is paid in a suit for money payable to the plaintiff for money paid for the defendant, while Art. 120 gives six years from when the right to sue accrues for a suit for which no period of limitation is provided elsewhere in the Schedule. A case which is nearly on all fours with the present is 13 Cal 155.¹ There one T first deposited a sum of 1. Torab Ali Khan v. Nil Ruttun Lal, (1886) 13 Cal 155.

money with a shroff in the name and to the credit of a third person but later withdrew it. The heirs of the third person sued the shroff to recover the sum deposited and obtained a decree against him, in satisfaction of which the shroff paid the money. The shroff then sued *T*, to recover the sum he had been compelled to pay under the decree of 1878. It was held that Art. 61 applied and that the plaintiff's cause of action arose at the time when he actually paid the money on 15th January 1883, and that the suit, which was instituted on 5th February 1884 was not barred by limitation. A somewhat similar case is reported in 31 P R 1904.²

Reliance was placed upon 87 I C 1017.³ There were three mortgagees of certain property. The mortgagor remitted the mortgage money by money order to the names of all the three mortgagees but the amount was received by *S* alone, who did not pay their share to the other mortgagees. A suit was subsequently brought for sale on foot of the mortgage and the Court held that payment to *S* alone did not amount to satisfaction of the mortgage deed and made a decree. Thereupon the mortgagor brought a suit to recover from the sons of *S* the amount received by *S* together with interest. It was held that the suit was governed by Art. 96 and that time began to run from the date of the judgment in the mortgage suit when the mistake was discovered. As against this, however, it was held in 4 Pat 448⁴ that in giving effect to a statute of limitation, if two Articles limiting the period for bringing a suit are wide enough to include the same cause of action and neither of them can be said to apply more specifically than the other, that Article which keeps alive rather than that which bars the right to sue should be preferred. Where therefore a patnidar brought a suit to recover from the landlord a sum of money paid in excess of the amount demandable for cess, the relief being based on mistake, it was held that Art. 62 (which corresponds to Art. 61), and not Art. 96 was applicable.

34 Mad 167⁵ dealt with a case where an agent sued to recover moneys spent by him on account of his principal. It was held that the right of the agent to recover was conferred by S. 70, Contract Act, and that he was entitled to bring the suit immediately after he had expended his own moneys, and that the Article applicable was Art. 61. It was said that that Article was not confined to cases where defendant was under a legal liability to make the payment but was also applicable to cases falling under S. 70, Contract Act. To the similar effect is A I R 1931 Lah 344.⁶ In 25 C W N 813,⁷ a case which fell within S. 70, Contract Act, it was held that Art. 120, Lim. Act, applied and not Art. 61. 133 I C 615⁸ is also somewhat in point. A mortgaged certain property to *B* for Rs. 750 in June 1921 directing *B* to pay Rs. 400 to *A*'s creditors. *B* did not pay and *A* had to pay the amount to his creditors. Thereafter *A* instituted a suit against *B* to recover the amounts paid. It was held that the suit was not governed by Art. 61 but by Art. 120. Again, in 57 Mad 347⁹ the plaintiff, who was a principal partner of a firm, sued the defendant, his sub-partner, for the recovery of that portion of the plaintiff's share of the partnership losses paid by him to the creditors of the partnership on its dissolution which the defendant was bound to contribute under a special contract. Here again it was held that Art. 120 governed the suit, and not Art. 61. In another case the Allahabad High Court in 70 I C 582¹⁰ held that where a vendee, with whom a part of the sale money is left for payment to a creditor of the vendor, failed to pay the amount and the vendor had to pay it himself and then brought a suit for damages against the vendee, the suit is governed by Art. 61. A similar case of the same Court is reported in 63 I C 87.¹¹

5. *Kandaswami Pillai v. Avayambal*, (1911) 34 Mad 167=7 I C 399=20 M L J 989.

6. *Shahbaz Khan v. Bhangl Khan*, A I R 1931 Lah 344=135 I C 177=93 P L R 1090.

7. *Upendra Krishna Mondal v. Naba Kishore*, A I R 1921 Cal 93=62 I C 615=25 C W N 813.

8. *Zaitun Aheer v. Sat Ram Singh*, A I R 1931 All 549=133 I C 615=53 All 702=1931 A L J 588.

9. *L. Seenayya v. L. Ramalingayya*, A I R 1934 Mad 12=148 I C 204=57 Mad 347=65 M L J 789.

10. *Brikant Pande v. Jamna Dhar Dube*, A I R 1922 All 409=70 I C 582.

11. *Sarju Misra v. Ghulam Husain*, (1921) 63 I C 87.

2. *Fitzgerald v. Musa*, (1904) 31 P R 1904.

3. *Ganesh Parshad v. Jot Singh*, A I R 1925 Oudh 719=87 I C 1017.

4. *Tofa Lal Das v. Molnuddin Mirza*, A I R 1925 Pat 765=93 I C 129=4 Pat 448=7 P L T 481.

It is clear therefore that whether there is an obligation to pay or whether there is a case which falls within S. 70, Contract Act, the authorities lean to the view that Art. 61 applies or that Art. 120 applies in cases such as the present, but that Art. 96 does not apply. This is a case where S. 70, Contract Act, is applicable. It is unnecessary to decide in the present case whether the better Article is Art. 61 or Art. 120 as, whichever applies, the suit is within limitation. Perhaps the better view would be that Art. 120 is the appropriate Article, as such a suit as the present falls within that Article without straining the language thereof. For the reasons given we dismiss the appeal with costs.

P.R./D.S.

*Appeal dismissed.***A. I. R. 1938 Lahore 101****JAI LAL AND BHIDE JJ.***Ramel Singh and others*

Appellants.

v.

Emperor.

Criminal Appeal No. 683 of 1937, Decided on 20th September 1937, from order of Sess. Judge, Hoshiarpur, D/- 1st June 1937.

Criminal Trial — Retracted confession — Contradictory confessions cannot be relied upon in absence of direct testimony — Fact that some policemen were interested in investigation when confessions were made is good ground for not relying upon them.

In the absence of any direct evidence, it is not safe to rely upon the retracted confessions which are contradictory to each other in material details and which have been contradicted by the direct testimony. The fact that the confessions were retracted and that when they were made some policemen were interested in the investigation of the case, is a good ground for not relying upon the confessions. [P 102 C 2]

Dr. Nand Lal — for Appellants.

Sardar Jhanda Singh for Advocate-General — for the Crown.

Jai Lal J.—The three appellants, Ramel Singh, Kirhu and Fakhru, have been convicted of the murder of Prabh Dyal on the night preceding 29th October 1936 in a village called Bhall adjoining the main road between Pathankot and Kangra in the vicinity of Shahpur. Ramel Singh and Kirhu have been sentenced to death; Fakhru, a Gujjar, who was a servant of Ramel Singh has been sentenced to transportation for life. It appears that on the morning of 29th October 1936 the body of

the deceased was noticed hanging on a tree by a lorry driver who reported the matter to the police and an enquiry was immediately started. Having regard to the position in which the body was found or for some other reasons which it is difficult to discover, the theory started during this enquiry was that the deceased had committed suicide. Mt. Pankho, mother of the deceased, and his cousin also made statements that Prabh Dyal had committed suicide. These statements were made on 31st October 1936. The body was sent to the Civil Surgeon for post mortem. His report was that the deceased had died as a result of asphyxia. In his statement in Court he was definitely of opinion that the deceased was not strangled to death but that he was hung alive on the tree. He was cross-examined at considerable length in order to enable him to agree with the theory which was subsequently propounded by the prosecution that Prabh Dyal had been throttled by three men and was hung on the tree after he had died, but the Civil Surgeon adhered to his original opinion that he was not throttled but was hung alive on the tree. At some subsequent stage, therefore, it was considered that Prabh Dyal could not have committed suicide and consequently the investigation was directed towards discovering the culprits who had caused his death.

It appears that Mt. Lachho, widow of Prabh Dyal, had been enticed away about a month previous to his death and Ramel Singh and Kirhu were considered to be the persons who had done so. She however returned to her husband after an absence of about ten days but after remaining with him for a few days she again disappeared. Prabh Dyal, it is said, after having made inquiries about her whereabouts and being unsuccessful in recovering her, filed a complaint in the Court of a Magistrate on 27th October naming Kirhu and Ramel Singh as the accused. It is however to be noted that in this complaint he stated that Kirhu had illicit intimacy with Mt. Lachho and was keeping her with criminal intention. He accused Ramel Singh of abetting this conduct of Kirhu. As I will show presently, the case for the prosecution is that it was Ramel Singh who had enticed Mt. Lachho and had contracted illicit intimacy with her and that Kirhu, the maternal uncle of Ramel Singh, was merely an abettor. On 28th October, according to the statement of Mt. Pankho,

mother of Prabh Dyal, he was called away from his house by Kirhu and the next that she heard about him was when his dead body was being taken to Dharm-sala on 29th October.

At the trial, witnesses were produced for the prosecution to show that the accused were seen with the deceased on the previous evening. That evidence has however been disbelieved by the learned Sessions Judge. One Sohnun was produced as an approver. His statement also has been disbelieved by the Sessions Judge. The conviction is based on the existence of motive and the three retracted confessions made by the three convicts before an Honorary Magistrate of Second Class at Rehlu and the testimony of Mt. Pankho that on the evening of 28th October Kirhu took the deceased with him on the pretext of compromising the affair of Mt. Lachho. It may be mentioned here that though it is alleged that Mt. Lachho was with Ramel Singh on 28th October, it appears that immediately after the discovery of the corpse of Prabh Dyal, she is said to have gone into the custody of a head constable of police and for about six months after the incident, till her recovery, she lived with Tulsi Ram, a constable, in his village. It is said that she was handed over to them by one Situ who was a cousin of the deceased and that the woman remained with Tulsi Ram because she was assured that money had been paid to Situ as her price through Rup Singh. This incident I have mentioned only to show that some policemen were vitally interested in the result of the investigation and that the fact that almost immediately after the murder Mt. Lachho went into the possession of a policeman is a matter which has some bearing on the culpability or otherwise of the present accused and on the theory of suicide which was first started.

I have no doubt on the evidence that Prabh Dyal was murdered. The theory of suicide is not under the circumstances believable. The medical evidence shows that he was hung on the tree when he was alive. At the time of the recovery of his body, his handkerchief was found in his mouth. This circumstance clearly indicates murder and not suicide. The three confessions were made by the accused before the same Magistrate and the learned Sessions Judge has in his judgment described some of the discrepancies

that exist in these three confessions and has remarked as follows :

From these confessions it is obvious that they were made by each accused according to his own choice and that Ramelu and Kirhu still hoped that there being no other evidence and Mt. Lachho having been secreted away, even these confessions might not completely condemn them.

It is clear that the confessions do not give the true circumstances of this crime. In the first instance it is stated in them that the deceased was throttled by the three appellants and the approver. The approver's evidence has been disbelieved by the Sessions Judge. According to the medical evidence there were no marks of throttling. This circumstance shows that the confessions do not contain a true statement of the circumstances under which the deceased died. It appears that after the confessions were recorded, all the three accused were remanded to police custody and not to the judicial lock-up, and before the Committing Magistrate they made an application and this application was made at a fairly early stage of the inquiry, stating that the confessions had been obtained by coercion. There is no evidence of coercion and it is not necessary to come to a finding whether there was or there was no coercion but the fact that the confessions were retracted and that when they were made some policemen were interested in the investigation of the case, is in my opinion a good ground for not relying upon the confessions specially when it has been admitted that the confessions do not agree in material details.

As to the circumstances under which Mt. Lachho left her husband's house, there are material discrepancies between the statement of Mt. Lachho and the statements of the two accused Ramel Singh and Kirhu. I consider that though there was a motive for Ramel Singh and Kirhu to cause injury to Prabh Dyal, in the absence of any direct evidence it is not safe to rely upon the retracted confessions which are contradictory to each other in material details and which have been contradicted by the direct testimony of Mt. Lachho. I may mention that Rup Singh, the head constable, who was the first, according to the prosecution case, to come into possession of the woman after the death of her husband and who is said to have disposed of her and is said to have been instrumental in selling her to Tulsi Ram, was at the time

an orderly of police officer who was investigating this case. I do not feel inclined to accept the evidence of Mt. Pankho. She contradicts the other witnesses as to the interval between the disappearance of Mt. Lachho and the murder. On the whole the guilt of the appellants has not been satisfactorily proved and I would accept their appeal, set aside their convictions and direct their release from jail forthwith.

Bhide J.—I agree.

S.C./R.K.

Appeal allowed.

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BHIDE J.

Jagta and another — Defendants — Appellants.

v.

Bugga and others, Plaintiffs and others, Defendants — Respondents.

Second Appeal No. 80 of 1936, Decided on 8th February 1937, from decree of Dist. Judge, Ludhiana, D/- 16th November 1935.

Custom (Punjab)—Adoption—Jhali Jats of village Dehlon, Ludhiana District—Right of adopted son to succeed collaterally.

Among Jhali Jats of the village Dehlon in the Ludhiana District, an adopted son is entitled to succeed collaterally in the family of his adoptive father. [P 105 C 1]

F. C. Mittal for J. N. Aggarwal —

for Appellants.

Manohar Lal —

for Respondents (Plaintiffs).

Judgment.—The sole point for decision in this second appeal is whether according to the custom governing the parties, who are Jhali Jats of the village Dehlon in the Ludhiana District, an adopted son is entitled to succeed collaterally in the family of his adoptive father. The plaintiffs alleged that they were not so entitled, while the defendants joined issue on the point and disputed the plaintiffs' claim to the property in suit. The case came up to this Court once before but was remanded to the District Judge for re-decision, on a Letters Patent Appeal, by order dated 21st February 1935. The trial Court reported after further enquiry (which was ordered by the learned District Judge) that an adopted son was entitled to succeed collaterally in the family of the adoptive father; but the learned District Judge did not accept this finding and dismissed the

appeal filed by the defendants. From this decision they have preferred a second appeal supported by the necessary certificate on the question of custom. The learned District Judge was of opinion that the onus lay clearly on the appellants to prove that the custom was as alleged by them, as it was contrary to the general custom as stated in paras. 48 and 49 of Rattigan's Digest of Customary Law and as there were two decisions of this Court relating to Jats of the Ludhiana District, in which the custom was found to be in accordance with the general custom. The Customary Law of the District, prepared by Mr. Dunnet in 1911, contains no specific rule on the precise custom in issue in the present case (*see* questions 69 and 70). The author has merely referred to two decided cases (only one of them related to Jats) and remarked 'presumably when the adopted son acquires no right of collateral succession in his adoptive family, he loses no right of collateral succession in his natural family'. As far as I can see, the answers to questions 69 and 70 contain no definite statement of custom on the point at issue in this case. The defendants-appellants proved three instances in support of the custom alleged by them; but these were considered by the learned District Judge to be insufficient to establish it.

On behalf of the appellants, it was urged that there is no 'general' custom in this province and the learned District Judge was wrong in relying on it and shifting to the defendants the onus of proof which clearly lay on the plaintiffs. In support of this contention, he relied on 17 Lah 10¹ and 17 Lah 296.² As regards the two decisions of this Court referred to by the learned District Judge, viz. 8 Lah 46³ and A I R 1929 Lah 216,⁴ it was urged that these were not in point as they related to Jats of different gotes and different localities. As regards the *riwaj-i-am* it was urged that it did not lay down any specific rule on the point at issue and was not against the appellants. Lastly, it was contended that the instances produced by

1. *Mt. Samon v. Sahu*, A I R 1935 Lah 93=161 I O 245=17 Lah 10=38 P L R 198.

2. *Kartar Singh v. Mt. Banto*, A I R 1936 Lah 804=168 I O 379=17 Lah 296=38 P L R 800.

3. *Khushi Ram v. Mangal Singh*, A I R 1926 Lah 630=96 I O 788=8 Lah 46=28 P L R 481.

4. *Dulla v. Tara Singh*, A I R 1929 Lah 216=113 I O 17.

the appellants clearly supported them and taken along with the oral evidence were sufficient to establish their case, even if the onus had been on them, especially in view of the fact that no instances were produced by the plaintiffs in support of their case.

The contention of the learned counsel for the appellants that there is no 'general' custom in this province and that the burden of proof lies on the party relying on custom is supported by the rulings cited by him; but it was urged by the learned counsel for the respondents that in view of the fact that a customary appointment of an heir merely creates a personal relation and does not transplant the adopted son into the adoptive family, the onus lay on the appellants to prove the alleged right of collateral succession in the adoptive family. In support of this contention reliance was placed by him on the reasoning adopted in the Full Bench ruling reported in 3 Lah 362.⁵ There is some force in this contention, though it is open to the criticism that custom is not matter of inferences but of fact, and if there is no 'general' custom in the province, no assistance can be gained from considering the nature or incidents of custom prevailing amongst other tribes or other localities. In the present instance, although the Customary law of the Ludhiana District does not state any precise rule on the point arising in this case, the answer to question 69 in the compilation of 1911 and the illustrations thereto show that an adopted son does not as a rule succeed to his natural father's estate as against his natural brothers. If the appointment of an heir is akin to gift and does not result in transplantation of the adopted son in the adoptive family as laid down in 3 Lah 362⁶, there is no reason why the adopted son should lose his right of succession in the natural family even in the presence of his brothers. The fact that he does lose such right shows that custom is not always logical or consistent. Its real test must therefore be found in instances. The plaintiff-respondents produced no instances in their favour. Their learned counsel has merely relied upon two reported cases, viz. 8 Lah 46³ and A I R 1929 Lah 216⁴, but these refer to Jats of different got's in other villages and are not directly in point.

The appellants, on the other hand produced three clear instances relating to Jhali Jats in support of their case, including one in their own family. The latter instance related to succession on the death of Sobha Singh when Gangu, an adopted son, was allowed to succeed collaterally (*vide* Mutation Ex. D/3 decided on 17th December 1894). The other two instances relating to Jhali Jats are from a neighbouring village called Ghorī (*see* Exs. D/11 and D/14). The fact that there are clear cut instances showing the parties concerned followed the rule of custom as alleged by the appellants, was not challenged by the learned counsel for the respondents; but he contended that the instances were few and are not sufficient to discharge the onus which lay on the appellants. However, I have already pointed out above that the Customary Law of the district does not lay down any rule on the point at issue and the presumption arising merely from the general statement as to the nature of customary adoption in 3 Lah 362⁵ cannot be considered to be very strong. It is significant that the plaintiffs have not been able to cite a single instance in support of their case. The oral evidence produced by them was of little value and they did not rely on it or even care to have it printed or typed for the purpose of this second appeal. The appellants have, on the other hand, relied on their oral evidence also and it is supported by three clear instances. The instances are few but a few clear cut instances are better than a large number of dubious ones. The parties in this case are admittedly governed by custom and the only point in dispute is the actual rule followed on the point at issue. This being the case, I do not see why a large number of instances should be insisted on. The case might have been different if there was a dispute as to whether personal law applied and a custom contrary to such personal law had to be established.

The fact that the right of collateral succession in the adoptive family has been found to exist in some cases of customary adoption cannot be disputed (*see* e. g. 3 Lah 17⁶ and other cases given under para 49, Rattigan's Digest of Customary Law). The appellants have produced a copy of an extract from the *riwaj-i-am*.

5. *Mela Singh v. Gurdas*, A I R 1922 Lah 493 = 68 I C 858 = 8 Lah 362 (F B).

6. *Waryaman v. Kanshi Ram*, A I R 1922 Lah 105 = 66 I C 309 = 8 Lah 17.

of pargana Ghungarana (in which the village of the parties is situated) prepared in 1882, which shows that the spokesman of the tribes concerned (amongst whom were some representatives of the got and the village of the parties) considered that an adopted son stood on the same footing as a natural son and hence lost his rights in the natural family (Ex. D/7). In the *riwaj-i-am* of the same pargana prepared in 1911, the custom was stated to be the same as before, though it must be said that the instances given are conflicting (Ex. D/9). In the Customary Law of the District prepared in 1911, the author has noted in the answer to question 69 that the custom varies in different villages and the uncertainty of custom about the rights of succession of the adopted son is also noticed at the end of the preface to that book. If the custom is so variable and uncertain, well ascertained instances from the Jhilli got including one from the family of the parties, even though they may be few, must obviously be given great weight. Taking into consideration all the facts stated above, the evidence produced by the appellants appears to me to be sufficient to prove that the custom amongst Jhilli Jats is as alleged by them. I therefore accept the appeal and dismiss the plaintiffs' suit, but in view of all the circumstances leave the parties to bear their costs throughout.

T.M./D.S.

Appeal accepted.

A. I. R. 1938 Lahore 105

TEK CHAND AND ABDUL RASHID JJ.

Firm Haji Ghulam Rasul Khuda Bakhsh — Assessee — Petitioners.

v.

Commissioner of Income-tax, Lahore—Respondent.

Civil Misc. No. 214 of 1937, Decided on 1st July 1937, from decision of Commissioner of Income-tax, Punjab, North West Frontier and Delhi Provinces.

Income-tax Act (1922), Ss. 26-A, 2 (14) — Registration — Income-tax authorities may go into evidence, circumstantial and direct, to determine if partnership document is genuine — Onus rests on person applying for registration.

It is open to the income-tax authorities to go into evidence, both circumstantial and direct, to determine whether the instrument of partnership is a genuine document or whether it merely embodies a bogus transaction for the purpose of evading the tax. The onus rests on the person

who applies for the registration of the firm to prove that a genuine instrument of partnership has been executed and that all the persons named therein are actual persons and not "dummies."

A firm, consisting of two partners, applied for registration of partnership in 1934 on the ground that the sons of one of the partners had been included in the partnership as partners in 1932. On the conclusion of the financial year 1932-33, the profits were not divided between different partners. The sons lived in the houses belonging to their father and all their household expenses continued to be paid by the father. Neither was there any evidence that any of the sons contributed anything towards the capital of the firm, nor was it proved that they possessed any separate property from which the losses could have been recovered :

Held that the firm consisted only of two original partners: (1927) 11 *Tax Cas* 614; 7 *I T C* 38; *A I R* 1932 *Bom* 116 and 5 *I T C* 389, *Rel. on.*
[P 106 C 2 ; P 107 C 1, 2]

Kirpa Ram Bajaj — *for Petitioners.*Jagan Nath Aggarwal and S. M. Sikri —
for Respondent.

Abdul Rashid J.—This is an application under S. 66 (3), Income-tax Act, praying that the Commissioner of Income-tax may be required to state the case of the assessee "firm Haji Ghulam Rasul Khuda Bakhsh" to this Court for the decision of the questions of law arising therein. The firm Haji Ghulam Rasul Khuda Bakhsh consisted, according to the case for the assessee, of two partners, namely the brothers Haji Ghulam Rasul and Haji Khuda Bakhsh, till 1st July 1932. Haji Ghulam Rasul had a 12/16th and Haji Khuda Bakhsh 4/16th share in the firm. On 1st July 1932 the constitution of the firm was changed and the three sons of Haji Ghulam Rasul, namely Abdul Wahid, Abdul Rahman and Abdul Ghaffar, became partners in the firm to the extent of 3/16th, 3/16th and 2/16th respectively. The share of Haji Ghulam Rasul was reduced from 12/16th to 4/16th.

On 21st March 1934 a partnership deed was executed evidencing the fact that the firm consisted of five partners, and that their shares were as specified above. On the strength of this deed of partnership an application was presented to the income-tax authorities, under S. 26-A, Income-tax Act, for the registration of the firm. The Income-tax Officer was of the opinion that the deed of partnership was a bogus one, and that the three sons of Haji Ghulam Rasul were merely 'dummies' and not real partners in the firm. The Income-tax Officer gave a number of reasons for holding that the share of Haji Ghulam Rasul was 12/16th and that his

sons were working in the firm as assistants of their father and not as real partners. On these findings the application for the registration of the firm was dismissed, and the firm was assessed to income-tax as originally constituted. Against this decision an appeal was preferred to the Assistant Commissioner of income-tax. He affirmed the decision of the Income-tax Officer, and gave additional reasons for holding that the deed of partnership did not embody a genuine transaction. The Income-tax Commissioner was approached under S. 66 (2), Income-tax Act, to refer the case of the assessee to this Court. On his refusal to do so, an application was preferred to this Court under S. 66 (3) as already mentioned.

It was contended on behalf of the assessee that the provisions of Ss. 2 (14) and 26-A, Income-tax Act, coupled with Rr. 2 to 4 framed under the Act, left no option to the income-tax authorities to refuse registration once an instrument of partnership specifying the individual shares of the partners was presented to them by the assessee. It was urged that the certificate produced by the assessee as regards the shares of the different partners must be regarded as conclusive of the matter by the income-tax authorities, and that the manner in which they could prevent evasion of taxation was to resort to the provisions of S. 48, Income-tax Act and disallow refunds in the case of persons who were not proved to be genuine partners of the firm in question.

In my opinion the contention put forward on behalf of the assessee is devoid of all force. The instrument of partnership specifying the individual shares of partners referred to in S. 26-A, Income-tax Act, means obviously a genuine instrument of partnership. If there is evidence, direct or substantial, showing the bogus nature of the so-called instrument of partnership, it is open to the income-tax authorities to refuse registration of the firm in question. Reference may be made in this connexion to the case in (1927) 11 Tax Cas 614.¹ In that case a farmer had entered into a deed of partnership with his three sons with the admitted intention of reducing the income-tax liability in respect of the profits. There were however circumstances showing that the deed of partnership did not

embody a genuine transaction between the father and the sons. In these circumstances it was held that as a partnership did not exist in fact, there was no partnership for the special purposes of the Income-tax Act.

In a case reported in 7 I T C 38,² where a deed was drawn up as a partnership deed between the assessee and his major son for avoiding income-tax, the two minor sons not being admitted to the benefits of partnership, but no capital account was opened or any capital shown as the son's contribution, it was held that there was material on which the Income-tax Officer could find as a fact that a partnership did not exist. This case was not a case of a Hindu undivided family and was not governed by S. 25-A of the Act. Reference may also be made to a Bombay case reported in 6 I T C 13.³ In that case the assessee was a Mahomedan lady, and a document was put forward for registration as an instrument of partnership between the lady and her three minor children. This document purported to show the shares of the different partners in the profits of the firm without stating the business of the firm, or its assets, or wherefrom the profits were derivable and there was no combination of property, labour or skill other than the income proposed to be shared with her children which the lady received from certain investments in shares of a large sum of money left by her father. Registration was refused by the income-tax authorities on the ground that the whole transaction was illusory and bogus and that the deed of partnership was executed for the purpose of evading income-tax only. It was held by the High Court that the circumstances showed that in point of fact there was no partnership as defined in S. 239, Contract Act.

The principle underlying all the rulings mentioned above is that it is open to the income-tax authorities to go into evidence, both circumstantial and direct, to determine whether the instrument of partnership is a genuine document or whether it merely embodies a bogus transaction for the purpose of evading the tax. These rulings are fully applicable to the facts of the present case. It appears to me, therefore, that the Income-tax Officer was fully

1. *Dickenson v. Gross*, (1927) 11 Tax Cas 614 = 187 L T 851.

2. *Abowath Brothers v. Commr. of Income-tax, Burma*, (1938) 7 I T C 88.

3. *Bai Sakinaboo In re*, A I R 1932 Bom 116 = 187 I C 908 = 34 Bom L R 100 = 6 I T C 13.

entitled to refuse registration of the firm if as a fact he found that the instrument of partnership did not embody a genuine transaction.

The next point urged by the learned counsel for the assessee is that the onus of showing that the three sons of Haji Ghulam Rasul were not partners in the firm was on the Department and that this onus had not been discharged. On this point also I do not agree with the contention put forward on behalf of the assessee. It was for the assessee, who applied for registration, to prove that a partnership in fact existed and who were the partners. In a case reported in 5 I T C 389⁴ it was claimed on behalf of the assessee that he was carrying on business in partnership, the partners being members of his family entitled to and paid a share in the profits. The Income-tax Officer was not satisfied with the evidence called in support of the contention by the assessee and assessed him as an individual on the profits of the business. It was held that the assessee having failed to discharge the onus of establishing that the business managed and controlled by him was a partnership, he was rightly assessed as an individual on the profits of the business. The onus would thus rest on the person who applies for the registration of the firm to prove that a genuine instrument of partnership has been executed and that all the persons named therein are actual persons and not "dummies".

In the present case it was alleged by the assessee that the three sons of Ghulam Rasul had become partners on 1st July 1932. No deed of partnership was, however, executed till 21st March 1934. No application for the registration of the firm was made till 20th March 1934. On the conclusion of the financial year 1932-33, the profits were not divided between the different partners. A division of profits took place on 31st March 1934, and a sum of Rs. 12,776 is alleged to have fallen to the shares of the three sons of Ghulam Rasul. They are alleged to have withdrawn their entire profits on the same day. No evidence has however been tendered to show what became of the profits in the hands of Abdul Wahid, Abdul Rahman and Abdul Ghaffar. The three sons of Ghulam Rasul live in the houses belonging to

their father and all their household expenses continue to be paid by Ghulam Rasul. There is no proof that any of the sons of Ghulam Rasul contributed anything towards the capital of the firm nor has it been established that they possess any separate property from which the losses, if any, could have been recovered.

The above mentioned circumstances, in my opinion, provide ample material for the finding that the firm really consists of Haji Ghulam Rasul and Haji Khuda Bakhsh only and that the three sons of Haji Ghulam Rasul are not partners in the firm but are merely assisting their father in running the business. In this view of the matter, no question of law arises in the present case. I would therefore dismiss this application. The parties will bear their own costs of these proceedings.

Tek Chand J.—I agree.

V.B.B./R.K. *Application dismissed.*

A. I. R. 1938 Lahore 107

JAI LAL AND ABDUL RASHID JJ.

Feroze Din and others — Plaintiffs —
Appellants.

v.

Hassan Din and others — Defendants
— Respondents.

First Appeal No. 2314 of 1935, Decided on 23rd February 1937, from decree of Sub.Judge, First Class, Lahore, D/- 26th July 1935.

(a) Custom (Punjab)—Alienation — Ancestral property — Limited power — Persons should be mainly agriculturists and members of village community.

A presumption in favour of a restricted power of alienation of ancestral immovable property applies only to members of agricultural tribes who are members of village communities and whose main occupation is agriculture, but not to those who have altogether drifted away from agriculture as their main occupation and have settled for good to urban life and have adopted trade, industry or service as their principal occupation and means and source of livelihood : 55 P R 1908, Rel. on. [P 109 C 1]

(b) Custom (Punjab) — Father earning on service — Land in dispute, built upon and within municipal limits — Alienation of land by father — Sons contesting alienation must prove that they are governed by custom.

Where the father of persons contesting alienation made by him was found to be a person earning his livelihood by service and the land in dispute was within municipal limits and built upon, it is for the persons contesting alienation to show that they are governed by customary law and not by personal law. [P 109 C 1]

⁴ Raghu Karson v. Commr. of Income-tax, Bihar & Orissa, (1931) 5 I T C 389.

Abdul Haye, Mela Ram and Shabbir Ahmad — *for Appellants.*

Mehr Chand Mahajan, Daulat Ram (for Mt. Rahmat Bibi) and Kahn Chand (for Forbes, Forbes Campbell & Co. Ltd.) — *for Respondents.*

Abdul Rashid J. — This appeal arises out of a suit instituted by Feroze-ud-Din, Channan Din, Fazal-ud-Din and Qamar-ud-Din, sons of Hasan Din, for a declaration to the effect that the sale of land, measuring 6 kanals and 1 marla, by means of a registered sale deed dated 14th November 1930, made by their father Hasan Din, defendant 1, in favour of Asmat Ullah, defendant 2, is unlawful, null and void and shall not affect their reversionary rights after the death of defendant 1. The land in dispute is situated in the area of Naulakha, which is a suburb of the City of Lahore, and is included within the Municipal area. It was stated in the plaint that the land in dispute was the ancestral property of Hasan Din, the father of the plaintiffs and that Hasan Din sold this property to Asmat Ullah without consideration and necessity. According to the plaint Hasan Din, the father of the plaintiffs, was a simpleton and was in the service of Asmat Ullah, defendant 2, and the sale was effected by him without necessity and consideration as undue influence was exercised on him by Asmat Ullah. Rupees 53,707.11.0 was entered as the consideration for the sale in the sale deed.

Hasan Din, defendant 1, supported the claim of his sons and pleaded that he had been in the service of defendant 2 for 15 years as his gardener on Rs. 20 a month; that no consideration passed to him and the sale was fictitious. Defendant 2 denied that the land was ancestral and pleaded that the plaintiffs were governed by Mahomedan law, as they resided in the Lahore city, were not members of any village community and did not cultivate land with their own hands. It was further pleaded by defendant 2 that the land in dispute had been mortgaged in his favour by defendant 1 by registered deeds of mortgage, dated 18th November 1902, 8th September 1912, and 2nd August 1917, and that by virtue of these mortgage deeds defendant 1 was not entitled to possession of the land till the year 2016. The equity of redemption was sold by defendant 1 to him for a sum of Rs. 500 as on the date of the sale, the equity of redemption was not

worth more than Rs. 500. Messrs. Forbes, Forbes, Campbell & Co. Ltd. were also made defendants as a part of the building erected on the land in dispute had been sold in their favour. On these pleadings the following issues were framed :

(1) Whether the plaintiffs are governed by custom ? (2) Whether the suit land is ancestral qua the plaintiffs ? (3) If the two preceding issues are found in favour of the plaintiffs, whether the alienation in question was for consideration and necessity ? (4) Is this alienation otherwise to be upheld on the ground of the same being an act of good management ? (5) Whether the plaintiffs are estopped by their conduct, omission or acquiescence ? (6) Whether the suit is a collusive one ? (7) How will the factum of the mortgages before the sale not being impugned affect this case ? (8) What relief is the plaintiff entitled to and against whom ?

The trial Court held that it had not been established that the plaintiffs were governed by Customary Law. Out of the land in dispute 2 kanals and 7 marlas were proved to be ancestral, while 3 kanals and 14 marlas were self-acquired. On issues 3 and 4 the Court came to the conclusion that the sale was for consideration and necessity and that it also amounted to an act of good management. It was further held that the three mortgages dated 18th November 1902, 8th September 1912, and 2nd August 1917, could not now be attacked by the plaintiffs owing to the expiry of limitation. On these findings the suit was dismissed. Against this decision the plaintiffs have preferred an appeal to this Court.

The first question for consideration is whether the plaintiffs are governed by Customary Law. In the year 1868 Ahman, the grandfather of the plaintiffs, owned two ghumaons of land. This land was mortgaged in favour of Sarab Dayal, son of Bulaqi Shah. The entire land owned by the father of the plaintiffs was only 6 kanals and 1 marla. This land was used prior to the year 1902 for the purposes of stacking fuel. After 1902, defendant 2 built a factory on this land. There is no proof on the record therefore that this land was ever actually cultivated either by the plaintiffs' father or his grandfather. Hasan Din, defendant 1, made a statement before the framing of the issues, in which he admitted that he lived inside the city of Lahore and that his father and grandfather had also lived inside the city. It is mentioned in the plaint itself that the father of the plaintiffs was earning his living by serving defendant 2 as a gardener and receiving Rs. 20 as his pay. Naulakha, as

mentioned already, is within the Municipal limits of Lahore. The land in dispute has been built upon and all the lands contiguous to it are also occupied by buildings. In these circumstances I am of the opinion that it would be for the plaintiffs to prove that their family was governed by custom and not by Mahomedan law. It was held in 55 P R 1908¹ that a presumption in favour of a restricted power of alienation of ancestral immovable property applies only to members of agricultural tribes who are members of village communities and whose main occupation is agriculture, but not to those who have altogether drifted away from agriculture as their main occupation and have settled for good to urban life and have adopted trade, industry or service as their principal occupation and means and source of livelihood. The following instances are relied upon by the plaintiffs in support of their contention that they are governed by the Customary Law :

(1) One Ali Gohar Arain alienated land situated in village Nawan Kot in the year 1890. His sons brought a declaratory suit to the effect that the sale by their father should not affect their reversionary rights after his death. The parties were arains and the area in dispute consisted of 71 kanals and 2 marlas of land. It was held by Mr. Mir Ibrahim, Subordinate Judge, that the parties were governed by Customary law and the plaintiffs were entitled to the decree prayed for. This instance is of no assistance to the plaintiffs as in the year 1891 village Nawan Kot and the land attached to it comprised rural property. The land was actually under cultivation and the vendor and his sons lived entirely on agriculture.

(2) In the year 1898 Mian Kamal Din made a gift of some land in favour of his sons Taj Din and Siraj Din. Mian Amin-ud-Din thereupon brought a declaratory suit to the effect that his father was not entitled to make an unequal distribution of his ancestral property by granting a part of the area to two of his sons and by depriving him of any. The suit of Mian Amin-ud-Din was decreed. The plaintiff was an arain of village Baghbanpura and the land was agricultural. This instance has no bearing on the question involved in the present case. Moreover, Baghbanpura was and is still a village and the parties

involved in the case lived solely on income from agricultural land.

(3) In the year 1912, Ibrahim sold 3 kanals and 10 marlas of land in Khubi Miran in favour of Nanak Chand. His son Mahraj Din contested the alienation and was given a decree. The parties were arains by caste and lived entirely on agriculture.

(4) An alienation made by Pir Bakhsh, arain of Rajgarh, of 40 kanals of agricultural land was set aside at the instance of his sons and his brother in the year 1914. The alienation referred to agricultural land. The parties were arains by caste and lived solely on agriculture.

(5), (6) and (7). These instances refer to agricultural land by certain arains in villages Bela Basti Ram and Bhogiwal in the years 1914 to 1919. The parties were arains by caste and their sole source of income was agriculture. Moreover, they were carrying on cultivation with their own hands.

The seven instances summarised above, in my opinion, do not in any way advance the case of the plaintiffs. None of these instances deals with arains residing inside the Lahore City. In none of these instances was the property at the time of the alienation situate within the limits of the Municipal area. In none of these instances had the land already been built upon before the alienation took place. These considerations deprive the above instances of all value. Ten witnesses were produced by the plaintiffs. They stated generally that the arains of villages Bhogiwal, Baghbanpura, Bela Basti Ram, Khubi Miran and Rajgarh were governed by the Customary Law. They were however not able to cite a single instance where any alienation made by an arain residing in Lahore City was set aside by a Court of law or challenged by the reversioners. It is established on the record that over 2500 alienations have taken place within the area of Naulakha during the last 20 or 30 years. None of these alienations has been successfully challenged by the reversioners of the alienors.

The learned counsel for the appellants relied on 26 P R 1915,² where it was held that arains residing in Lahore City who own land in the neighbourhood of the city and depend entirely upon agriculture for

1. Muhammad Hayat Khan v. Sandhe Khan, (1908) 55 P R 1908=105 P W R 1908.

2. Mohammad Din v. Ahmad Din, (1914) 1 A I R Lah 522=27 I O 577=26 P R 1915=31 P L R 1915.

their living are in matters of succession governed by agricultural custom and not by Mahomedan law. The reported case is distinguishable from the present one, as in that case it was established that the plaintiffs possessed a great deal of agricultural land which they cultivated with their own hands and made their living by agriculture. In these circumstances, the Punjab Chief Court held that the concurrent findings of the Courts below could not be upset in second appeal as arains were predominantly an agricultural tribe of the province. Reference was also made to 49 P R 1915.³ In that case it was held that although the burden of proof of a special custom contrary to personal law was on the plaintiff, yet, considering that the tribe of Gul-farosh, arains of the Lahore City, is a mere fragment of a very large body of arains who are agriculturists and follow ordinary Punjab custom, the burden should not be a very heavy one. After going through the various instances it was held that in that case the plaintiff had succeeded in establishing that there was a practice of will-making among the arains; that in making the will Mahomedan law was on important point departed from and that, therefore, the will in dispute was valid by custom. This ruling, in my opinion, has no bearing on the present case.

Reference was made by the learned counsel for the appellants to question no. 136 of the Customary Law of the Lahore District, where it is stated that a sonless proprietor cannot alienate his ancestral property by gift or bequest except as provided in the answers to questions nos. 116 to 121. Questions nos. 116 to 121 deal with gifts in favour of relatives. The provisions of the *riwaj-i-am* are applicable to agriculturists and village communities. In the present case the plaintiffs are residents of Lahore City and the land in dispute is not shown to have been used for agricultural purposes, at any rate, since 1902.

After a consideration of the entire oral and documentary evidence on the record, I have reached the conclusion that it has not been established on the present record that the family of the plaintiffs is governed by Customary Law. It is unnecessary to give any finding on the wider question whether arains living inside the City of

Lahore are governed by custom or by their personal law.

In the year 1902 Hasan Din, defendant 1 and his brother Imam Din, owned 12 kanals of vacant land, which includes the 6 kanals and 1 marla of land now in dispute. This land was mortgaged in favour of defendant 2 for a sum of Rs. 2,000. Rs. 80 per annum was payable as interest on this sum. A sum of Rs. 1,000 was received in advance on account of rent for five years at the rate of Rs. 200 per annum by the mortgagors. On 8th September 1912, the area in dispute was mortgaged for five years for a sum of Rs. 1,200 by Hasan Din, defendant 1 in favour of Asmat Ullah, defendant 2, interest was to be payable by the mortgagor at the rate of Re. 0-14-0 per cent. per mensem and compound interest was also to be charged if the interest was not regularly paid. On 2nd August 1917, the land in dispute was further mortgaged for a sum of Rs. 2,300 in favour of Asmat Ullah. The mortgagee was already in possession and he was given the right to retain possession for a period of 99 years. Interest on the mortgage debt was to be payable at the rate of Re. 0-14-0 per cent. per mensem. It is obvious that till the year 2016, Hasan Din could not claim possession of the land in dispute. On 30th September 1930, he received a sum of Rs. 500 as the price of the equity of redemption and sold the land in favour of Asmat Ullah and the sale deed was executed on 14th November 1930. The interest and principal on the basis of different mortgage deeds by the year 2016 would have amounted to considerably more than Rs. 53,707-11-0, which is stated to be the consideration for the present sale. A land which was so heavily encumbered and which could not revert to the mortgagor for a period of 99 years cannot be said to have been sold without consideration on the ground that the mortgagor only received Rs. 500 as the price of the equity of redemption.

The lower Court was therefore right in holding that the sale was made for valid consideration. No arguments were addressed to us on the question of necessity by the learned counsel for the appellants in his opening address. He tried to agitate this point during the course of his reply but was not allowed to do so. In any case, as the mortgages of the years 1902, 1912 and 1917 could not be challenged by the plaintiffs on account of limitation, it must

3. *Rahim Bakhsh v. Umar Din*, (1915) 2 A I R Lah 255=29 I C 882=49 P R 1915=243 P L R 1915.

be held that these mortgages were for consideration and necessity. Rs. 500 received as the price of the equity of redemption was, therefore, a very minor part of the consideration which passed to the vendor from the vendee. For the reasons given above, I would affirm the decision of the Court below and dismiss this appeal with costs.

Jai Lal J.—I agree.

B.D./R.K. *Appeal dismissed.*

A. I. R. 1938 Lahore 111

DALIP SINGH AND SKEMP JJ.

Mt. Gango and others — Plaintiffs —
Appellants.

v.

Mt. Hukam Kaur and others, Defen-
dants and another, Plaintiff —
Respondents.

First Appeal No. 181 of 1936, Decided on 2nd July 1937.

(a) Custom (Punjab) — Succession—Widow succeeding collaterally—After her death heirs of her husband and not those of last male holder succeed.

In a case where a widow has succeeded collaterally, after her death it is the heirs of her husband who have to be sought for and not the heirs of the last male holder of the property: *Civil Appeal No. 1090 of 1912* and *A I R 1937 Lah 468, Foll.* [P 112 C 1]

(b) Custom (Punjab) — Succession — Self-acquired property—Sansi Jats of Amritsar district—Daughters exclude collaterals of 7th degree.

Among Sansi Jats of Amritsar district, daughters exclude collaterals of the seventh degree in succession to the self-acquired property of their father: *A I R 1936 Lah 991* and *A I R 1935 Lah 408, Rel. on.* [P 112 C 2]

Harnam Singh and S. L. Puri —
for Appellants.

P. A. Bahl and M. C. Mahajan —
for Respondents 1 and 2.

Dalip Singh J. — Mt. Hukam Kaur widow of Fateh Singh gifted 5584 kanals 10 marlas of land in favour of her and Fateh Singh's daughter Mt. Malan. The plaintiffs claiming to be collaterals of Fateh Singh pleaded that as such collaterals the land being ancestral property the gift was void as against them. They further pleaded that even if the land was not ancestral they excluded the daughter from self-acquired property and therefore the gift was void as against them. Various issues were framed which do not now concern us. The trial Court held that the land was not

ancestral, that the plaintiffs were collaterals in the seventh degree of Fateh Singh but that the daughter was the next heir and the gift was therefore only an acceleration of succession and dismissed the plaintiffs' suit. The plaintiffs have come in appeal.

It has not been contested before us that the plaintiffs are seventh degree collaterals of Fateh Singh and that the land is not ancestral qua the plaintiffs. The history of the land is that one Tara Singh gifted the land to his daughter's son Dal Singh. Dal Singh had a brother Bhag Singh but he does not appear to have been included in the gift and the line of Dal Singh held this land exclusively until it came to one Bur Singh. Bur Singh's son Ganda Singh predeceased him and after Bur Singh's death the land was mutated in favour of Ganda Singh's widow Mt. As Kaur. On Mt. As Kaur's death it was mutated in favour of Mt. Hukam Kaur widow of Fateh Singh who was a lineal descendant of Bhag Singh, brother of Dal Singh. The trial Court held that the gift in favour of Dal Singh was really a gift in favour of the daughter and her issue and that, therefore, while any of the daughter's issues whether male or female were alive, the collaterals could not come in. I am unable to accept the reasoning of the trial Court, for it seems to me that if the gift had been intended to be in favour of the daughter and her issue, Bhag Singh would have been shown jointly with Dal Singh as owner of the land. On the contrary it was Dal Singh's line alone which held exclusive possession of the land in dispute and it seems to me that the fairer inference is that Tara Singh made this gift to a favourite daughter's son and not to the daughter and her issue as such.

But assuming that this was so, the next question that arises is whether on Mt. Hukam Kaur's death it is the heirs of her husband who have to be traced or the heirs of the last male holder Bur Singh. On this point which is by no means free from difficulty, we have fortunately two authorities to guide us. One is Civil Appeal No. 1090 of 1912 (*Ramal Devi's case*) where the same point arose for decision, namely, whether in a case where a widow has succeeded collaterally as it is called after her death, the heirs of her husband are to be sought or the heirs of the last male holder of the property. It was held

in that case that as the widow's right is only a fictitious extension of her husband's right, it is the heirs of the husband who should be sought for on the death of the widow. This Civil Appeal was followed in Civil Appeal No. 160 of 1935¹ by a Division Bench of this Court. I see no reason to differ from these rulings and respectfully following them I would hold that on Mt. Hukam Kaur's death it is the heirs of her husband who have to be sought for and not the heirs of Bur Singh as contended by the learned counsel for the appellants.

The next question, therefore, that arises is whether in the case of Sansi Jats of Amritsar District collaterals of the seventh degree exclude daughters to self-acquired property of their father. In the *riwaj-i-am* of the Amritsar District on which reliance is placed, certain sub-divisions of Jats were consulted qua the *riwaj-i-am* and certain others specifically mentioned were not so consulted because the number of the tribe or sub-division was under one thousand. Sansi Jats were therefore not consulted on the question of their custom in 1914. In 1865, similarly, Sansi Jats had been left out of the *riwaj-i-am* but they made a statement qua their custom which was embodied in a special *riwaj-i-am*. That *riwaj-i-am* however is silent as to the succession of daughters to self-acquired property. In these circumstances there are two Division Bench rulings from the same district, A I R 1936 Lah 991² and A I R 1935 Lah 408,³ where it was held that as there was no *riwaj-i-am* at all qua the tribe or sub-division of Jats in question, the collaterals on whom the onus lay had failed to prove that they excluded the daughters qua self-acquired property of the father. These rulings have been criticised in 17 Lah 296⁴ at pp. 302-3, but as the sub-division of Jats in that case was mentioned in the *riwaj-i-am*, the remarks on the point now before us appear to be obiter. I would therefore follow these Division Bench rulings which deal specifically with the point in question and hold that the collaterals on whom

the onus lay had not discharged it by the production of a *riwaj-i-am* which does not refer to them nor by any instances. Even if I were wrong in this decision, I would further hold that in this particular case the onus if it be held to lie on the daughter by reason of the *riwaj-i-am* is a very light one and has been discharged. The collaterals in this case were unable to produce a single instance where daughters had been excluded by collaterals of the 7th degree in succession to the self-acquired property of the father. But the daughter, on the other hand, has produced three instances where the daughters succeeded in the presence of collaterals. These instances are mentioned in the judgment of the learned trial Court at page 31 of the printed paper book. Mutation 201 at page 288 of the printed paper book shows that one daughter got the property of the father and on extinction of her line the descendants of the other daughter got it in preference to the collaterals of the father. Ex. D. W. 1/8, mutation 165, at page 241 of the printed paper-book, an instance of Khaler Jats also not mentioned as one of the tribes consulted in the *riwaj-i-am*, shows that after the widow the daughter got the land and not the collaterals. Ex. D. W. 1/10, mutation 29, printed at pages 249 and 264 of the printed paper book, shows that daughters were preferred in favour of collaterals. These three instances are in my opinion sufficient to rebut the onus if any which lay on the daughter in the circumstances and I would therefore agree with the trial Court and dismiss the appeal with costs.

Skemp J.—I concur with the order of my learned brother dismissing the appeal and generally with his reasons. I agree that on Mt. Hukam Kaur's death it is the heirs of her husband who have to be sought for; and I agree that the onus cast by the *riwaj-i-am* is discharged by the instances proved. The onus cast by the *riwaj-i-am* in the case of Jat gotis or sub-tribes who were consulted depends on the assumption that those giving the answers understood the questions, knew the custom and stated it honestly and without ulterior motive. The onus in the case of Sansi or other Jats who were not consulted depends on the further assumption that if consulted they would have given the same answers as the other gotis or sub-tribes.

R.W./R.K.

Appeal dismissed.

1. *Diwan Singh v. Natha Singh*, Reported in A I R 1937 Lah 468.

2. *Ujagar Singh v. Mt. Dyal Kaur*, A I R 1936 Lah 991=167 I O 710.

3. *Thakar Singh v. Dhan Kaur*, A I R 1935 Lah 408=157 I O 114=87 P L R 225.

4. *Kartar Singh v. Mt. Banto*, A I R 1936 Lah 804=168 I O 879 = 17 Lah 296 = 88 P L R 300.

A. I. R. 1938 Lahore 113**JAI LAL AND DALIP SINGH JJ.***Hari Shanker and another — Defendants — Appellants.*

v.

Pt. Ram Sarup, deceased, represented by Mt. Seoti—Plaintiff — Respondent.

First Appeal No. 336 of 1936, Decided on 28th September 1937, from decree of Sub.Judge, First Class, Delhi, D/- 20th August 1936.

(a) Hindu Law — Joint family — Trade — Extension of — Extended business is still ancestral business.

Where a business carried on by a father descends to his son, who extends it, that is, carries it on on a bigger scale, the business is still ancestral business and his sons acquire an interest in it on birth and in the property which is acquired out of the funds of that business as members of a joint Hindu family. [P 113 C 2 ; P 114 C 1]

(b) Hindu Law — Gift — Father's power — Power to gift portion of ancestral property to one son only extends only to moveables — Gift of immovables must be only for pious purpose.

Under Hindu law, the father's power to make a gift of ancestral property to a reasonable limit, in favour of one son to the exclusion of other sons, extends only to moveable property. In the case of immovable property the gift must be for a pious purpose. [P 114 C 1]

Shamair Chand, Parkash Chander and Qabul Chand Mital — for Appellants.

Achhru Ram and Bishen Narain — for Respondent.

Jai Lal J.—One Kallu, a Brahman of Delhi, had two sons from two different wives. The elder of these, Jagdish, was born on 1st February 1886: the younger, Ram Sarup, was born on 30th September 1893. The suit out of which this appeal has arisen was instituted by Ram Sarup for partition of the alleged joint family property, the defendants being Shib Shanker and Hari Shanker, two sons of Jagdish. The plaintiff Ram Sarup alleged that he was a member of a joint Hindu family with Jagdish and after his death with his sons and that the property in suit, which was described in the plaint, was the coparcenary property. Ram Sarup died during the pendency of the suit and is now represented by his widow, who is the respondent before us. The plea of the defendants was that there had been a separation of the joint family property in the year 1917. This plea however was taken at a late stage of the suit. They also claimed that in 1917 two items of the property in suit had been gifted by

Kallu, father of Jagdish and Ram Sarup, to Jagdish, and therefore Ram Sarup had no right to them. On the pleas, therefore, it was admitted that up to the year 1917 the parties were members of a joint Hindu family. It was admitted, and it is admitted now before us, that property no. 1 in suit is the ancestral property of the parties having been acquired by Kanhaya, father of Kallu, and also that at the time of the death of Kanhaya there was one mortgage for Rs. 1400 of two shops with possession in favour of Kanhaya which subsequently was renewed in favour of Kallu. It also appears from the evidence that Kanhaya used to do money-lending business and also earned income as a priest and by teaching military officers. Ram Sarup has stated that Kallu used to carry on the ancestral business of Kanhaya.

The learned Subordinate Judge has found that the entire property in suit (except item 11) was coparcenary property, having been acquired by Kanhaya Lal or by Kallu as the manager of the joint family and out of the nucleus which came to him from Kanhaya. With regard to the property gifted by Kallu in 1917 to Jagdish, he has held that as it was ancestral and joint family property it could not be gifted by Kallu to Jagdish, and as it has not been shown that the nature of the enjoyment of the property was changed after the gift so that Ram Sarup had notice of adverse possession of, or denial of his title by Jagdish, therefore there was no substance in the plea of the defendants that Ram Sarup's suit with regard to the gifted property was barred by time. The suit with regard to property no. 11 was dismissed.

On this appeal it is contended on behalf of the appellants Shib Shanker and Hari Shanker that the conclusion of the learned Subordinate Judge that the property acquired by Kallu was acquired out of the ancestral nucleus is not justified by any evidence on the record and that in any case Kallu was entitled to make a gift of the property acquired by him in favour of his son Jagdish and also that as the suit was instituted more than 12 years after the date of the gift, it is barred by time. Counsel has taken us through the record. It appears that Kanhaya carried on money-lending business which descended to Kallu and that Kallu extended that business, that is to say, he carried on the ancestral business but on a bigger scale.

The business therefore in his hands was ancestral business, and his sons acquired an interest in it on birth and in the property which was acquired out of the funds of that business as members of a joint Hindu family. It follows that Kallu had no power to make a gift of any portion of the coparcenary property. It has not been proved that after the gift Jagdish had separate enjoyment of the gifted property of which Ram Sarup had notice. Therefore no plea of adverse possession with regard to that property can be sustained by the defendants.

It was then contended that under the Hindu law father has power to make a gift to a reasonable limit of ancestral property in favour of one son to the exclusion of other sons; but this power extends only to moveable property. In the case of immovable property the gift must be for a pious purpose. In this case no such purpose has been shown to exist or even alleged. In my opinion therefore the conclusion of the learned Subordinate Judge that the property in dispute is joint family property having been acquired out of the ancestral nucleus is supported by evidence and by the circumstances of the case, and the defendants have not established their exclusive title to any portion of it. The preliminary decree of the learned Subordinate Judge directing partition of the property is therefore correct. I would dismiss the appeal with costs.

Dalip Singh J.—I agree.

(S.C./R.K. Appeal dismissed.

* A. I. R. 1938 Lahore 114

BHIDE J.

Ram Sarup — Defendant — Appellant.
v.

Sarnu Mal — Plaintiff — Respondent.

Second Appeal No. 431 of 1937, Decided on 3rd November 1937, from decree of Addl. Dist. Judge, Delhi, D/- 11th January 1937.

* (a) *Res judicata*—Suit by *A* against *B* — Another suit by *B* against *A* — Suits consolidated and tried together — *A*'s suit dismissed but *B*'s suit decreed — Appeal by *A* against decree in *B*'s case only — Unappealed decree does not operate as *res judicata*.

A suit was instituted by *A* against *B* for recovery of certain amount. Another suit was instituted by *B* against *A*. The two suits were consolidated and tried together as the issues were practically identical. The Court dismissed *A*'s

suit but decreed that of *B*. *A* appealed against the decree passed in *B*'s suit but did not appeal against decree passed in his own suit :

Held that the unappealed decree did not operate as *res judicata*. The existence of a contradictory decision was not fatal and it was the later decision of the highest Court that would be binding on the parties : *A I R 1927 Lah 289, Rel. on.*

[P 115 C 1]

(b) Civil P. C. (1908), O. 41, R. 27 — Additional evidence when should be admitted stated.

The legitimate occasion for the exercise of the discretion to allow additional evidence is not whenever, before the appeal is heard, a party applies to adduce fresh evidence but when on examining the evidence as it stands some inherent lacuna or defect becomes apparent : *A I R 1931 P C 143 and A I R 1937 Lah 285, Foll.*

[P 115 C 2]

J. L. Kapur — *for Appellant.*

M. C. Mahajan — *for Respondent.*

Judgment.—The material facts of the case giving rise to the present appeal are briefly as follows : A suit was instituted by a firm named Suraj Bhan Ram Sarup against Sarnu Mal for recovery of Rupees 1578.2.0 on the basis of a balance struck in a bahi account by Sarnu Mal. Another suit was instituted later by Sarnu Mal for recovery of Rs. 1450 against the firm Suraj Bhan Ram Sarup, alleging that he had paid the debt due to the firm by a hundi for Rs. 2500 and that he was himself entitled to recover a sum of Rs. 1450 from the firm. The two suits were tried together as the issues were practically identical. The trial Court dismissed Sarnu Mal's suit and decreed that of the Firm Suraj Bhan Ram Sarup. On appeal however, the learned Additional District Judge came to a contrary conclusion and dismissed the suit of the firm and decreed that of Sarnu Mal. The firm Suraj Bhan Ram Sarup has presented an appeal from the decree passed in the suit instituted by Sarnu Mal. No appeal has been presented from the decree passed in the suit instituted by the firm.

The learned counsel for the appellant raised two main points in appeal : (1) that the learned Judge of the Appellate Court erred in admitting additional evidence contrary to the principle laid down by their Lordships of the Privy Council in 10 Pat 654¹ and therefore the finding of the learned Additional District Judge that the debt due to the firm was discharged by a hundi for Rs. 2500 cannot be sustained; (2)

1. *Parsotim Thakur v. Lal Mohar Thakur*, (1931) 18 A I R P O 143=132 I O 721=10 Pat 654=58 I A 254 (P O).

that even if the finding of the learned Additional District Judge is accepted, the finding could at the most justify the dismissal of the present appellant's suit but could not sustain the decree granted against him.

The learned counsel for the respondent on the other hand urged that the decision in the appellant's own suit which was dismissed and against which he has not appealed operates as *res judicata*. He also contended that the additional evidence was rightly admitted by the learned Additional District Judge, and that his finding based thereon is final and that the decree passed against the appellant is fully justified on that finding.

It seems to me that the contention of the learned counsel for the respondent that the findings in the appellant's own suit operate as *res judicata* cannot be supported in view of the Full Bench decision in 8 Lah 384.² The two suits were consolidated and tried together and consequently the principles laid down in the Full Bench ruling are clearly applicable. It is true that the finding in the appellant's case has become final, but that fact is not fatal; for, it was held in the Full Bench ruling that the existence of another contradictory decision does not operate as *res judicata* in circumstances such as those of the present case and that it is the later decision of the highest Court that will be binding on the parties. I accordingly overrule the objection.

Coming to the question of the additional evidence admitted by the learned Additional District Judge, I note that the evidence was admitted before the arguments were heard, and before the Judge had applied his mind to all the points requiring decision and was in a position to appreciate fully the question whether admission of additional evidence was necessary and justifiable in the circumstances of the case. The only ground urged before him to which he has referred in his order admitting the evidence (see order dated 7th December 1936) is that

the finding of the lower Court would not stand if additional evidence is allowed to be let in to prove this fact (i. e. the handing over of the hundi to a notary public for presentation).

The learned Judge merely remarks that the point was important and would help

him to a just conclusion in the case. But this would not appear to be a sufficient ground for admitting additional evidence in appeal in view of the principles laid down by their Lordships of the Privy Council in 10 Pat 654.¹ As pointed out by their Lordships at p. 668 of the report :

The legitimate occasion for the exercise of this discretion is not whenever, before the appeal is heard, a party applied to adduce fresh evidence but when on examining the evidence as it stands some inherent lacuna or defect became apparent.

The provisions are not intended to help an unsuccessful litigant to patch up the weak parts of his case in appeal : *see also* A I R 1937 Lah 285.³ In view of this authority I hold that the learned Additional District Judge had no jurisdiction to admit the additional evidence in the circumstances and on the grounds on which he admitted it. It must therefore be excluded from consideration.

It was next urged by the learned counsel for the respondent that even apart from the additional evidence, the learned Additional District Judge has held Ex. P. 1 to be proved and on this finding the decree of the learned Judge is justified. This contention also does not appear to me to be correct. The finding of the learned Additional District Judge in respect of Ex. P. 1 is not given separately. He has considered Ex. P. 1 and other matters including the additional evidence and then come to the conclusion that "Sarnoo Mal did sell the hundi in satisfaction of the debt in suit".

Excluding the additional evidence, I think the finding of the trial Court on the evidence as it stood was quite sound. The learned Additional District Judge has not considered some of the points discussed by the learned Judge of the trial Court. The trial Court has given its reasons for holding the direct evidence as regards the execution of Ex. P. 1 to be unreliable and the evidence of the handwriting expert by itself inconclusive. The learned Additional District Judge gives no reasons for taking a different view on these points. He has also not considered the point that Amar Nath, the drawer of the hundi, was not produced. The mere fact that the evidence of Ram Sarup to the effect that he was out of Delhi was not considered to be reliable does not and cannot establish that Ex. P. 1 is genuine. I agree with the finding of the trial Court on the point and

2. *Mt. Lachhmi v. Mt. Bhull*, (1927) 14 A I R Lah 289=104 I O 849=8 Lah 384=28 P L R 712 (F B).

8. *Baga Singh v. Imam Din*, (1937) 24 A I R Lah 285.

on that finding it is unnecessary to consider any other points. I accept the appeal and dismiss the suit of Sarnu Mal with costs throughout.

D.S./R.K.

Suit dismissed.

A. I. R. 1938 Lahore 116

BLACKER J.

Ata Mohammed and another —

Petitioners.

v.

Khanun and others — Respondents.

Criminal Revn. Petn. No. 473 of 1937, Decided on 6th July 1937, from order of Addl Sess. Judge, Shahpur at Sargodha, D/. 25th February 1937.

Criminal P. C. (1898), S. 439—Enhancement of sentence—Petition for, by party—Policy is to dismiss such petition but rule is not hard and fast.

Although it is not the policy of the Lahore High Court to enhance sentences in criminal cases on a petition by a party, yet it is not an invariable rule and in proper cases sentence can be enhanced on the petition by a party also. [P 116 O 1]

S. L. Puri and D. R. Sawhney —

for Petitioners.

M. Sleem — *for Respondents.*

Order.—Khanun, Awrangzeb, Ata Mohamed, Mohamed Hussain and Mohammed Sharif, Awans of Khushab, were convicted by the learned Additional Sessions Judge of Shahpur, under S. 325, I. P. C. and sentenced to two years' rigorous imprisonment each. Their appeal was dismissed by me on 7th May last and the facts are given in full in my judgment in that case. The present petition is one by the complainants in the case praying for enhancement of the sentence and notice in it was issued by me on the day that I dismissed the appeal. Counsel for the convicts has raised one preliminary objection and that is that, it is not the policy of this Court to enhance sentences in criminal cases on a petition by a party. This is perfectly true, but it is not an invariable rule and in this case it is merely by chance that the order directing notice to issue to the respondents was written upon the revision petition put in by the complainants. Even if there had been no such revision, I would have issued notice in this case, of my own motion, after hearing and deciding the appeal.

It will be seen from the judgment in the appeal that the sentence of two years'

rigorous imprisonment inflicted on these appellants by the learned Additional Sessions Judge was inflicted by him in consequence of his finding that they had been acting in the exercise of their right of private defence and had only exceeded it. My finding on appeal after consideration of the circumstances was that there was no right of private defence at all and that the attack by the appellants was unprovoked and brutal. On the findings to which I have come, the Local Government, if so advised, could have put in a petition for the alteration of the conviction from S. 325 to that of a far more serious offence, and not merely for enhancement of sentence. The Crown has not taken this action but has instructed the Crown counsel to appear and support the petition for enhancement of sentence. The learned counsel for the convicts has also argued before me that as there has been no Government appeal or petition with regard to the actual conviction, that should be considered as finally settled and the accused should be regarded as having been acquitted of any offence under S. 304 or S. 302 and merely guilty under S. 325. He proceeded to argue that that being so, I should not be influenced in assessing the sentences by any consideration that the accused would have been liable to sentences such as transportation for life under S. 304 or even the capital sentence under S. 302, and that therefore I should not automatically pass the maximum sentence under S. 325. There is some force in this argument and I will certainly bear it in mind in assessing the sentences which I intend to inflict.

The third argument by the learned counsel for the convicts was that as the evidence is not clear in this case as to which of the petitioners inflicted which particular injuries, they could only be punished under S. 325 in consequence of their constructive liability under S. 149. On the other hand it cannot be denied that the act of the appellants was unprovoked, brutal and merciless. The medical evidence shows that no fewer than 70 injuries were inflicted by them on the unfortunate prosecution party, that many of these injuries were grievous and that two of their victims actually died. It is also perfectly obvious that if the learned Sessions Judge had not been misled by his erroneous finding that a right of private defence accrued to the convicts, he himself

would have passed a very much heavier sentence than that which he has passed. For these reasons I accept the petition and enhance the sentence of each of the five convicts to six years' rigorous imprisonment.

B.D./R K.

Sentences enhanced.

*** A. I. R. 1938 Lahore 117**

ADDISON AND DIN MOHAMMAD JJ.

Jodh Singh — Judgment-debtor — Appellant.

v.

Firm Bhagwan Das. Nanak Chand — Decree-holder — Respondent.

Letters Petent Appeal No. 118 of 1936, Decided on 4th February 1937, against judgment of Agha Haider J., reported in *A I R 1937 Lah 404*.

Limitation Act (1908), S. 14 (2) and Art. 182—Mortgage suit—Preliminary decree made final—Application within limitation for final decree and sale rejected—Application for execution out of time—Previous application held not step-in-aid (39 P L R 680 = *A I R 1937 Lah 404, Reversed*)—S. 14 (2) held did not help decree-holder.

In a mortgage suit, a preliminary decree was made final on 16th April 1929. On 23rd February 1932 the decree-holder put in an application under O. 34, R. 5, Civil P. C., asking the Court to pass a final decree and to sell the mortgaged property. On 19th May 1932 the application was rejected as the final decree had already been passed. On the same day, the decree-holder put in an application to execute the final decree, stating that on account of the wrong report of the Ahlmad, the decree-holder was prevented from applying for execution on 23rd February 1932. The entry in the register by the Ahlmad was correct in all respects except that the word "final" was not inserted before "decree":

Held that the step which the decree-holder contemplated by his application of 23rd February 1932 was only a step to further his suit and could not be a step-in-aid of execution: 39 P L R 680 = *A I R 1937 Lah 404, Reversed; Case law discussed.* [P 118 C 2; P 119 C 1]

Held further that the proceeding of 23rd February 1932 was in a Court which did not suffer from any defect of jurisdiction or other cause ejusdem generis. Nor could it be said that the application for final decree was for the same relief as an application to execute a final decree. S. 14 (2) therefore did not help the decree-holder.

[P 119 C 2]

Mehr Chand Mahajan, Achhru Ram and Ratan Lal Chawla — *for Appellant.*

Qabul Chand Mital — *for Respondent.*

Addison J.—On 12th March 1929 the decree-holder obtained an ex parte preliminary decree against the judgment-

debtor on the foot of a mortgage for Rs. 7000, dated 24th May 1922, for a sum of Rs. 14,000 together with costs and future interest. The judgment-debtor was directed to deposit the decretal amount in Court on or before 12th April 1929. There was a public holiday on the last date and it was therefore ordered that the case should come up for hearing on 16th April 1929 and not on 12 April 1929, notice of this being served on the parties. On 16th April 1929 both parties appeared in Court. The judgment-debtor did not deposit the decretal amount but put in an application asking the Court to set aside the ex parte decree which had been passed against him. This application was rejected by an order of that day, both parties being shown as present at the time the order was made. Another order was also made on 16th April 1929, both parties again being shown as present. This order directed the decree to be made final under the provisions of O. 34, R. 5, Civil P. C., instructions being given for a final decree to be drawn up. This was accordingly done. The order was a proper one, except that under the provisions of O. 34, R. 5 (3) an application should have been made by the plaintiff to pass a final decree. There was no written application to this effect but there may well have been an oral one. In any case, judgment was given on 16th April 1929 passing a final decree and directing a decree sheet to be prepared. The decree sheet was prepared and in the Court register the final decree was entered, but the preliminary decree of 12th March 1929 was not then entered in the register.

On 23rd February 1932 the decree-holder put in an application under O. 34, R. 5, Civil P. C., asking the Court to pass a final decree as the amount mentioned in the preliminary decree had not been paid into Court. This application was practically in the words of O. 34, R. 5. It asked for a final decree to be passed and that the mortgaged property, or a sufficient part thereof, should be sold. The words of the Code are "shall pass a final decree directing that the mortgaged property or a sufficient part thereof should be sold," and the words in the vernacular would be the usual words to convey that idea. On the same date the Ahlmad made a report to the effect that a decree had been passed. He copied the entry in the register correctly except that he did not put in the

word 'final' before 'decree'. This may well have been due to an oversight. He ended his report by stating that the applicant applied for a final decree and this was correct. Notice issued to the judgment-debtor and the Court heard the matter on 19th May 1932. The records were then before the Court and it was clear that a final decree had been already passed on 16th April 1929. Accordingly, on 19th May 1932, the Court rejected the application, as a final decree had already been passed on the date mentioned. The Court put some blame on the Ahlmad for not reporting the matter correctly, but, as has already been shown, the report was correct in all respects except that the word 'final' was not inserted before 'decree'.

On the same day, that is 19th May 1932, the decree-holder put in an application to execute the final decree. It was in the prescribed form but was not correct in every particular. For example, it gave the date of the decree as 12th March 1929, instead of 16th April 1929. In Col. 6, it was stated that a petition to make the decree final had been made on 23rd February 1932, but it was not then alleged that this was a petition for execution; while it was stated in the body of the application that on account of the wrong report of the Ahlmad the decree-holder was prevented from making an application for execution on 23rd February 1932. It may here be stated that if such an application had been made on 23rd February 1932, it would have been within the three years provided by Art. 182 of Sch. 1, whereas 19th May 1932 was beyond the three years provided.

On 20th May 1932 the Court passed an order that the application which had been made on 23rd February 1932 was for a final decree to be passed and that application had been dismissed the previous day. The question of limitation was considered and 27th May 1932 was fixed for arguments on this point without issuing notice. On this date the Court passed an order that *prima facie* the application appeared to be barred by time, but noted that the decree-holder sought to take advantage of the provisions of S. 14, Lim. Act. Notice was accordingly ordered to issue to the judgment-debtor to decide this matter, the date fixed being 21st July 1932. Service was not effected and the application was dismissed on 25th August 1932 the question of limitation being left open.

On 7th February 1935 another application for execution was made. In it again the date of the decree was given as 12th March 1929 instead of 16th April 1929. In Col. 6 an incorrect entry was made to the effect that the last application for execution was dated 23rd February 1932, which had been dismissed without any sum being realized. The application of that date was, as already shown, something else and the last application for execution was dated 19th May 1932. This application was again dismissed for default on 10th May 1935.

The last application for execution was made on 10th May 1935 the decree-holder apparently having turned up after the former one had been dismissed. In it again the date of the decree is given as 12th March 1929 but it was properly entered in Col. 6 that the last application for execution was dated 7th February 1935. The executing Court gave the decree-holder the benefit of S. 14 (2), Lim. Act, and the judgment-debtor appealed to this Court. The appeal was heard by a single Judge* who held that the application of 23rd February 1932 was also an application for execution as well as an application for a final decree, though as an application for execution it was defective; that in any case the application of 23rd February 1932 was a step-in-aid of execution; that as a corollary, an application under O. 34, R. 5, would in itself be a step-in-aid of execution; while he was also inclined to give the decree-holder the benefit of S. 14 (2), Lim. Act, though his decision was not definite in this respect. Against this decision the judgment-debtor has preferred this Letters Patent appeal.

From the application of 23rd February 1932 it is clear that it was an ordinary application under O. 34, R. 5, Civil P. C., for a final decree. Until such a decree is passed the suit is still pending and no execution can proceed. No other interpretation can be given to the document and this is our decision on the first question raised before us. The next question argued before us was whether the application of 23rd February 1932 was a step-in-aid of execution. It seems to us that there cannot be a step-in-aid of execution until execution has become possible by the passing of a final decree. This is clear from the defini-

*Reported in A I R 1937 Lah 404=39 P L R 680.

tion of "preliminary" and "final" decrees in S. 2 (2), Civil P. C., and from the provisions of O. 21, Rr. 10 and 11. The first Rule mentioned is to the effect that "where the holder of a decree desires to execute it, he shall apply to the Court which passed the decree to do so".

The step which the decree-holder contemplated by his application of 23rd February 1932 was a step to further his suit. In 17 Cal 53¹, it was held that the application contemplated was an application for the execution of a decree within the terms of S. 235, Civil P. C., that is to say setting the Court in motion to execute a decree in any manner possible. But having so set the Court in motion, any further application during the continuance of the same proceedings was an application to take some step-in aid of execution within the terms of Col. 5 of Art. 182 of the present Limitation Act. In 45 Mad 466² it was held by a Division Bench that an application to be a step-in aid of execution should be one made in a pending execution application. Again, in 37 All 226³ it was held that under the present Code there can be no doubt that the proceedings for a final decree must be held to be proceedings in a suit, that is, not in execution. In 39 All 532⁴ it was held that an application for a final decree is not an application for execution. In 40 All 203⁵ it was held that an application for a final decree is an application in the suit and not an application in execution. The same Court held in 118 I C 670⁶ that an application for the preparation of a final decree was not an application for the execution of a decree but an application governed by Art. 181 in a suit. This latter authority also went on to lay down that the time spent in proceedings for executing a preliminary decree could not be excluded under S. 14, Lim. Act from the period of limitation for making an

application for the preparation of a final decree, capable of execution, as the two reliefs were not the same. We may here dispose of the argument based on S. 14 (2), Lim. Act. It is to the effect that :

In computing the period of limitation prescribed for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of Appeal, against the same party for the same relief, shall be excluded, where such proceeding is prosecuted in good faith in a Court, which, from defect of jurisdiction, or other cause of a like nature is unable to entertain it.

Here the proceeding of 23rd February 1932 was in a Court which did not suffer from any defect of jurisdiction or other cause ejusdem generis. Nor can it be said that an application for a final decree is for the same relief as an application to execute a final decree. S. 14 (2) therefore does not help the respondent in any way. The learned counsel appearing for the respondent contended that an application for execution may still be a valid application though defective, as was held in 53 Cal 664.⁷ This is correct but the argument does not help him as in the present case there was no application for execution till 16th May 1932. He principally however relied on 44 Bom 227,⁸ 46 Bom 269,⁹ A I R 1924 Bom 71¹⁰ and A I R 1928 Mad 38.¹¹ In 44 Bom 227⁸ the decree was passed on 18th February 1899. The first application for execution was presented on 20th March 1907 ; another on 31st March 1910, and the third on 12th September 1910. On the last occasion the defence was raised that the application of 31st March 1910 was barred by time. The Court decided that the application of 12th September 1910 was in time and directed that the money due should be paid by instalments and Rs. 220 were paid to the plaintiff on 26th March 1913. Finally, there was an application put in on 19th November 1915 to recover the balance. It was dismissed as time-barred on the ground

1. Parooshrum Das v. Kallipuddo Banerjee, (1890) 17 Cal 53.

2. Kuppaswami Chettiar v. Rajagopala Iyer, (1922) 9 A I R Mad 79=70 I O 324=45 Mad 466=42 M L J 303.

3. Muhammad Masih Ullah Khan v. Jarao Bai, (1916) 2 A I R All 88 = 27 I O 771 = 37 All 226=18 A L J 807.

4. Ramji Lal v. Karan Singh, (1917) 4 A I R All 119=40 I O 424=39 All 532 = 15 A L J 448.

5. Nizam Ud-din Shah v. Bohra Bhim Sen, (1918) 5 A I R All 76 = 48 I O 870 = 40 All 203=16 A L J 85.

6. Maqbul Ahmad v. Partab Narain Singh, (1929) 16 A I R All 677=118 I O 670 = 1929 A L J 976.

7. Pitambar Jana v. Damodar Guchait, (1926) 18 A I R Cal 1077=98 I C 166 = 53 Cal 664 = 30 O W N 918=45 O L J 86.

8. Desalappa Khalilappa Desai v. Dundappa Malkappa, (1920) 7 A I R Bom 264 = 55 I O 329=44 Bom 227=22 Bom L R 76.

9. Gulappa Rudrappa v. Erava Basanagowda, (1922) 9 A I R Bom 118=63 I O 844=46 Bom 269=28 Bom L R 1013.

10. Bindu Govind Naik v. Hanmant Govind, (1924) 11 A I R Bom 71=79 I O 407.

11. Kunhammad Hajee v. Chatboth Parkun Kozhuvammal, (1928) 15 A I R Mad 88=106 I O 395.

that the decree was dead on 31st March 1910, as that application was barred by time. It was held that the application of 19th November 1915 was within time as the order made on the application of 12th September 1910 not having been reversed on appeal was valid. This decision followed a decision of the Privy Council reported in 8 I A 123,¹² where it was held that assuming that a decree was barred at the date of some order made for its execution, such order, though erroneously made, was nevertheless valid unless reversed upon appeal. These authorities are of no help in the present case.

In 46 Bom 269,⁹ a decree passed in a mortgage suit giving six months time for payment was dated 25th February 1904. On 12th June 1907, an application for execution was put in but was dismissed eventually. On 13th June 1910 another application for execution was presented for sale of the property, but it was dismissed on the ground that the plaintiff had not applied for a final decree as required by the new Code of Civil Procedure 1908. The plaintiff accordingly applied on 7th October 1912 for a final decree, but the application was dismissed for non-payment of process fees. A similar application was made on 7th November 1913, but was withdrawn later. The application under discussion was filed on 7th September 1915. It was held that the applications of 7th October 1912 and 7th November 1913, in which the plaintiff applied for a final decree were steps-in-aid of execution. The decision was based on the following grounds, namely that the application of 13th June 1910 should not have been dismissed because the plaintiff had not applied for a final decree as required by the new Code of Civil Procedure, as that Code was not retrospective and that therefore when the plaintiff was endeavouring to get an order which he had been told to get when the previous application was dismissed, he must be held to be taking steps-in-aid of his execution. It was said that this followed from the decision in 44 Bom 227,⁸ though what that decision laid down was that, if an application which was barred by time is held to be in time and that order is not appealed against, a subsequent application cannot be dismissed on the ground that

the former order was a wrong one. This of course was an elementary proposition based on the general principles of res judicata.

The matter was again considered in A I R 1924 Bom 71.¹⁰ In that case a decree was payable by yearly instalments, the first of which was payable on 31st March 1914. On failure to pay any one instalment in time, the decree allowed sale of the mortgaged property or a sufficient portion thereof to recover the amount of the instalment overdue. Each time default took place, the creditors sought to make the decree final instead of applying for sale, and final decrees were passed. Finally on 30th October 1919, the creditors again applied to make the decree final as regards the instalment due on 31st March 1917. This application was rejected on the ground that no final decree was necessary. It was nevertheless held in a later application that this application to make the decree final should be considered as a step-in-aid of execution. In this decision however it was said that an application to make a decree final may in one case be considered as a step-in-aid although in another case it may be not so. Macleod C. J. was a party to all the decisions and he qualified his remarks in 46 Bom 269⁹ in his later decision in A I R 1924 Bom 71.¹⁰ As already pointed out, 46 Bom 269⁹ was based on 44 Bom 227⁸ and 8 I A 123,¹² which do not appear to be in point. The Bombay decisions, therefore, on the whole are not very useful.

In A I R 1928 Mad 38¹¹ it was held that strictly speaking O. 34, R. 5 has no application to a compromise decree, but that where the decree-holder, by applying for a final decree, was endeavouring to get an order which he thought at the time was necessary before executing his decree, but afterwards due to better advice he gave up that attempt and applied for the execution of the decree without obtaining a final decree, such an application was a step-in-aid of execution; for he was asking the Court to make an order which was thought necessary before taking out actual execution of the decree. With all respect, this amounts to a decision that the decree-holder can take any step, whether necessary or not, and whatever that step may be, it will be counted as a step-in-aid of execution though unnecessary. This appears to us to go very far and in any case this decision has no application to the

12. *Mungul Pershad Dohit v. Grija Kant Labari*, (1882) 8 Cal 51=8 I A 123=11 O L R 113=4 Bar 249 (P O).

facts before us where there was already a final decree in existence passed in the presence of the decree-holder. Further, the decree-holder accepted the fact that the decree was made final on 16th April 1929, for he did not appeal against the decision of the Court rejecting his application of 23rd February 1932, asking for a final decree to be passed.

The learned counsel appearing for the respondent further relied on 50 Mad 403.¹³ That was a case where an application was made by a decree-holder purchaser for delivery of property purchased by him in execution, and it was held that that was a step-in aid of execution within Art. 182, Cl. 5, Lim. Act, and it was said that in order that an application by the decree-holder should serve as a step-in-aid, it was not necessary that it should be made in a pending execution application. The learned Judges followed 5 Mad 141¹⁴ and stated that in such matters the principle of *stare decisis* was applicable. This simply amounts to saying that, what had for a long time been acted upon, should be applied though of doubtful legality. The other Madras decisions on this point need not therefore be considered. He also relied on 4 Pat 202¹⁵ and certain other cases. In 4 Pat 202¹⁵ it was said that any step taken by the decree-holder to remove an obstacle thrown by the judgment-debtor in the way of the execution of the decree was a step-in-aid of execution. Where the judgment-debtor raised an objection to the execution of the decree, and the decree-holder examined a witness in order to meet the objection, it was held that this action of his was a step-in-aid of execution. Such cases however cannot help the respondent before us, for he took no step which could be called a step on 23rd February 1932. He merely applied for something which had already been done in the suit. On all grounds, therefore, we consider that the decision of the single Judge was wrong and accepting this appeal, we dismiss the application for execution as barred by time. The parties will bear their own costs throughout.

S.C./D.S.

Appeal allowed.

13. Mathonkandi Kannan v. Avvulla Haji, (1927)

14 A I R Mad 288=99 I C 677=50 Mad 403=52 M L J 1.

14. Kunbi v. Seshagiri, (1882) 5 Mad 141.

15. Sheo Sahay v. Jamuna Prasad Singh, (1925)
12 A I R Pat 459=88 I C 607=4 Pat 202=6 P L T 777.

ABDUL RASHID J.

Mohammad Hayat Muhammad Yar —
Complainant—Petitioner.
v.

Daulat Khan Saleh and others —
Accused—Respondents.

Criminal Revn. Petn. No. 822 of 1937,
Decided on 28th September 1937, from
report of Addl. Sess. Judge, Shahpur, D/-
3rd June 1937.

Criminal P. C. (1898), S. 247 — Case ad-
journd for judgment without attendance of
complainant having been specially directed—
Complainant absent on fixed day — Accused
cannot be acquitted on that ground.

Section 247 does not apply when the entire
evidence in a case has been concluded and the case
has been adjourned only for judgment without
the attendance of the complainant having been
specially directed. The order of a Magistrate
acquitting an accused on the ground of absence of
the complainant on the date fixed for judgment
cannot be sustained : A I R 1919 Cal 201, *Foll.*

[P 121 C 2; P 122 C 1]

Roop Chand — *for Petitioner.*Ved Kumar Ranade — *for Respondents.*

Order.—On 12th August 1936, Moham-
mad Hayat instituted a complaint under
S. 447, Penal Code, against Daulat and
others. The prosecution evidence was con-
cluded on 5th February 1937. Thereafter
the defence evidence was recorded. On
25th February the defence evidence was
concluded, and the case was adjourned for
pronouncing judgment to 2nd March. On
2nd March the complainant was absent.
The Magistrate acquitted the accused under
S. 247, Criminal P. C., on the ground that
the complainant was absent without any
reasonable cause.

Mohammad Hayat complainant pre-
ferred a petition for revision in the Court
of the Additional Sessions Judge, Shahpur,
praying that the order of acquittal dated
2nd March 1937 may be quashed and the
Magistrate may be ordered to proceed with
the case in accordance with law. The
learned Sessions Judge has recommended
that the order of acquittal be set aside
and the Magistrate be directed to decide
the case on the merits.

It is well settled that S. 247, Criminal
P. C., does not apply, when the entire
evidence in the case has been concluded
and the case has been adjourned only for
judgment without the attendance of the
complainant having been specially directed;

vide 46 Cal 867.¹ The order of the Magistrate acquitting the accused on the ground of the absence of the complainant cannot be sustained. I therefore accept this petition for revision, set aside the order of acquittal passed by Khan Mohammad Akhlas Khan, Magistrate, Third Class, Khushab, on 2nd March 1937, and direct him to decide the case on the merits after hearing arguments. Counsel for the parties have been directed to cause their respective clients to appear in the trial Court on 1st November 1937.

B.D / R.K.

Order set aside.

1. Girish Chandra Das v. Bhusan Das, (1919)
6 A I R Cal 201=51 I C 476=20 Cr L J 492
=46 Cal 867=29 C L J 387=23 C W N 959.

A. I. R. 1938 Lahore 122

JAI LAL J.

Mohammad Ali — Petitioner.

v.

Ladha and another — Respondents.

Criminal Revn. Petn. No. 922 of 1937,
Decided on 7th September 1937, from report
of Sess. Judge, Sialkot, D/- 16th June 1937.

Criminal P. C. (1898), S. 145—S. 145 is applicable even to case of dispossession of tenants by landlords.

The question of title does not arise before the Magistrate making an enquiry under S. 145. He is concerned with the question of possession in such proceedings. S. 145 equally covers the cases of dispossession of the tenants by their landlords.

[P 122 C 2]

K. A. Hamid — *for Petitioner.*Allah Din Malik — *for Respondents.*

Report.—According to the allegations set forth in the petition under S. 145, Criminal P. C., khasra nos. 680, 681, 682, 683 and 686 of the jamabandi of 1933-34 were shamilat deb, but they had been in possession of Mohammad Ali, the petitioner, from the time of his ancestors. A part of the land was given by Mohammad Ali to one Hussain for cultivating it under him. The respondents Ladha and Ahmad Din, sons of Umar Bakhsh who are the proprietors in the village, unlawfully turned out his tenant and cultivated the land. The petitioner therefore approached the learned Additional District Magistrate with the request that as the act of the respondents was likely to cause the breach of peace, hence action be taken under S. 145, Criminal P. C., and he be placed in possession of the property. The statement of

the petitioner was first recorded by Mr. Skeaf on 7th April 1937, when it was made over for disposal to the Magistrate Ilaga. It then came up before Lal Amar Nath, Additional District Magistrate, who further examined the petitioner and recorded an order on 12th April 1937, dismissing the petition on the ground that the land is shamilat and the applicant is not a co-sharer in the village. Consequently no case was made out for action under S. 145, Criminal P. C. The petitioner has preferred the present petition for revision.

The revenue records, i. e. the jamabandi of 1933-34, would show that Mohammad Ali was in possession of this land as a tenant under the owners of the shamilat Taraf Suja. The copies of khasra girdawaris for the year 1935-36 show that the petitioner was in possession of this land in the capacity of a tenant as khidmat guzar takla. The allegations of the petitioner were that he was dispossessed by the respondents from a part of the land which was under his possession in the capacity of the tenant, and the learned Additional District Magistrate has rejected the application on the ground that the petitioner not being an owner in the village, his application could not be entertained under S. 145, Criminal P. C. From the order of the learned Magistrate it appears that he was of the opinion that whenever a dispute is between a landlord and a tenant, S. 145, Criminal P. C., is inapplicable. But this view appears to me erroneous. S. 145 equally covers the cases of dispossession of the tenants by their landlords and in such circumstances the learned Magistrate to my mind could not summarily dismiss the application of the petitioner. I therefore recommend the case of the petitioner under S. 438, Criminal P. C., to the Hon'ble the High Court with the request that the order of the learned Additional District Magistrate be set aside and he be directed to proceed with the petition in accordance with law.

Order of the High Court.

The view of the learned Sessions Judge is correct. The question of title does not arise before the Magistrate making an inquiry under S. 145, Criminal P. C. He is concerned with the question of possession in such proceedings. I set aside the order of the Additional District Magistrate and direct him to proceed with the application

presented by the petitioner under S. 145, Criminal P. C., in accordance with law.

D.S./R.K.

Order set aside.

A. I. R. 1938 Lahore 123

BHIDE J.

Firm Durga Das Bhagwan Das —

Judgment debtor — Appellant.

v.

Peoples Bank of Northern India —

Decree-holder — Respondent.

Exn. First Appeal No. 139 of 1937, Decided on 15th October 1937, from order of Sub-Judge, First Class, Lahore, D/- 9th March 1937.

(a) Civil P. C. (1908), O. 21, R. 57 — 'Consigned to record room' is tantamount to dismissal.

Where an execution is ordered 'to be consigned to record room,' the order is tantamount to 'dismissal' of the application: *A I R 1924 Lah 645*, *A I R 1922 Lah 108* and *A I R 1919 All 194*, *Foll.* [P 126 C 1]

(b) Civil P. C. (1908), O. 21, R. 57 — Agreement between parties that attachment should subsist till decree is satisfied and execution application consigned to record room — Attachment does not end—Subsequent application for attachment and sale of same property—Property found to be sold by judgment-debtor — Decree holder failing to proceed further and application consigned to record room with note that execution incomplete—Attachment held came to an end.

Certain property was attached in execution of the decree. But in the course of further proceedings, the parties made a compromise by which the judgment-debtor was given time and it was agreed inter alia that the attachment should subsist until the decree was fully satisfied. The result was that the application was consigned to the record room. Subsequently another application praying attachment and sale of the same property was made. The property was found to have been sold by the judgment-debtor. The decree-holder failing to take any further steps, the application was consigned to the record room with a note that the execution was incomplete. The decree-holder again applied for sale of the property on the ground that the attachment still continued under the compromise deed :

Held that the application was first consigned to the record room owing to the lawful agreement between the parties and not to the default on the part of the decree-holder and consequently the provisions of O. 21, Rule 57 did not apply. But when the decree-holder subsequently failed to proceed further as he ought to have done in assertion of his rights under the agreement and allowed the application to be dismissed, the attachment came to an end. The fact that the decree-holder did so under a wrong impression as to his rights cannot help him in view of the mandatory character of the provisions of O. 21, R. 57: *A I R 1924 Mad 494 (F B)*, *Rel. on* ; *Case law referred*, [P 124 C 2 ; P 125 C 2 ; P 126 C 1]

D. N. Aggarwal — *for Appellant.*

Bhagwat Dayal — *for Respondent.*

Judgment. — The Peoples Bank of Northern India obtained a decree for about Rs. 5000 with interest against a firm, named Durga Das Bhagwan Das of Kasur, in the year 1930. Applications for execution were made from time to time and it appears that on 13th January 1933 a compromise was effected between the parties whereby the judgment-debtor agreed inter alia that the attachment of a certain factory belonging to him should subsist till the entire decretal amount was paid off. Some applications for execution were made after this compromise also, but it is unnecessary to refer to these for the purpose of this appeal. The most important application on which reliance has been placed before me is that of 20th November 1935. By this application, the decree-holder sought to attach and sell the factory referred to above which was to remain under attachment till the decretal amount was paid off according to the compromise. A warrant of attachment was issued, but a report was received that the property had already been sold by the judgment-debtor. The decree-holder's representative failed to take any further steps and as a consequence, the application for execution was consigned to the record room on 31st January 1936 with a note that the execution was incomplete. Two more applications were made for attachment and sale of certain moveable property, but these are also not material for the purpose of this appeal. Eventually a fresh application was made for the sale of the factory on 19th August 1936. It was stated in this application that the property was still under attachment by virtue of the compromise dated 13th January 1933 referred to above and therefore only an order for sale was prayed for. The judgment-debtor opposed this application on the ground that owing to the dismissal of various applications after the compromise, the attachment had ceased to subsist in accordance with the provisions of O. 21, R. 57, Civil P. C., and as the property had already been sold privately to the Central Bank of India it could no longer be sold in execution of the decree. The learned Senior Sub-Judge has however held that the attachment subsisted and the property was liable. From this decision the present appeal has been preferred.

In the final orders passed by the executing Court on the applications for execution, the words used were that the case was 'consigned to the record room'. But it was contended on behalf of the appellant that such an order amounted to a dismissal of the execution application within the meaning of O. 21, R. 57. In support of this contention, reliance was placed on A I R 1924 Lah 645,¹ 3 Lah 7² and A I R 1934 Lah 395.³ It was further contended that even if the attachment subsisted by virtue of the compromise dated 13th January 1933, the attachment ceased at least when on 20th November 1935 the decree holder sought to re-attach the property but failed to proceed further with the application for execution when a report was received that the property had been privately sold by the judgment-debtor. Reliance was placed in support of this contention on 47 Mad 483,⁴ 55 Bom 693⁵ and A I R 1935 Mad 17.⁶ The main points which appear to me to require decision in this appeal are: (1) the precise scope of O. 21, R. 57, Civil P. C., and (2) the effect of the agreement between the parties dated 13th January 1933 as regards the attachment of the factory remaining in force till the decree was fully satisfied. As regards the first point, O. 21, R. 57, runs as follows:

Where any property has been attached in execution of a decree but by reason of the decree-holder's default, the Court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a further date. Upon the dismissal of such application, the attachment shall cease.

It would appear from the above that three things are necessary for an attachment coming to an end under the rule. viz.: (1) the property in question must have been "attached in execution"; (2) the decree-holder must have committed default, owing to which the Court is unable to proceed with the application for execution; and (3) lastly that the applica-

tion for execution must have been dismissed owing to the default of the decree-holder.

As regards the first point, there is no doubt that the factory in dispute was attached in execution of the decree. But in the course of the proceedings on the application on which the attachment was made, the parties made a compromise by which the judgment-debtor was given time, and it was agreed *inter alia* that the attachment of the factory should subsist until the decree was fully satisfied. As a result of this compromise, the application for execution was consigned to the record room. It is not suggested that there was anything illegal in such an agreement or that in spite of the agreement, the attachment came to an end on the consignment to the record room of the application in the proceedings relating to which this compromise was arrived at. It seems clear enough that the dismissal of that application was due to a lawful agreement between the parties and not to any "default" on the part of the decree-holder and consequently the provisions of O. 21, R. 57, Civil P. C., could not apply to the consignment of the application to the record room, which as will be seen hereafter was equivalent to its "dismissal".

As regards subsequent applications also, it seems to my mind clear that O. 21, R. 57, Civil P. C., could not in any case apply except to those applications in which the factory in question was sought to be sold. The Rule apparently contemplates that the property must have been the subject matter of the application. For, if this were not so, the decree-holder could not proceed against the property on that application and there could be no justification for any attachment of property outside the scope of the application coming to an end. It is open to the decree-holder to proceed against any properties of the judgment-debtor he likes, and the law does not require him to proceed against all properties of the judgment-debtor when he applies for execution. Even when an attachment already subsists, as for instance by virtue of an order made under O. 38, Civil P. C., before the passing of a decree, it is not incumbent on the decree-holder to proceed against that property as soon as he applies for execution after the decree is passed. He may, if he so chooses, proceed against other properties. There is a conflict of decisions as to whether O. 21,

1. *Lakhpatt Rai v. Mayya Mal*, (1924) 11 A I R Lah 645=75 I O 824.

2. *Fateh Din Allah Ditta v. Qutab Singh*, (1922) 9 A I R Lah 108=67 I O 543=3 Lah 7.

3. *Daim Shah v. Vir Bhan*, (1934) 21 A I R Lah 395=150 I O 1058=96 P L R 241.

4. *Meyyappa Chettiar v. Chidambaram Chettiar*, (1924) 11 A I R Mad 494=79 I O 144=47 Mad 483=46 M L J 415 (F B).

5. *Harl v. Shrinivas* (1931) 18 A I R Bom 550=184 I O 972=55 Bom 693=83 Bom L R 1130.

6. *Ayyappa Naloker v. Thayammal*, (1935) 22 A I R Mad 17=154 I O 786=67 M L J 801.

R. 57, Civil P. C., applies at all to an attachment before judgment, but in the Full Bench Madras judgment, 47 Mad 483⁴ wherein it was held by the majority that the Rule applies to attachments before judgment, it was laid down that the Rule applies only when the decree-holder actually applies for sale of the property attached before judgment and not till then. The Madras view has been dissented from by the Calcutta High Court in 56 Cal 416⁷ and the Allahabad High Court has also held in 46 All 894⁸ that O. 21, Rule 57, Civil P. C., only applies to properties attached in the course of proceedings in execution and not to attachments before judgment. But even if the Madras view is taken, the only application for execution in which a prayer for attachment and sale of the factory was actually made, but which was infructuous owing to failure on the part of the decree-holder to proceed further was that of 20th November 1935. If the attachment of the factory subsisted, then, as is contended for the decree-holder, there was, of course, no need to ask for its attachment at all. Such attachment was prayed for in this application apparently under the impression that the previous attachment had come to an end under O. 21, R. 57, Civil P. C., owing to consignment to the record room or dismissal of previous applications. When a report was received that the judgment-debtor had privately sold the factory, the decree-holder took no steps to proceed further and the application for execution was consequently dismissed. The decree-holder's contention is that the application was made by the counsel for the decree-holder under an erroneous impression as regards the legal position in respect of the attachment and the attachment could not come to an end merely owing to such error. On the other hand on behalf of the appellant it is contended that the requirements of O. 21, R. 57, Civil P. C., were fulfilled and the attachment came to an end at any rate on the dismissal of this application.

After carefully considering the matter it seems to me that the contention of the learned counsel for the appellant is sound and should prevail. It may be that the

application of 20th November 1935 was made under the error of law as to the subsistence of the attachment. But there seems no doubt that the decree-holder had made up his mind to proceed against the factory in the execution proceedings taken on that application. According to the compromise, the attachment of the factory was to subsist so long as the decree was not satisfied. It was therefore open to the decree-holder to proceed against any other properties he liked in the first instance, and the attachment of the factory would certainly have subsisted as long as he did not proceed against it in execution. But once he made up his mind to proceed against it, as he did in November 1935, it is difficult to see how he can get out of the mandatory provisions of O. 21, R. 57, Civil P. C. It is true that no attachment was actually effected on the application of 20th November. But according to the position of the decree-holder himself, the previous attachment subsisted and no fresh attachment was necessary. All that the Rule says is "where any property has been attached in execution" In the present instance, there can be no doubt that the factory had been attached in execution, though this was done on a previous application and not on the application of 20th November. But would this be sufficient to take the case out of the scope of O. 21, R. 57, Civil P. C., I think not. The reasoning adopted by the majority of the Full Bench in 47 Mad 483⁴ will, I think, apply to the circumstances of this case with greater force; for the difficulty which arises in the case of an attachment 'before judgment' does not arise in the present case. 'Attachment before judgment' and its consequences are specially provided for in O. 38 and as O. 21, R. 57 requires that the property shall have been attached in execution, there is difficulty at the outset in bringing an 'attachment before judgment' within the scope of O. 21, R. 57, Civil P. C. It is chiefly on these grounds that the Allahabad and Calcutta High Courts have held that 'attachment before judgment' is not subject to the provisions of O. 21, R. 57, Civil P. C. But in the present instance the attachment in question had been made in the course of execution and there seems to be no good reason for holding that it is not subject to the provisions of O. 21, R. 57, Civil P. C. It is true that the parties had agreed that the attachment should

7. *Shibnath Singh Ray v. Saheruddin Ahmed*, (1929) 16 A I R Cal 465=119 I O 118=56 Cal 416.

8. *Bohra Akhey Ram v. Basant Lal*, (1924) 11 A I R All 860=80 I O 106=46 All 894=22 A L J 828.

subsist till the decree was fully satisfied. But I do not think the agreement can override the mandatory provisions of O. 21, R. 57, Civil P. C. It seems to me that when the decree-holder chose to proceed against the factory in his application of 20th November, and subsequently failed to proceed further (as he ought to have done in assertion of his rights under the agreement) and allowed the application to be dismissed, the attachment came to an end as a result of the provisions of O. 21, R. 57, Civil P. C. The decree-holder may have done so under a wrong impression as to his rights, but that fact cannot I think help him in view of the mandatory character of those provisions.

I may note here that although the words used in the order were that the proceedings were to be 'consigned to the record room', there is ample authority for the proposition that the order was tantamount to a 'dismissal' of the application: see A I R 1924 Lah 645,¹ 3 Lah 7² and 41 All 157,⁹ etc. The decree-holder himself understood this to be the effect of the orders of 'consignment to the record room' and filed fresh applications for execution after such orders. I accordingly accept the appeal and dismiss the application of the decree-holder for proceedings in execution against the factory, but in view of the circumstances I leave the parties to bear their costs.

S.C./R.K.

Appeal accepted.

9. Dildar Husain v. Sheo Narain. (1919) 6 A I R All 194=49 IC 113=41 All 157=17 A L J 52.

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ADDISON AND DIN MOHAMMAD JJ.

Murli Dhar — Judgment-debtor — Appellant.

v.

Firm Basheshar Lal Moti Lal through joint Receivers, Decree-holder and others, Judgment-debtors and another — Respondents.

Exn. First Appeal No. 130 of 1937, Decided on 9th November 1937, from order of Senior Sub-Judge, Hissar D/- 12th ary 1937.

(a) Civil P. C. (1908), O. 21, R. 2 (as amended by Punjab Relief of Indebtedness Act)—Payment out of Court—Judgment-debtor not applying for certification taking objection in execution—Executing Court must go into question: 39 P L R 6=A I R 1936 Lah 842=165 I O 358, Overruled.

Order 21, R. 2 has been amended by the repealing of sub-r. (3) by the Punjab Relief of Indebtedness Act and the executing Court must go into the question of payment made by the judgment-debtor out of the Court when he raises such objection in execution proceedings as the question relates to the discharge of the decree, although he has not taken advantage of the permission given him by sub-rule (2): 39 P L R 6=A I R 1936 Lah 842=165 I O 358, Overruled [P 127 O 2]

(b) Punjab Relief of Indebtedness Act (7 of 1934), S. 36—S. 36 has retrospective effect—Question of payment out of Court raised by judgment-debtor before passing of Act but pending till passing of Act—Court must decide question.

The general principle is that the alterations in procedure are always retrospective, unless there be some good reason against it. [P 128 O 1]

Section 36, Punjab Relief of Indebtedness Act, has a retrospective effect. The repealing of sub-r. (3) of Rule 2, O. 21, Civil P. C. is merely an alteration in procedure and the question of payment by judgment-debtor out of Court although raised by him before the passing of the Act must be decided by the executing Court if it is pending at the time of the passing of the Act. [P 128 O 1]

Shamair Chand and Qabul Chand —

for Appellant.

Yashpal Gandhi — *for Respondents.*

Addison J.—The decree-holder obtained on the Original Side of the Calcutta High Court a decree for a large sum of money against the judgment-debtor. This decree was transferred to the Court of the Senior Subordinate Judge, Hissar, in this province, for execution. The present execution application was made some time in 1933 and the judgment-debtor put in certain objections on the 27th July 1933. One of these objections was that the decree had been completely satisfied. Sub-rule (3) of O. 21, R. 2, Civil P. C., 1908, was omitted so far as this province was concerned by S. 36, Punjab Relief of Indebtedness Act 7 of 1934, which came into force on the 19th April 1935, when the execution was still pending and the objections had not been decided. The judgment-debtor contended that the question of complete satisfaction must be decided by the executing Court in view of the repeal of the sub-rule referred to. The executing Court has decided that this is not so and has repelled the objection. It held that an outside payment could only be certified under the provisions of sub-r. (2) of O. 21, R. 2, and that this had to be done within ninety days of the alleged payment under Art. 174, Limitation Act. Against this decision the judgment-debtor has appealed. Under S. 47, Civil P. C.,

All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

It is clear therefore that it is the duty of the executing Court to decide the question of an alleged payment towards the decree or discharge of the decree, and a separate suit does not lie for this purpose. Under O. 21, Rule 1, which is headed "Modes of paying money under decree," it is enacted that:

All money payable under a decree shall be paid as follows, namely: (a) into the Court whose duty it is to execute the decree; or (b) out of Court to the decree-holder; or (c) otherwise as the Court which made the decree directs.

Then O. 21, R. 2 deals with "Payment out of Court to decree-holder". Sub-r. (1) is to the effect that:

Where any money payable under a decree of any kind is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree, and the Court shall record the same accordingly.

Sub-rule (2) is:

The judgment-debtor also may inform the Court of such payment or adjustment and apply to the Court to issue a notice to the decree-holder to show cause . . . why such payment or adjustment should not be recorded as certified; and if . . . the decree-holder fails to show cause . . . the Court shall record the same accordingly.

Sub-r. (3), which has now been repealed, runs:

A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognized by any Court executing the decree.

The effect of these two Rules of O. 21 was that a duty was thrown upon the decree holder to certify any payment out of Court while no such duty was placed on the judgment-debtor, but he was permitted, if he so cared, to apply to the Court, within ninety days of the date of the alleged payment or adjustment, to issue a notice to the decree-holder to show cause why the payment should not be certified. If he did not do so, sub-r. (3) enacted that a payment or adjustment not so certified or recorded should not be recognized by the Court executing the decree. This meant that if the judgment-debtor failed to take advantage of sub-r. (2) of O. 21, R. 2, he was not allowed to plead payment or adjustment in the executing Court; and even if he had made payment, he had to make it again into Court. It was held however that in such cases he

could institute a suit for return of the excess payment, which the executing Court was not allowed to go into by virtue of sub-rule (3).

This sub-rule has now been repealed so that as O. 21, Rr. 1 and 2 now stand, the duty still remains upon the decree-holder to certify payments out of Court, while the judgment-debtor is permitted to apply to the Court within ninety days of the date of an alleged payment to issue a notice to the decree-holder to show cause why the payment should not be certified. If he does not take advantage of this concession, no penalty is now placed upon him such as was done by the repealed sub-r. (3). The penalty formerly was that he could not plead payment in the executing Court. That penalty having gone and as S. 47 enacts that all questions relating to the discharge of the decree must be determined by the executing Court and not by a separate suit, it would now seem that the executing Court must go into the question, although the judgment-debtor has not taken advantage of the permission given him by sub-r. (2) of O. 21, R. 2, to apply to the Court to issue a notice to the decree-holder for certification. There seems to be no escape from this conclusion and we so decide. We have been referred to A I R 1936 Lah 842,¹ a decision by a single Judge of this Court, but with all respect we are unable to agree with his decision.

It was contended however that as the decree was passed by the Calcutta High Court and was only sent for execution to this Province, it must be executed according to the law in force in Calcutta. In this connexion reliance was placed upon 36 Mad 108.² This authority however seems to us to have nothing to do with the present case. S. 40, Civil P. C., which, as enacted for the first time in the Code of 1908, runs as follows:

Where a decree is sent for execution in another Province, it shall be sent to such Court and executed in such manner as may be prescribed by rules in force in that Province.

This section is plainly worded and can mean only one thing: that the rules applicable to executions in the Punjab are the rules which apply in execution of decrees sent from the Calcutta High Court or

1. *Shadi v. Ram Ditta*, (1936) 23 A I R Lah 842 = 165 I O 358 = 89 P L R 6.

2. *Sree Krishna Doss v. Alambu Ammal*, (1913) 36 Mad 108 = 11 I O 635 = 21 M L J 777.

anywhere outside the Province. O. 21, Rr. 1 and 2, as amended by the Punjab Relief of Indebtedness Act, S. 36, are the rules in force in this Province. In fact O. 21, R. 1, is headed "Modes of paying money under decree", while S. 40 is to the effect that the decree shall be executed in such manner as may be prescribed by rules in force in the Province to which the decree is transferred. It follows that now that O. 21, R. 2 has been amended by the repealing of sub.r. (3), the amended Rule is the rule which must be applied in execution of decrees in the Punjab.

It was however contended that S. 36, Punjab Relief of Indebtedness Act, could not have a retrospective effect. It follows from what has already been said that the repealing of sub.r. (3) is merely an alteration in the procedure. Before it was repealed, the executing Court was debarred from trying a certain question which fell under S. 47, Civil P. C., if a particular act was not done by the judgment-debtor within ninety days. But the judgment-debtor still had his cause of action left by reason of the fact that he was debarred from raising the plea in the executing Court. Now that sub.r. (3) has been repealed, the question must be decided in the executing Court and not by a separate suit. Clearly therefore the enactment refers only to procedure. It is said at page 195 of Edn. 7 of Maxwell on the Interpretation of Statutes that :

Although to make a law punish that which, at the time when it was done, was not punishable, is contrary to sound principle, a law which merely alters the procedure may, with perfect propriety, be made applicable to past as well as future transactions, and no secondary meaning is to be sought for an enactment of such a kind. No person has a vested right in any course of procedure. * * * The general principle indeed seems to be that alterations in procedure are always retrospective, unless there be some good reason against it.

It is true that the objection of the judgment-debtor had been raised before the Punjab Relief of Indebtedness Act, but it was still pending when the Act came into force and the procedure bar was removed. The question therefore is one which the executing Court must decide. We accept the appeal, set aside the order of the executing Court dated 12th February 1937, and direct it to hear on the merits the question of the alleged payment and satisfaction. We make no order as to costs.

S.O./R.K.

Order set aside.

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MONROE J.

*Natha and others — Plaintiffs —
Appellants.*

v.

*Siri Ram and others — Defendants —
Respondents.*

Second Appeal No. 218 of 1937, Decided on 20th May 1937, from decree of Dist. Judge, Hissar at Gurgaon, D/- 23rd November 1936.

Second Appeal—Question of law—Question of law requiring complete re-trial for its decision cannot be allowed to be raised.

A question of law cannot be allowed to be raised in second appeal, for the decision of which it is necessary to refer the case back for further findings of fact and a complete re-trial is necessary inasmuch as it was not raised in lower Courts. [P 128 C 2]

N. C. Pandit — *for Appellants.*

Shamair Chand — *for Respondents.*

Judgment. — In this second appeal Mr. Nanak Chand Pandit for the appellants has raised a question of law, which was discussed in neither the trial Court nor the first Court of Appeal. It seems to me that in order to decide this question, namely whether Mt. Dhohan acquired a title by adverse possession to property mutated in her name on the death of her brother-in-law Dewa, it would be necessary to refer the case back for further findings of fact and to permit the defendants to give evidence about the mutation to Mt. Dhohan and other matters as well. Inasmuch as this question was not raised and cannot be decided without a complete retrial, I refuse to allow it to be raised now; at best a decision on the point in the plaintiffs' favour would affect only a part of the property in suit.

The other point argued before me was whether fields nos. 328 and 331 were rightly held to have been in possession of Dhanna. The learned Judge has presumed that they were, because his son Dewa is shown to have been in possession of them. Dhanna is shown to have been in possession of other fields involved in this suit in the 1849 Settlement, but other persons are shown as having been in possession of fields nos. 328 and 331. In view of this fact I do not see how there is any presumption that Dhanna ever was in possession of these two fields. The plaintiffs are entitled to a decree for possession of fields nos. 328 and 331 in addition to field

No. 180 for which they have obtained a decree. The appeal has failed in its more important aspect; and the appellants will pay one-half costs of the appeal to the respondent.

S.O./B.K. *Appeal partly allowed.*

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ADDISON AND DIN MOHAMMAD JJ.

Intizamia Committee Gurdwara Darbar Sahib, Amritsar — Plaintiff — Appellant.

v.

Central Bank of India Ltd., Amritsar and another — Defendants — Respondents.

First Appeal No. 76 of 1937, Decided on 17th November 1937, from decree of Sub-Judge, First Class, Amritsar, D/- 23rd November 1936.

(a) Punjab Sikh Gurdwaras Act (8 of 1925), Ss. 3 (1) and (3), 5 (1), 31, 36 and 37 — *B* taking equitable mortgage from *S* and obtaining decree on it — Mortgaged property claimed under S. 3 (1) by Shromani Parbandhak Committee — Counterclaim made under S. 5 (1) by *S* — No reference made by either to mortgage in favour of *B* — Property declared by Sikh Gurdwara Tribunal to belong to Darbar Sahib, Amritsar, and decree passed accordingly — *B* taking out execution of its decree — Committee of management, Darbar Sahib, applying for stay of execution relying on S. 37 — Execution stayed — *B* instituting suit against *S*, Shromani Parbandhak Committee, and Committee of Management for setting aside decree by tribunal — *B*'s suit decreed — *B* again starting execution proceedings — Suit by committee for declaration that decree in favour of *B* was without jurisdiction — Suit held maintainable — Court decreeing *B*'s suit held to have no jurisdiction to try it and decree in favour of *B* held to be ultra vires and of no effect.

B, a bank, obtained an equitable mortgage of certain property situate in Amritsar from *S* and on default by *S* obtained a decree on the mortgage. Subsequently a claim was made under S. 8 (1) on behalf of the Shromani Parbandhak Committee, Amritsar, in respect of the mortgaged property but no mention was made of the encumbrance in favour of *B*. The only counterclaim that was made under S. 5 (1) was by *S* and he too did not make any reference to the mortgage in favour of *B*. *B* took out execution of its decree. An application under S. 31 by the Committee of Management, Darbar Sahib, Amritsar, for stay of execution was rejected. On the petition by *S* under S. 5 (1) coming for hearing before the Sikh Gurdwara Tribunal, a compromise was arrived at under which the property was declared to belong to Darbar Sahib, Amritsar, and a perpetual right of occupation and user was conceded to *S* and a decree was passed by the tribunal in terms of the compromise. Armed with this order, the Com-

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mittee of Management again applied for stay of the execution, relying on S. 37 and the executing Court holding that the sale of the property would offend against the provisions of the Sikh Gurdwaras Act, stayed the execution. *B* then instituted a suit against *S*, Committee of Management, and the Shromani Gurdwara Parbandhak Committee for setting aside the ex parte decree of the tribunal and the Court holding that the compromise was based on fraud, decreed the suit of *B*. *B* again started the execution proceedings which were objected to on the basis of Ss. 36 and 37. The committee instituted a suit for declaration that the decree in favour of *B* was without jurisdiction, ultra vires and against the provisions of the Gurdwaras Act :

Held that the suit by the committee of management, as instituted, was competent. The decree passed in favour of *B* had no existence in law so as to affect prejudicially the decree made by the Sikh Gurdwaras Tribunal. The decree clearly contravened Ss. 30, 36 and 37 and being made in teeth of statutory prohibition was ultra vires inasmuch as the Court had no jurisdiction to grant the relief prayed for and the fact that the committee had wilfully absented itself made no difference. The jurisdiction had been assumed in utter disregard of law, and for lack of inherent jurisdiction, the decree was no decree at all. The committee was entitled under S. 44, Evidence Act, to urge in course of the execution proceedings that the decree in favour of *B* was a nullity. It was not incumbent on the Shromani Parbandhak Committee applying under S. 8 (1) to have impleaded *B* as it was not in possession of any right, title or interest which was claimed in respect of the property. For the same reason no notice under S. 8 (3) could be sent to *B*. It was *B*'s duty on the other hand under S. 5 (1) to forward to the Local Government a petition claiming the right, title or interest that it possessed to enable the Government to forward the petition to the Gurdwaras Tribunal for disposal and *B* failed to do this. [P 132 C 2; P 133 C 1; P 134 C 2; P 135 C 1]

(b) Decree — Setting aside — Person not party to decree is not entitled to have it set aside on ground of fraud.

No person who is not a party to a decree can claim to have it set aside on the ground of fraud or collusion. All that he can claim is that the decree may not affect his rights : *A I R 1930 Cal 268 and 8 I C 614, Rel. on.* [P 132 C 2]

(c) Jurisdiction — Absence of — Absence and inactivity of party does not cure want of jurisdiction.

Even the consent of parties cannot confer jurisdiction where it does not exist, much less would the absence of a party or its inactivity be sufficient to legalize what is ab initio illegal.

[P 133 C 1]

(d) Execution — Decree binding — Powers of executing Court — Court passing decree having no inherent jurisdiction to pass it — Decree has no real existence in law — Executing Court can decide whether decree was passed by Court, which for lack of jurisdiction could not pass it.

An executing Court must be able to decide whether a decree exists at all and therefore where the Court has no inherent jurisdiction to pass the so-called decree, the decree has no real existence

in law and the executing Court within those narrow limits can decide whether the decree was passed by a Court which, for lack of inherent jurisdiction, could not pass such a decree; for, that point settles the question as to whether there is an existing decree upon which the executing Court can take action: *A I R 1925 Cal 907 (F B), Foll.; A I R 1929 Lah 449; A I R 1927 Lah 651 and A I R 1928 Lah 829, Rel. on.*

[P 133 C 1]

(e) Practice—Appeal—Failure by party to appeal—Decision holds good for what it is worth—Party not appealing is not debarred from having recourse to other modes of relief available to it.

Where there is an appeal against a decision, the effect of not appealing is that the decision holds good for what it is worth. So far as concerns any other modes of relief available, the person not appealing is in no worse position than if he had appealed and failed: *24 Cal 546; 28 Cal 475 and 29 Cal 395 (P C), Rel. on.*

[P 133 C 2]

(f) Decree — Setting aside — Judgment passed without jurisdiction is void—Separate suit is maintainable for setting aside decree on ground that Court passing it had no jurisdiction to pass it.

A separate suit is maintainable for setting aside a decree on the ground that the Court passing had no jurisdiction to pass it. Judgments of a Court of law are either unassailable or assailable. To the former category belong those judgments which are pronounced by a competent Court and are free from defects otherwise. Judgments falling under the latter category may either be voidable or void. Those obtained by collusion or fraud are voidable and if not attacked they hold good, but judgments which are void have no existence in law and a judgment which is passed without jurisdiction is void: *A I R 1926 Cal 167 and A I R 1923 Pat 242, Rel. on; A I R 1915 P C 99, Ref.*

[P 134 C 1]

Bhagat Singh — *for Appellant.*

H. J. Rustomji, P. A. Bahl, Gauri Shankar and Manohar Lal Mehra — *for Respondents.*

Din Mohammad J.—The facts disclosed in this case are an apt illustration of how a legal step missed at the right moment leads to a crop of proceedings. They cover a period of about 13 years and as they are inseparably linked together, it will be necessary to set them out in this judgment however briefly it may be. On 21st November 1924, the Central Bank of India, hereinafter called the Bank, obtained an equitable mortgage of certain property situate in Amritsar from Messrs. S. S. Charaya and Company, through its representative, Santokh Singh. The mortgagors having made default in discharging their liability, the Bank obtained a decree against them on 27th May 1926. In the meantime, the Sikh Gurdwaras Act,

hereinafter referred to as the Act, came into force on 1st November 1925. Under S. 3 (1) of the Act, any Sikh could forward to the Local Government a list of all rights, titles or interests in any immovable property situated in the Punjab inclusive of the Gurdwara, which he claimed to belong to the Gurdwara, mentioning the name of that person alone who was in possession of such right, title or interest, and under S. 3 (2) the Local Government was enjoined to publish a consolidated list of all such rights, titles or interests claimed in respect of such property. Under S. 3 (3) the person in possession alone was to be notified of the claim. In pursuance of S. 3 (1) a claim was made on behalf of the Shromani Gurdwara Parbandhak Committee, Amritsar, on 27th January 1926, in respect of the mortgaged property and no mention was made of the encumbrance to which it was subject. The only counter-claim that was forwarded under S. 5 (1) of the Act was made by Santokh Singh alone, and he, too, did not make any reference to the simple mortgage that he had effected in favour of the Bank. The Bank in the normal course of events took out execution of the decree obtained by it, in reply to which an application under S. 31 of the Act was made by the Committee of Management, Darbar Sahib, Amritsar asking for stay of execution. This happened on 26th March 1928.

The executing Court rejected this application on 9th July 1928, and against that order a petition for revision was presented to this Court. A declaratory suit was also instituted by the Sikh Gurdwaras Parbandhak Committee which however was allowed to be dismissed for default on 28th April 1929. The revision referred to above was also dismissed in the absence of the parties on 27th May 1929. The petition of Santokh Singh under S. 5 (1), of the Act, came on for hearing before the Sikh Gurdwaras Tribunal, in which a compromise was effected on 17th July 1929, by which the property was declared to belong to the Darbar Sahib, Amritsar and a perpetual right of occupation and user was conceded to Santokh Singh, his lineal descendants and their families. All this happened behind the back of the Bank. The Sikh Gurdwaras Tribunal made a decree in terms of the compromise and armed with this order, the Committee of Management, Darbar Sahib, once more applied to the executing Court to stay execution as regards

the property mortgaged. The Committee placed its reliance on S. 37 of the Act, and the executing Court holding that the sale of the mortgaged property would offend against the provisions of the Act, stayed its hand and consigned the proceedings to the record room. From that order, the Bank preferred an appeal to this Court which was dismissed by Tapp J. on 18th May 1931. A Letters Patent appeal against that order also failed.

The Bank put in an application before the Sikh Gurdwaras Tribunal for setting aside the ex parte decree of 17th July 1929, but that application was dismissed. On 23rd July 1932, the Bank instituted a suit in the Court of the Subordinate Judge, First Class, Amritsar, against Santokh Singh as well as against the Committee of Management, Notified Gurdwaras of Amritsar and Shromani Gurdwara Parbandhak Committee for setting aside the decree of the Sikh Gurdwaras Tribunal dated 17th July 1929. Out of the three defendants, the Committee of Management alone appeared and contested the suit. A preliminary issue was framed as to the sufficiency or otherwise of the court-fee paid on the plaint, but on the date fixed for arguments on that issue, the Committee absented itself. The Subordinate Judge holding that the compromise was based on fraud, inasmuch as the Sikh Gurdwaras Tribunal had been kept in ignorance of the decree obtained by the Bank, decreed the suit of the Bank ex parte. This took place on 23rd December 1932.

On 17th January 1933, one Phuman Singh, an agent of Shromani Gurdwara Parbandhak Committee applied for setting aside the ex parte decree on the usual grounds, and it is very astonishing to find that these miscellaneous proceedings were protracted for more than two years. Ultimately, this application was dismissed on 4th May 1935, and an appeal against that order was dismissed in limine by a Division Bench of this Court on 6th November 1935. During this interval the Bank had again started execution proceedings which were objected to on the basis of Ss. 36 and 37 of the Act. On 11th July 1935 the executing Court expressed an opinion that execution proceedings could not be stayed in face of the decree of the Subordinate Judge dated 23rd December 1932, setting aside the decree of the Gurdwaras Tribunal, which alone was pleaded as a bar, and finding itself in an embarrassing position, it sus-

pended further proceedings to enable the "Intizamia" Committee (Committee of Management) of the Gurdwaras to seek a proper remedy in a proper Court to have the decree of the Court of Mr. Kishen Chand (dated 23rd December 1932) reversed or set aside.

It appears that taking its cue from this decision, the Intizamia Committee on 21st December 1935, instituted the suit out of which this appeal has arisen for a declaration that the said decree was without jurisdiction, ultra vires and against the provisions of the Sikh Gurdwaras Act. The Subordinate Judge who tried the case dismissed it on 23rd November 1936 and the Intizamia Committee has appealed. Before dealing with the appeal however, it will be necessary in the interests of clearness to complete the history of this litigation upto the present time. Against the order of 11th July 1935, referred to above, an appeal was preferred to this Court which came on for hearing before Jai Lal J. on 5th May 1936. The learned Judge appreciated the complicated nature of the situation but came to the conclusion that it was not open to the executing Court to hold in execution proceedings that the decree dated 23rd December 1932 was without jurisdiction and that that decree 'prevented the appellants from raising the bar created by the decision of the Tribunal'. A Letters Patent appeal was presented against that order but it was dismissed on 28th January 1937 as time-barred.

Further, Messrs. S. S. Charaya and Company raised objections to the execution of the original mortgage decree on the basis of Ss. 36 and 37 of the Act but those objections were dismissed on 3rd November 1936, and an appeal against that order was dismissed in limine by this Court on 24th February 1937. A review against that order was dismissed on 1st October 1937. Santokh Singh filed another application to have the ex parte decree of 23rd December 1932 set aside but that application too was dismissed on 27th November 1936, and an appeal against that order was dismissed in limine by this Court on 19th April 1937. In the case now before us the trial Court, while conceding that Mr. Kishen Chand, Subordinate Judge had no jurisdiction to try the suit which was instituted in his Court, came to the conclusion that all the same he had jurisdiction to decide, however wrongly, that he did possess the jurisdic-

tion which did not actually exist. It was further held that the suit did not lie in the form in which it was lodged. Counsel for the appellant has attacked both the findings of the trial Court and has urged that, inasmuch as the decree passed by Mr. Kishen Chand was a nullity for more reasons than one and the Intizamia Committee had been denied the right of raising this point in the course of execution proceedings, the suit did lie, especially as the Committee was no party to the original mortgage decree which alone was being executed and was therefore not barred by the provisions of S. 47, Civil P. C.

On the other hand, counsel for the Bank has contended that both the Shromani Gurdwara Parbandhak Committee and the Intizamia Committee, Darbar Sahib had throughout been working in collusion with Santokh Singh and that their main object was to deprive the Bank of the benefit of its decree legitimately obtained against Santokh Singh in his presence and with his consent. In the compromise entered into before the Sikh Gurdwaras Tribunal, all that the Sikhs obtained was a mere declaration of ownership without any right of alienation and that the possession and user of the property in question was for ever surrendered to Santokh Singh, his lineal descendants and their families. It is further argued that, although both these bodies had been impleaded in the suit brought by the Bank for setting aside the decree of the Sikh Gurdwaras Tribunal and they knew that the validity of the decree had been challenged on the ground of fraud and that they ran the risk of an adverse decision which might create complications in the long run, they did not pursue their defence diligently. Even after an ex parte decree had been made against them which is now being attacked as ultra vires and opposed to the provisions of the Act, they contented themselves with prosecuting a doubtful remedy under O. 9, R. 13, Civil P. C., and did not seek to have the decree reversed on appeal. It is consequently urged that the suit as lodged was not maintainable and as neither equity nor law could come to the aid of the Intizamia Committee, its suit was rightly dismissed. We have given due consideration to the arguments advanced before us, and have come to the conclusion that however strongly we may condemn the conduct of the Intizamia Committee in not properly contesting the

suit before Mr. Kishen Chand, and however reprehensible its ulterior object might be, it would be a sheer disregard of law not to grant to the Committee the relief prayed for in the present suit.

The true legal position in our view is this. Under S. 3 (1) of the Act, it was not incumbent on the applicant to have impleaded the Bank as it was not in possession of any right, title or interest which was being claimed in respect of the property on which it had only an equitable mortgage. Neither the section nor the rules enjoined it. For the same reason no notice under S. 3 (3) of the Act could be sent to the Bank. On the other hand, under S. 5 (1) it was the duty of the Bank to forward to the Local Government a petition claiming the right, title or interest that it possessed to enable the Government to forward its petition to the Gurdwaras Tribunal for disposal. This the Bank failed to do in spite of the warning it received in March 1928, when, to the execution that it had taken out, S. 31 of the Act was pleaded as a bar. So far therefore it was the Bank which was to blame and not the Committee, for the Committee could take shelter under the law but the Bank could not. Again, when even this Court had declared in 1931 that no such action could be taken by a Civil Court in pursuance of the mortgage decree in the face of S. 37 of the Act as would tend to come into conflict with the decree of the Gurdwaras Tribunal, the Bank instituted a suit of the same nature in the Court of Mr. Kishen Chand. In the first place, the relief it claimed there was illegal inasmuch as no person who is not a party to a decree can claim to have it set aside on the ground of fraud or collusion. All that he can claim is that the decree may not affect his rights : see A I R 1930 Cal 263¹ and 8 I O 614.² Secondly, in spite of the judgment of this Court referred to above, it again sought the help of a Civil Court to secure an order which could not but be inconsistent with the decision of the Tribunal. Besides S. 37 of the Act, S. 36 prohibited the entertainment by any Court of any suit the object of which was to question anything purporting to have been done by a Tribunal in exercise of any

1. *Biswambar Biswas v. Nilambar Murari*, (1930) 17 A I R Cal 263=125 I O 861=83 O W N 997.

2. *Komerappa Chetty v. Beindu*, (1910) 8 I O 614=8 Bur L T 41.

powers vested in it by the Act. In addition, a Civil Court, if satisfied under the first proviso to S. 30 of the Act that a claim that should have been made under the Act had not been so made on account of the ignorance of a party, is bound under S. 32 to frame an issue in respect of such claim and, instead of deciding the matter itself, to forward the record of the suit or proceeding to the Tribunal. The order of Mr. Kishen Chand clearly contravened the provisions of the Act, and was therefore ultra vires inasmuch as he had no jurisdiction to grant the relief prayed for in his Court. All that is contended by counsel for the respondent in this behalf is that for that order the wilful absence of the Committee was mainly responsible. But it is well established that even the consent of parties cannot confer jurisdiction where it does not exist and this being so, much less the absence of a party or its inactivity would be sufficient to legalise what was ab initio illegal.

The decree of Mr. Kishen Chand was in itself not capable of execution. It could only be used to remove the bar created by the decree of the Sikh Gurdwaras Tribunal which was being relied upon in execution of the original mortgage decree and to that use alone it was put. Under S. 44, Evidence Act, any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under Ss. 40, 41 or S. 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion. On the same reasoning, the Committee was in the course of execution proceedings competent to urge that the decree made by Mr. Kishen Chand was a nullity. It was remarked in 53 Cal 166,³ that :

An executing Court must be able to decide whether a decree exists at all, and therefore where the Court has no inherent jurisdiction to pass the so-called decree, the decree has no real existence in law and the executing Court within those narrow limits can decide whether the decree was passed by a Court which, for lack of inherent jurisdiction, could not pass such a decree ; for, that point settles the question as to whether there is an existing decree upon which the executing Court can take action.

These remarks were quoted with approval by a Division Bench of this Court

8. Gora Chand Halder v. Prafulla Kumar, (1925) 12 A I R Cal 907=89 I O 685=53 Cal 166=42 O L J 1=29 O W N 948 (F B).

in a case reported in A I R 1929 Lah 449⁴ and were prior to that followed by a single Judge of this Court in A I R 1927 Lah 651⁵ and A I R 1928 Lah 829.⁶ In this case, too, the Intizamia Committee raised objections on this score in the course of execution proceedings, but its objections were disallowed and it was referred to a regular suit to obtain a declaration to that effect. It was in these circumstances that the present suit was lodged. The Intizamia Committee preferred an appeal, too, from that order ; but, as stated above, the appeal was dismissed by this Court on the ground that it was not open to the executing Court to hold that the decree made by Mr. Kishen Chand was without jurisdiction. The effect of this remark might have been nullified on appeal under the Letters Patent as, in our view, the order of the executing Court not being one under S. 47, Civil P. C., the appeal before Jai Lal J. was incompetent. Unfortunately, no decision on that point could be given by the Letters Patent Bench as the appeal was time-barred. In this state of affairs, if the present suit also is thrown out on the ground that it does not lie, it would amount to a denial of justice. The Committee is entitled in law to have an adjudication from some Court or another on the question at issue and, after having failed to obtain the proper relief from the executing Court, the only course left to the Committee was to institute a regular suit. It is said that the Committee could lodge an appeal against the decree of Mr. Kishen Chand. No doubt it should have appealed and that would have been a better course to adopt ; but as observed in 24 Cal 546⁷ :

When there is an appeal against a decision, the effect of not appealing is that the decision holds good for what it is worth ; so far as concerns any other modes of relief available, the person not appealing is in no worse position than if he had appealed and failed.

This case went on appeal to their Lordships of the Privy Council and the judgment of the Calcutta High Court was confirmed : see 28 Cal 475.⁸ The judgment

4. Parshotam Das Nathu Ram v. Radha Kishen, (1929) 16 A I R Lah 449=120 I O 279.

5. Mir Muhammad Khan v. Surjan Mal & Co., (1927) 14 A I R Lah 651=103 I O 673.

6. Roop Narain v. Hukum Chand, (1928) 15 A I R Lah 829.

7. Pran Nath v. Mohesh Chandra, (1897) 24 Cal 546.

8. Radha Raman Shaha v. Pran Nath, (1901) 28 Cal 475=5 O W N 757 (P O).

in 24 Cal 546⁷ was adopted by the same High Court in another case which also went on appeal to their Lordships of the Privy Council and the appeal was dismissed: see 29 Cal 395.⁹

If a separate suit can be maintained by a party to the suit in the circumstances related in the two judgments referred to above, *a fortiori* such a suit is maintainable if the person instituting the suit complains that the decree was without jurisdiction. There is apparently no distinction between the two cases. In one case, the party aggrieved seeks to set aside the decree on the ground of fraud or collusion and in the other on the ground of want of jurisdiction. Judgments of a Court of law are either unassailable or assailable. To the former category belong those judgments which are pronounced by a competent Court and are free from defects otherwise. Judgments falling under the latter category may either be voidable or void. Those obtained by collusion or fraud are voidable, and if not attacked, they hold good, but judgments which are void have no existence in law and a judgment which is passed without jurisdiction is void: see A I R 1926 Cal 167¹⁰ and A I R 1923 Pat 242.¹¹ In this connection reference may also be made to 37 All 485¹² which, though not exactly in point, emphasizes the distinction between the exercise of jurisdiction and its existence and impliedly holds that if there is a total want of jurisdiction, even a party to a suit is competent to sue for the rescission and destruction of the decree obtained therein.

It is true, as remarked in A I R 1928 Lah 178,¹³ relied upon by the Court below, that a decree once obtained can only be set aside on the ground of fraud and that it cannot be set aside on the ground of mistake where the mistake was not the mistake of the plaintiff nor of the defendant but the mistake of the

Munsif who tried the suit or of the Judge who dismissed the appeal. But, in our view, that principle applies only where there is a decree in existence or, in other words, where the decree has been made by a competent Court. Where however the decree has emanated from a Court which had no jurisdiction whatsoever to make that decree, it will not be a decree at all. In the present case, the decree was made in teeth of statutory prohibition and jurisdiction was assumed in utter disregard of law. There was therefore a lack of inherent jurisdiction and the decree was no decree at all. The Intizamia Committee could ignore it altogether without taking any step to have it set aside but it could not do so in the present case in the face of the judgment of this Court dated 5th May 1936, which in unequivocal terms clothed it with the sanctity of a valid decree. The Committee had no option therefore but to seek its remedy by a separate suit and it cannot now be told that that remedy too is not available to it.

There is another way too of looking at the matter. In the course of the execution of a decree to which the Intizamia Committee was no party, an objection was made or a claim preferred by the Committee which in substance though not in form could be treated as an objection or claim under O. 21, R. 58, Civil P. C. This objection or claim, to all intents and purposes, amounted to this that the property which the Bank sought to attach did not belong to the judgment-debtor, Santokh Singh, but to the objector or claimant, the Committee, by virtue of the decree of the Sikh Gurdwaras Tribunal. This was met by a counter-objection by the decree-holder, the Bank, that the decree on which reliance was placed by the Committee no longer existed in law as it had been set aside by a later judgment of Mr. Kishen Chand. The decree-holder's objection prevailed and the objection or claim of the Committee was disallowed. The only course open to the Committee in these circumstances was to attack that order in a regular suit under O. 21, R. 63, Civil P. C., for a declaration that the property could not be attached in execution of the Bank's decree against Santokh Singh as it belonged to the Committee. This relief would have directly involved further declaration that Mr. Kishen Chand's decree was a nullity. The Committee did lodge the present suit within the prescribed time; but, instead

⁹ *Khagendra Nath Mahata v. Pran Nath*, (1902) 29 Cal 395=29 I A 99=6 C W N 473=8 Sar 266 (P O).

¹⁰ *Fazluddin Mahammad v. Khetra Ghorai*, (1926) 13 A I R Cal 167=90 I O 866=30 C W N 59.

¹¹ *Satdeo Narain v. Ramayan Tewari*, (1923) 10 A I R Pat 242=71 I O 705=2 Pat 385=4 P L T 147.

¹² *Rajwant Prasad v. Ram Ratan Gir*, (1915) 2 A I R P O 99=30 I O 849=42 I A 171=37 All 485 (P O).

¹³ *Municipal Committee, Amritsar v. Harnam Dass*, (1928) 15 A I R Lah 178=110 I O 628=9 Lah 85=29 P L R 316.

of claiming the relief in terms of O. 21, R. 63, merely sought a declaration against Mr. Kishen Chand's decree. The net result however would be the same. If once it was declared that Mr. Kishen Chand's decree was a nullity as being without jurisdiction, the conclusion that would inevitably follow would be that the interest which was being claimed by the Committee in respect of the property in suit was not liable to attachment or sale. This suit therefore would be immune from attack, being the only remedy permissible under the law.

We accordingly hold that the suit as instituted lay. We further order that the decree of Mr. Kishen Chand has no existence in law so as to affect prejudicially the decree made by the Sikh Gurdwaras Tribunal. This may work hardship on the Bank but for this result its own laches are responsible. It could easily have safeguarded its interests if it had proceeded in the manner enjoined by law and at the proper time. Not having done so, it cannot ask any Court to countenance an illegal order obtained in an unauthorised manner.

Before we conclude, we may refer to a matter which came to our notice while preparing this judgment. We found that Santokh Singh, one of the defendants in the suit, had been adjudged an insolvent by the Bombay High Court in April 1933, and was still undischarged. Despite the fact that the Bank knew that Santokh Singh had been adjudged an insolvent, and the Bank had raised an objection on that score in another case in this Court about the same time when the present suit was proceeding in the Court below, it did not raise that objection in the suit with the result that the Official Assignee, who was entitled to be brought on the record in place of Santokh Singh, was not so impleaded. The Bank did not take that objection even before us when the appeal was argued. We consequently called upon the parties to take note of the fact and to discuss the effect of the non-joinder of the Official Assignee either in the original suit or in appeal. Counsel for the appellant has relied on O. 1, R. 13, Civil P. O., where it is said that an objection as to misjoinder or non-joinder of parties, if not taken at the proper time, shall be deemed to have been waived. Counsel for the respondent has not been able to attack this position. We consequently ignore this defect. The

only result of not impleading the Official Assignee will be that he will not be bound by the decree obtained by the Committee in this case. As to how it would eventually affect the execution proceedings, it is not our function to determine.

In the result we allow this appeal, set aside the decree of the Court below and grant the plaintiff the relief prayed for. We leave the parties to bear their own costs throughout as, in our opinion, neither party appears to have conducted its case properly in the trial Court nor has it rendered any appreciable help to us in the disposal of this appeal.

R.M./R.K.

Appeal allowed.

A. I. R. 1938 Lahore 135

YOUNG C. J. AND MONROE J.

Puran — Convict — Appellant.

v.

Emperor

Criminal Appeal No. 579 of 1937, Decided on 6th October 1937, from order of Addl. Sess. Judge, Hissar, D/- 7th April 1937.

Criminal Trial — Approver resiling in Sessions Court from statement in Committing Court sent up for trial — Statement must be treated as confession and may be sufficient for conviction.

Where an approver is sent up for trial on resiling in the Sessions Court from a statement made in the committing Magistrate's Court, his statement should be treated as a confession and his conviction might follow on this confession alone without corroboration. [P 135 C 2]

A. G. Maurice — *for the Crown.*

Judgment.—This is a jail appeal. Puran was given a pardon as an approver in a murder case. He resiled from his statement in the committing Magistrate's Court when he was in the Sessions Court. He has therefore been sent up for trial.

There is the evidence of the appellant's own statement in the committing Magistrate's Court, in which he gave a detailed account of the murder. The learned Judge apparently thinks that as he was an approver, this statement, which amounts to a confession by himself, required corroboration in the same way as an approver's statement requires corroboration. This is a misunderstanding of the position. In this case it must be treated as a confession and on the confession alone conviction might follow. There is however ample corroboration of the confession. He himself pro-

duced from his house a mass of ornaments which were proved and identified to have been stolen from the house of the deceased. He produced them from a hidden place where he alone could know that the goods were. Many of the articles that he produced were blood stained and have been proved to be stained with human blood. It would be impossible to find stronger corroboration of his own confession than this.

His only point was that he had been forced by the police to make this statement. It only needs to be said that he waited about five months, until the trial in the Sessions Court, to raise this defence. It is unbelievable. There is ample evidence in this case on which to find the accused guilty. He has been mercifully and moderately dealt with by a sentence of transportation for life. The appeal is dismissed.

S.O./R.K.

Appeal dismissed.

* A. I. R. 1938 Lahore 136

JAI LAL J.

Rattan Chand and another — Objectors
— Appellants.

v.

Firm Kishen Chand-Ishar Das and another — Respondents.

Exn. First Appeal No. 1 of 1937, Decided on 28th April 1937, from order of Sub-Judge, First Class, Amritsar, D/- 7th December 1936.

(a) Transfer of Property Act (1882), S. 53— Mere fact that debts are due from transferor is not alone sufficient to establish fraudulent intention.

The mere fact that debts are due from transferor is not alone sufficient to establish a fraudulent intention; on the other hand it must be proved that at the time of the transfer, motive for the transaction was to defeat or delay the creditors. There can however ordinarily be no direct evidence of the existence of a fraudulent intention. This can be inferred from circumstances proved in the case. [P 137 C 1]

(b) Transfer of Property Act (1882), S. 53— Fraudulent intention — Prior, subsequent and contemporaneous conduct of transferor is relevant— Debtor's motive in transfer held was fraudulent.

The subsequent and the prior conduct as well as the contemporaneous conduct of the transferor are all relevant and must be considered in order to decide what his motive was in transferring the property. [P 137 C 2]

Where at the date of transfer of the property to her sons the transferor did owe money to the creditors and subsequently had to transfer her goods at

a great loss to some of the creditors and there were still creditors who had not been satisfied :

Held the inference was irresistible that her motive in transferring the property in favour of her sons was to screen it from her creditors.

[P 138 C 1]

* (c) Transfer of Property Act (1882), S. 53— Objection to sale by transferee of property from judgment-debtor — Decree-holder can contest objector's claim on ground that transfer was fraudulent without filing separate suit— To such defence rule under S. 53, T. P. Act, as to form of suit does not apply— Defence by creditor moreover can be described to be made in representative capacity.

Where at the time of a sale of the judgment-debtor's property in execution of a decree an objection to the sale is made by a party under S. 47, Civil P. C., on ground that he is owner of the property by virtue of a transfer of the property in his favour by the judgment-debtor, the decree-holder is entitled to contest the objector's claim on the ground that the property was transferred fraudulently and he need not file a separate suit to have that transfer declared fraudulent. To such a defence by the creditor, the rule contained in S. 53, T. P. Act, as to the form in which the suit is to be brought does not apply. Moreover the defence of the creditor in such a case can be described to be made in a representative capacity to apply for a rateable share in the sale proceeds if the property is sold : *A I R 1920 Mad 748 (F B), Rel. on.*

[P 138 C 1, 2]

Mehr Chand Mahajan and Shambhu Lal Puri — for Appellants.

Jagan Nath Aggarwal and Dev Raj Sawhney — for Respondents.

Judgment.—In execution of a money decree obtained by the respondent firm Kishen Chand-Ishar Das of Benares against Mt. Kahan Devi, the decree-holder, attempted to sell a house situated in Amritsar. An objection was taken to the sale of this house by the appellants, Rattan Chand and Girdhari Lal, sons of Mt. Kahan Devi, on the ground that they were the owners of the house by virtue of a gift made in their favour by Mt. Kahan Devi on 15th November 1933. The objection was under S. 47, Civil P. C., because the objectors were originally parties to the suit in which the decree had been granted but had been absolved from liability. It appears that Wishva Nath, husband of Mt. Kahan Devi, and father of the objectors, carried on business. The business in connection with which the liability was incurred in favour of the respondent by Mt. Kahan Devi was, however, started by her after her husband's business failed. Prior to the date of the gift, the dealings between the parties were on an extensive scale as it appears that during the two years preceding the gift goods worth

about Rs. 40,000 were purchased by Mt. Kahan Devi and Rs. 28,000 odd were paid back by her to the respondents. Consequently on the date of the gift about Rs. 11,000 was still owing to the respondents by Mt. Kahan Devi. Subsequently also, the business and the dealings continued and it appears that in the beginning of the year 1935 about Rs. 14,000 still remained due to the respondents from Mt. Kahan Devi. There had been transactions on both sides during the interval but the balance had always been on the side of the respondents.

The learned Subordinate Judge has disallowed the objection holding that the gift was a fraudulent transaction; in other words that the intention of Mt. Kahan Devi in making the gift of the house in the year 1933 was to defeat or delay the payment of debts due from her to her creditors. In this connection, the learned Judge has made a reference to a peculiar coincidence, that this house originally belonged to Wishva Nath, husband of Mt. Kahan Devi, and when he found himself to be involved in financial difficulties, he made a gift of the house to Mt. Kahan Devi. It is suggested on behalf of the respondents that when Mt. Kahan Devi found herself similarly involved, she transferred the house by way of gift to her own sons. It is common ground that the mere fact that debts are due from the donor is not alone sufficient to establish a fraudulent intention; on the other hand, it must be proved that at the time of the gift the motive for the transaction was to defeat or delay the creditors. There can however ordinarily be no direct evidence of the existence of a fraudulent intention. This can be inferred from circumstances proved in the case.

Now, the respondents claim that they have proved the following circumstances: (1) the previous history of the property which I have already mentioned; this however in my opinion has no direct bearing on the question in issue; (2) that in the transactions between the parties the balance was always in favour of the respondents; in other words that Mt. Kahan Devi was incurring liabilities for larger amounts than she could pay; (3) that she had other creditors who have not all been satisfied even up to this time and that on the institution of the suit out of which these proceedings have arisen when an attempt was made to prevent her from transferring the goods in the shop to

others, it transpired that no goods remained in the premises. Subsequently in her statement Mt. Kahan Devi stated that she had handed over the shop goods to other creditors than the respondents in satisfaction of their debts and in most cases the consideration was far below the market value of the goods. She stated that she did so on account of the fear of the respondents. This however was in 1935 prior to the institution of the suit and it is contended by Mr. Mehr Chand, for the appellants, that the conduct of Mt. Kahan Devi more than a year after the date of the gift is immaterial and irrelevant in determining her intention at the end of 1933. I have already stated that what I have to see in this case is the intention on the date of the gift, but, in my opinion, the subsequent and the prior conduct as well as the contemporaneous conduct of Mt. Kahan Devi are all relevant and must be considered in order to decide what her motive was in transferring the house to her sons by way of gift. She adds in her statement that she handed over the goods to other creditors for fear of the respondents. This is a statement which I have not been able to follow.

Another circumstance relied on by Mr. Jagan Nath is that Mt. Kahan Devi has not produced her books to show the condition of her finances in November 1933. In the witness box she stated that her books had been eaten up by white ants. Mr. Mehr Chand says that this has nothing to do with the objectors, her sons. But there is a special ground for considering this statement of Mt. Kahan Devi as an important factor in this case because it is proved that Rattan Chand, objector, used to carry on her business and says that he does not know anything about the books. Therefore neither Rattan Chand has been able to produce the books nor Mt. Kahan Devi, and the latter has given a curious explanation for the disappearance of her books. The matter therefore is at least suspicious.

Then Mt. Kahan Devi was asked about the nature of her transactions and about the condition of her finances about the time when the gift was made and her answers were unsatisfactory. I do not think much stress can be laid on the fact that, after the gift on 28th September 1934, Mt. Kahan Devi served a notice signed by herself on one of the tenants in the house in dispute demanding possession.

of the house. The matter is not of much importance, though it is not irrelevant, because as Mr. Mehr Chand has pointed out, the tenant was holding the property under a lease granted to him by Mt. Kahan Devi in the year 1931. The notice was not issued by a lawyer and does not appear to have been written by a person whose knowledge of English could be said to be good. Under the circumstances the giving of the notice is not very material. But considering all the circumstances of the case, the relationship of the parties, the fact that Mt. Kahan Devi did owe money to the respondents and subsequently had to transfer her goods at a great loss to the other creditors and there are still creditors who have not been satisfied, the inference is irresistible that her motive in transferring the house in favour of her sons was to screen it from her creditors.

I must, at this stage, deal with a legal point urged by the learned counsel for the appellants. He referred to S. 53, T. P. Act, and contended that the section, as now amended, expressly provides that a suit to set aside an alienation brought by a creditor on the ground that the alienation was made with a view to defeat or defraud the creditors must be brought on behalf of all the creditors and in a representative capacity. It must however be observed that in the present case no suit has been brought by the creditor. On the other hand an objection has been raised by Rattan Chand and another, sons of Mt. Kahan Devi, and the creditor has defended his action in attaching the property to satisfy his decree. No authority has been cited that the rule contained in S. 53, T. P. Act, as to the form in which the suit is to be brought also applies to a defence raised by a creditor. The practical suggestion made by the learned counsel for the appellants was that what the executing Court should have done in this case is that on holding that a gift had been made it should have allowed the objection and should have directed the decree-holder to institute a suit to have the gift declared fraudulent. I see no justification for this suggestion because, as I have already stated, the proceedings before the executing Court were under S. 47, Civil P. C., which makes it incumbent upon it to decide all questions mentioned in that section and this is one of such questions in the execution proceedings and not in a separate suit. Moreover the defence of the creditor in

this case can be described to be made in a representative character because it is open to any creditor to apply for a rateable share in the sale proceeds of the house if it is sold. 43 Mad 760,¹ a judgment of a Full Bench of the Madras High Court, seems to support the view that in a case like this a decree-holder is entitled to contest the claim of an objector on the ground that the disputed property was transferred fraudulently. The consequence is that in my opinion the conclusion of the Subordinate Judge is correct. I dismiss the appeal with costs.

T.M./D.S.

Appeal dismissed.

1. Ramaswami Chettiar v. Mallapa Reddhar, A I R 1920 Mad 748=59 I O 947=43 Mad 760=39 M L J 350 (F B).

A. I. R. 1938 Lahore 138

BHIDE J.

Amolak Chand, Defendant, Judgment-debtor — Appellant.

v.

Hoshiar Singh — Plaintiff, Decree-holder — Respondent.

Second Appeal No. 340 of 1937, Decided on 8th October 1937, from order of Dist. Judge, Delhi D/. 19th December 1936.

Limitation Act (1908), Art. 182 — Step-in-aid — Application for payment of money realized in execution is not step-in-aid.

Payment of money after realization in execution of a decree is a purely ministerial act when there is no dispute about it and an application for such payment does not advance or further execution. Such an application is not therefore a step-in-aid of execution within the meaning of Art. 182 and does not save limitation: A I R 1931 Lah 81 and 103 P R 1908 (F B), Rel. on; A I R 1925 Mad 703, Dissent. [P 138 O 2 ; P 139 O 1]

R. L. Anand I — for Appellant.

Dharam Bhusan — for Respondent.

Judgment.—The sole point for decision in this second appeal is whether an application for payment of money realized in execution of a decree is a "step-in-aid" of execution within the meaning of Art. 182, Limitation Act and saves limitation. The learned District Judge has held that it does, following A I R 1925 Mad 703,¹ in preference to 207 P L R 1908 = 103 P R 1908.² He has distinguished the latter

1. Balaguruswami Naloken v. Guruswami Naloken, (1925) 12 A I R Mad 703=87 I O 939=48 M L J 506.

2. Kasu v. Atar Singh, (1908) 103 P R 1908=142 P W R 1908=207 P L R 1908 (F B).

case on the ground that the money was realized in execution in the present case while it was paid voluntarily in 1903 P R 1908.² I think however that the reasoning of the latter ruling applies to payment of money realized in execution also. The question for consideration is whether an application for payment of money realized in execution can be considered to be a step-in-aid of execution. As pointed out in a Full Bench ruling of this Court reported in A I R 1931 Lah 81,³ unless an application "advances or furthers" execution, it cannot be held to be a step-in-aid of execution. Now even if money has been realized in execution, can an application for its payment be said to advance or further execution of the decree in any way? I think it does not. In Madras, it appears to have been held that it does, but the Madras view has been dissented from by the Full Bench in 103 P R 1908.² As pointed out in the latter ruling, payment after realization is a purely ministerial act when there is no dispute about it. I therefore hold that the learned District Judge's view cannot be sustained and the application for execution was time barred. In view of this finding the cross-objections must fail. I accept the appeal and dismiss the cross-objections, but in view of all the circumstances leave the parties to bear their costs.

B.D./R.K.

Appeal allowed.

3. Ghanaya Lal v. Nathu Ram, (1931) 18 A I R Lah 81=131 I O 100=12 Lah 158=92 P L R 84 (F B).

A. I. R. 1938 Lahore 139

COLDSTREAM AND MONROE JJ.

Sardarni Vidya Wanti Kaur and another—Defendants—Appellants.

v.

Sardar Shahdev (Shivdev) Singh — Plaintiff — Respondent.

First Appeals Nos. 573, 2174 and 2175 of 1935, Decided on 19th April 1937, from preliminary decree of Sub.Judge, First Class, Lahore, D/. 6th February 1935.

(a) Limitation Act (1908), Art. 62 — Applicability — Defendant asked to account for properties and moneys when person managing or collecting them is entitled to just allowances—Art. 62 does not apply.

Article 62 governs cases where a definite sum of money has been received by the defendant and which the law says he must hold for the use of the plaintiff, and is not applicable to cases where

the defendant is asked to account for properties and moneys when the person managing or collecting them is entitled to just allowances.

[P 142 C 2]

(b) Limitation Act (1908), Arts. 48, 49, 62 and 120 — Widows of deceased coparcener filing suit for rendition of accounts against one of surviving coparceners — Suit not being for possession of any specific sum, Art. 120 and not Arts. 48, 49 and 62 held applied.

The widows of a deceased coparcener filed a suit for rendition of accounts against one of the surviving coparceners. The suit was not one for possession of any specific sum, as the amount recoverable could not be exactly known, for the person in possession was entitled to deduct his expenses of management even if the widows were in a position to state the exact amount of moneys which came into the hands of the surviving coparcener :

Held that Art. 120 and not Arts. 48, 49 and 62, applied : A I R 1922 Mad 150 (F B), Rel. on.

[P 142 C 2; P 143 C 1]

(c) Limitation Act (1908), Art. 120 — Defendant by denying plaintiff's position as co-tenant of property with himself cannot bar latter's subsisting right to ask for accounts.

There is nothing in Art. 120 warranting the view that where a defendant is a co-tenant of property with the plaintiff, he can bar the latter's subsisting right to ask him for accounts by merely denying that the plaintiff is a co-tenant. So long as the defendant is a co-tenant with the plaintiff, the latter has a right to ask for accounts. His right accrues continually as income comes into the co-tenant's hands. But this right is continually barred by Art. 120 when the account sought is more than six years old.

[P 143 C 1]

(d) Accounts—Suit for — Interest — When granted — Plaintiffs' suit and defendant's cross-suit for rendition of accounts relating to number of properties—Plaintiffs alleging that defendant acted as manager and co-sharer on their behalf—Plaintiffs claiming future interest only in their plaint — Both sides found liable to account — Defendant allowed interest on balance from year to year—Interest before date of final settlement held ought not to be allowed.

The plaintiffs in a suit for rendition of accounts relating to a number of properties with which they alleged that the defendant had dealt as manager and co-sharer on behalf of themselves, while setting forth in their plaint the relief asked expressly for future interest only. The defendant had also filed cross-suit against plaintiffs for accounts. Both sides were found liable to account and the defendant was allowed interest to be calculated apparently on balances as they stood from year to year :

Held that the suit was not one in which interest before date of final settlement ought to have been allowed, assuming that the Court had discretion to allow it, which it was perhaps doubtful. Interest would fairly be payable only on the amount found due on a balance of both accounts: A I R 1927 Lah 287, Rel. on.

[P 144 C 2]

(e) Res judicata — Constructive — Former suit as exclusive owner against persons in wrongful possession—On dismissal of such suit subsequent suit as co-sharer for accounts

—Subsequent suit held not barred by Expl. 4 to S. 11, Civil P. C.

A person filed a suit as exclusive owner against persons in wrongful possession. This suit being dismissed, he instituted another suit for accounts as a co-sharer. It was contended that he was barred from instituting the subsequent suit for accounts :

Held that the two suits were brought in different capacities. The right to accounts was not in issue in his former suit and hence the rule of constructive res judicata embodied in Expl. 4 to S. 11, Civil P. C., was inapplicable to the case.

[P 145 C 1]

Badri Das and Vishnu Datta —

for Appellants.

M. C. Mahajan and Daulat Ram —

for Respondent.

Coldstream J. — This judgment will dispose of the three Appeals Nos. 573, 2174 and 2175 of 1935. They arise out of the following circumstances: Sardar Gulab Singh, the head of an important and wealthy family in Kapurthala State, died in 1905 leaving five sons Dwarka Nath Singh, Triloki Nath Singh, Rajeshwar Singh, Angadh Singh and Arjan Singh. Angadh Singh died soon after his father. His widow Sardarni Parbati was given a maintenance allowance. Gulab Singh's lands were recorded in the revenue records as having been inherited by his remaining four sons. Triloki Nath Singh, Rajeshwar Singh and Dwarka Nath Singh died in 1918. Triloki Nath Singh left two widows, Lajwanti Kaur and Chanan Kaur, Dwarka Nath Singh, a widow Vidya Wanti Kaur and Rajeshwar Singh a son Shahdev Singh (also called Shivdev Singh).

When Gulab Singh died, the family owned moveable and immovable property in Kapurthala State, in Bhika Nangal in Jullundur District, the Bhagat Mills in Jullundur city, shops in Jullundur, Amritsar and Lahore cities, land in Lucknow, and a tea estate in Kangra District besides land in Kheri District in the United Provinces from which it derived the greater part of its income. After his death more immovable property was acquired. When the three brothers died in 1918 and 1919 Shahdev Singh was a minor and Arjan Singh an inmate of the Mental Hospital in Lahore. The Maharaja of Kapurthala, to whom the family was related through Sardar Gulab Singh's grandmother, appointed his own sons to manage the family property and fixed allowances for the female members of the family. When Arjan Singh came out of the Mental Hos-

pital he took over the management. In March 1920, after there had been some dispute between Arjan Singh and the widows, the shares of the latter's husbands in the lands in Jullundur and some other districts were recorded as their property by mutation in the revenue papers in spite of objections by Arjan Singh and his nephew Shahdev Singh who contended that the widows were entitled to maintenance only.

When Shahdev Singh attained majority, he brought a suit in Jullundur on 30th August 1921 against the widows, Arjan Singh and others, asserting that he and Arjan Singh had formed a joint Hindu family with Triloki Nath Singh and Dwarka Nath Singh whose widows were entitled only to maintenance, that the family property had passed to himself and Arjan Singh by survivorship and that by a custom followed by the family, widows were excluded from inheritance. He claimed a declaration of his title in respect of those lands in British India which had been recorded as belonging to the widows but were in possession of Arjan Singh as manager, and a decree for possession of the lands in possession of the widows. The widows contested the suit alleging that there had been a disruption of the joint family and denying that any special family custom excluding them from inheriting their husbands' property existed, but during the trial Lajwanti Kaur compromised with Shahdev Singh admitting his claim and agreeing to accept Rs. 20,000 and a monthly allowance in satisfaction of her rights.

The Subordinate Judge who tried the suit held that a complete disruption of the joint family had taken place in 1910 and he dismissed the suit against the other two widows Chanan Kaur and Vidya Wanti Kaur. Shahdev Singh appealed to this Court but his appeal was dismissed (Appeal No. 2632 of 1927 decided on 15th February 1932 published in A I R 1932 Lah 550.¹) Arjan Singh, I may here mention, disappeared from India in 1924 during the trial of the suit. On 5th July 1928, a year after the dismissal of Shahdev Singh's suit, while his appeal was pending in the High Court, Sardarni Vidya Wanti Kaur and Chanan Kaur instituted a suit against Shahdev Singh and Arjan Singh in the Court of the Senior Subordinate Judge,

1. Shahdeo Singh v. Lajwanti Kaur, A I R 1932 Lah 550=188 I C 401=89 P L R 747.

Jullundur, for rendition of accounts relating to a number of properties with which they alleged Shahdev Singh had dealt as manager and cosharer on behalf of themselves and Lajwanti Kaur. The following properties were concerned: (1) War Bonds to the value of Rs. 65,000. (2) A debt due to the family by Ram Lal. (3) Income from the property known as the Bhagat Mills in Jullundur. (4) The rent of a bungalow in Jullundur. (5) War Bonds of the value of Rs. 50,000. (6) Postal cash certificates purchased through the post office, Kapurthala, on 20th June 1917 to the value of Rs. 5812-8-0. (7) A War loan investment of Rs. 5000. (8) A sum of Rs. 6990 deposited with a firm Dherumal Baij Nath. (9) A saw mill which had been sold by Shahdev Singh. (10) A sum of Rs. 3000 said to be due to the family by one Kanshi Ram. (11) The rent of a shop in Basti Ghazan in Jullundur. (12) Postal cash certificates in Kapurthala.

On 28th August 1930, Sardar Shahdev Singh instituted a suit (No. 219 of 1930) in the Court of the Senior Subordinate Judge, Lahore, against Vidya Wanti and Chanan Kaur for rendition of accounts in respect of shops in Lahore city (the original plaint claimed relief in respect of other properties but that plaint was amended). His allegations were that he and Arjan Singh were the sole surviving owners of the whole property of the joint family of his father and uncles, the defendants being entitled to maintenance only but that he had been held by the decision of 23rd June 1927 to be owner of a 6/16th share only (4/16th being his by inheritance and 2/16th his by surrender to him of her rights by Lajwanti Kaur), that the defendants were in possession of his share and had refused to render accounts of their dealings with it. The widows' suit was transferred to the Court of the Senior Subordinate Judge, Lahore, and was registered as Suit No. 89 of 1932. In that suit (No. 89) the learned Senior Subordinate Judge granted Vidya Wanti Kaur and Chanan Kaur a preliminary decree for rendition of accounts (apparently from the time when the properties concerned came into his possession) in respect of those properties which he found to have belonged to all the cosharers, dismissing it in respect of those not proved to have belonged to the family. Against this judgment both sides have appealed.

In Appeal No. 2174 of 1935, Vidya Wanti

Kaur and Chanan Kaur have appealed asking for accounts to be taken in respect of all the items in dispute, and in Appeal No. 2175 of 1935 Shahdev Singh contends that he is not liable to render accounts of any of the properties, the suit being barred by limitation, and that, in any case, the lower Court was wrong in holding some of the items in dispute to have belonged to the family. The decision in Shahdev Singh's suit (No. 219) was that the plaintiff was entitled to a 6/16th share in the suit property and that the widows were liable to render accounts of it with interest at 6% from 13th October 1918 (when Vidya Wanti's husband died) to the date of suit. Against the judgment in Shahdev Singh's suit, the widows have preferred the Appeal No. 573 of 1935. It will be convenient to dispose of all three appeals in one judgment as the suits were between the same parties and arise out of the same dispute, namely the right to claim accounts relating to properties in possession of the defendants on the ground that the properties belonged to the family of which the sons of Gulab Singh were members. I take first the two appeals Nos. 2174 and 2175 against the judgment in the widows' suit, registered as No. 89 of 1932. In contesting this suit Shah Dev Singh pleaded that it was barred by limitation in respect of all the properties specified by the widows. Four of the properties he admitted had been joint family property. Of five he asserted himself and his uncle Arjan Singh to have been exclusive owners and three, he declared, had never come into his possession.

In arguing Shah Dev Singh's appeal No. 2175 (originally filed in the Court of the District Judge but transferred to this Court) his counsel has first attacked the lower Court's judgment on the ground that a suit for account was not maintainable in the circumstances because no legal relationship such as entitled the widows to bring an action for accounts subsisted, as Shah Dev Singh was not an agent or a bailee, trustee, receiver, partner or mortgagor either by contract or implication, in respect of any of the properties in dispute and therefore not liable to accounts and because it was not open to the widows to ask for accounts of only some of the family property without disclosing the accounts relating to that part of it which was in their possession, that is to say, the suit could not be decreed without taking into consideration

the accounts relating to all the family property. This is a new argument not advanced at the trial where no issue on the point was struck. It is true that in para. 32 of his written pleas Shah Dev Singh stated that the plaintiffs had no right to call for rendition of accounts but the argument now put forward was not the basis of that plea. When Shah Dev Singh instituted his suit for accounts (No. 219) the widows pleaded that the suit could not proceed until the plaintiffs rendered accounts of the property in his possession but this plea was dropped (see page 34 of the printed judgment) as the widows were themselves suing for accounts. Both suits proceeded on the assumption that the parties in possession were liable to render accounts of the properties in respect of which the suits had been instituted, and I do not think that it is open to Shah Dev Singh now to set up a new defence which is not suggested even in the grounds of appeal. In any case however the plea is met by the fact that Shah Dev Singh has himself sued for accounts relating to property in the widows' possession and the amount due from one party to the other can be adjusted in execution of the two decrees together.

I pass to the question of limitation. The four properties which Shah Dev Singh admitted to have been joint and of which the widows were therefore tenants in common or co-sharers under the decision in Shah Dev Singh's suit were: (1) war bonds to the value of Rs. 65,000; (2) a debt due to the family on a decree for Rs. 4200; (3) income from the property known as the Bhagat Mills in Jullunder (this income according to Shah Dev Singh, consisted wholly of the proceeds of grass grown in the mill precincts, the mills never having been worked during the time they were in his control); (4) rent of a bungalow in Jullunder. At page 41 of his printed judgment the learned Subordinate Judge has stated that Shah Dev Singh's counsel did not contend that the suit was barred in respect of these properties. Mr. Mehr Chand, in arguing Shah Dev Singh's appeal (the case was conducted in the lower Court by another counsel) informs us that this statement is incorrect, and this is asserted in the memorandum of appeal (which was filed by another counsel). We must proceed on the assumption that the judgment is correct, and as in my opinion the suit was not barred in respect

of the accounts relating to these items, the matter is of no consequence. The trial Judge has held that the claim is governed by Art. 120, Lim. Act, and that as there was no refusal to render accounts before the suit was instituted, Shah Dev Singh must render accounts from the time he took possession of the properties concerned. It is contended by Mr. Mehr Chand that a suit for accounts was barred in respect of any property which was in his client's hands on the date of his suit of 1921 inasmuch as by that suit he clearly denied the widows' right in any of the family property and asserted a hostile title, alleging that he and his uncle were exclusively owners of it, the widows being entitled to maintenance only. He also contends that Art. 120 is inapplicable in the circumstances of this suit which in effect is one to recover possession of property misappropriated by the defendant and that the suit is governed either by Art. 48 or Art. 49 or probably Art. 62, that limitation ran either from the date of the death of the widow's husband (1918) or from the date of Shah Dev Singh's suit of 1921 or from the time when Shah Dev Singh converted the property concerned to his use, for example when he realized his Government Securities (war bonds) in 1923 or sold the saw mill (about 1922).

A very large number of authorities has been cited before us on the point of limitation, most of which deal with circumstances not wholly similar to those of this case. The suit is not one for possession of any specific sum, as the amount recoverable cannot be exactly known, for the person in possession was entitled to deduct his expenses of management even if the widows were in a position to state the exact amount of money which came into Shah Dev Singh's hands. Neither Art. 48 nor Art. 49 can therefore apply. Nor, in my opinion, does Art. 62 apply. That Article governs cases where a definite sum of money has been received by the defendant and which the law says he must hold for the use of the plaintiff, and is not applicable to cases where the defendant is asked to account for properties and moneys when the person managing or collecting them is entitled to just allowances. Here it cannot be said that Shah Dev Singh received money which belonged to the plaintiff. He was as a matter of fact a cosharer. As pointed out by the Full Bench of the Madras High Court in 45)

Mad 648², a suit for money had and received could not lie by one tenant-in-common against another who had received more than his share and I have no doubt that the learned trial Judge rightly applied Art. 120.

Next it has to be seen whether the suit is barred by that Article as contended by Mr. Mehr Chand because limitation began to run at the latest in 1921 when Shah Dev Singh asserted a hostile title to the knowledge of the plaintiff. Mr. Mehr Chand relies in this connexion on the last sentence of the Madras judgment² cited above. Shah Dev Singh's suit did no doubt positively assert such a title but though that clearly gave the widows a right to sue for accounts forthwith, there is nothing in Art. 120, and I say so with the greatest respect, warranting the view that where a defendant is, as a matter of fact, a co-tenant of property with the plaintiff, he can bar the latter's subsisting right to ask him for accounts by merely denying that the plaintiff is a co-tenant. So long as Shah Dev Singh was a co-tenant with the plaintiffs the latter had a right to ask for accounts. Their right accrued continually as income comes into the co-tenant's hands. In this case although Shah Dev Singh had denied the widows' rights in any of the family property, it was ultimately found that, in reality, his possession had never been adverse but that he held what he possessed of the joint property as a co-tenant on the widows' behalf. On the other hand that right is continually barred by Art. 120 when the account sought is more than six years old and the learned Subordinate Judge was in my opinion wrong in decreeing rendition of accounts for a longer period than six years.

My conclusion on the question of limitation is therefore that the widows' suit for accounts was not barred in respect of any of the family property, that is to say property which did not belong exclusively to Shah Dev Singh and that Shah Dev Singh must render accounts of the balances in his hands, in respect of the items concerned, on 6th July 1922 and the moneys received since. What those balances were is a question with regard to which the earlier accounts will be material, that is to say the accounts previous to that date

will have to be examined as evidence of what Shah Dev Singh had in hand at that date. This ends the matter so far as the four properties which were admittedly joint are concerned.

The remaining properties about which there is still a dispute were: (1) war bonds to the value of Rs. 50,000 purchased in 1917; (2) postal cash certificates to the value of Rs. 5812.8.0; (3) war loan investments through the Kangra Post Office; (4) a sum of Rs. 6990 deposited with the firm Dheru Mal-Baij Nath; (5) the saw mill; (6) a shop at Basti Ghazan in Jullundur. The trial Judge has found that Shah Dev Singh is liable to accounts in respect of the properties 1, 2, 3, 5 and 6 and this decision is attacked in Shah Dev Singh's appeal. He has found it not proved that the sum of Rs. 6990 (the deposit with Dheru Mal-Baij Nath) was joint and the widows have appealed against this finding.

The oral evidence about the war bonds has been rejected by the learned Judge who has based his decision regarding this item on the documentary evidence. This evidence is carefully described and discussed at pp. 47 to 51 of the printed judgment. We have scrutinized this evidence carefully. Mr. Mehr Chand's contention is that the evidence on the accounts is discrepant and untrustworthy. His arguments have all been dealt with by the learned Judge and I do not think it necessary to say more than that the register of accounts (Ex. P.3) read with the accounts kept by the Bank of Bengal to which reference has been made in the judgment is good proof that these war loans were joint property and not the independently acquired property of Shah Dev Singh's father as he maintained. The register (Ex. P.3) was produced during the trial of the suit of 1921 and its genuineness has apparently never been attacked. The original bears the signatures of Shah Dev Singh's father who was in control of the family affairs in 1917 and it was produced by Arjan Singh at the instance of Shah Dev Singh. There is no reason why it should not be accepted unreservedly as strong evidence and no sufficient reason has been shown for interfering with the trial Court's decision about these bonds. The same register proves that the postal cash certificates (Rs. 5812.8.0) purchased at Kapurthala and a war loan investment through the post office in Kangra (Rs. 5000) were also of the joint family.

² Yerukola v. Yerukola, A I R 1922 Mad 150 = 71 I O 177 = 42 M L J 507 = 45 Mad 648 (FB)

As regards these items it is not necessary to add to what is said in the trial Court's judgment, of the correctness of which I am satisfied.

On the other hand it is not proved that the saw mill belonged to the family. The learned trial Judge has assumed that it was joint because it came out of the Bhagat Mills (which, it is admitted, are flour mills), but Mr. Badri Das has not been able to show us any evidence that the saw came from the mills. This item must therefore be excluded. As regards the shop at Basti Ghozan there is no rebuttal of the evidence of Shah Dev Singh himself made on 2nd December 1934 that the widows are in possession of this property. The allegation of Shah Dev Singh in the previous suit, on which the learned Subordinate Judge has based his finding that they are in his possession, was not that he was in possession of all the family property but that it was in his and Arjan Singh's possession. As it is not proved that he has ever been in possession of that property it also must be excluded.

The lower Court has also decreed that the widows are entitled to damages for omission to work the Bhagat Mills while they were in his possession. The widows claimed accounts of the profits of the mill and the decree in respect of damages is unwarranted, for it is not shown that Bhagat Singh was in a position to work the mills at a profit. There was no claim for damages and no issue on the question of Shah Dev Singh's liability for damages, a question which was outside the scope of the suit. So far as the income from grass is concerned, there is no appeal by Shah Dev Singh, but the order that Shah Dev Singh's liability for damages is to be investigated must be set aside. This disposes of Shah Dev Singh's appeal No. 2175, which is accepted to the extent indicated above. In view of the result, I would allow Shah Dev Singh to recover half his costs in this Court.

The widows' appeal, No. 2174, asks that the sum of Rs. 6990 deposited with the firm Dheru Mal-Baij Nath be included in the items in respect of which accounts were to be rendered, that they should have been allowed interest on the amount found payable on accounts from the date of the suit until realization and that they be allowed their costs. It is not disputed that Rs. 9000 were deposited with Dheru Mal-Baij Nath. For reasons I have stated

the register P. 3 must be accepted as a strong piece of evidence. An entry in this register dated 28th December 1915 (*see* Ex. P. 99, which is part of P. 3 at page 1 of Part 2 of the printed record) shows that a sum of Rs. 7000 was drawn from the Bank of Bengal for joint purposes and deposited with the firm. Another entry of 4th May 1916 shows that a sum of Rs. 2000 was also deposited, but it does not mention that this money was taken for joint purposes. The first entry is signed by the plaintiff's father. The Bank account was produced (the excerpt has not been printed for this appeal, but is exhibited in the printed record of Shah Dev Singh's suit of 1921) and it shows that the money was drawn from the joint account. The learned Judge of the lower Court has excluded this item because no one representing the firm of Dheru Mal was called to give evidence. In my opinion no further evidence was necessary and I would accept the widows' appeal so far as to include Rs. 6990 which is the amount we are asked to include.

The learned Subordinate Judge has not allowed interest because in setting forth in their plaint the reliefs they desired, the widows asked expressly for future interest only, presumably from the date of the decree (*see* page 34 of the printed judgment in Appeal No. 573). In the cross-suit by Shah Dev Singh he has however allowed interest at 6 per cent. to be calculated apparently on balances as they stood from year to year. The suit is not one in which in my opinion interest before the date of final settlement ought to have been allowed, assuming that the Court had discretion to allow it, which is perhaps doubtful: *see* 8 Lah 524.³ Both sides have been held liable to account and interest would fairly be payable only on the amount found due on a balance of both accounts. As regards costs, the ordinary rule is that they follow the event and no good reason for withholding them in this suit is apparent. The widows have been successful as regards the greater part of their claim. I think that it will be just to allow them their costs in the lower Court and here.

There remains the third appeal, that of the widows against the decree granted to Shah Dev Singh (Appeal No. 573). The

3. Kirpal Singh v. Jiwanmal Thakur Das, A I R 1927 Lah 287=101 I C 644=8 Lah 524=28 P L R 174.

grounds pressed before us are that the suit was barred by the principle of *res judicata* and that under Art. 120, Lim. Act, the widows are liable to render accounts for the previous six years only. In the suit which Shahdev Singh instituted against the appellants and others in 1921 he prayed for possession with mesne profits until he obtained possession of the property now concerned. As against the widows that suit was dismissed and the argument is that this dismissal bars Shahdev Singh's present claim for accounts which might have been preferred in that suit. Shahdev Singh's right to accounts was not in issue in his former suit and in my opinion the rule of constructive *res judicata* embodied in Explan. 4 to S. 11, Civil P. C., is inapplicable to the case. The two suits were brought in different capacities. In the previous suit, Shahdev Singh sued as exclusive owner against persons in wrongful possession. His right as a co-sharer was admitted by the defendants and his suit was defeated on the plea that he was in joint possession. It is by virtue of this decision alone that he can claim the relief he now seeks. This claim would have been destructive of the case he set up in 1921 and although it might have been open to him to put forward entirely distinct pleas it cannot be said that he was bound to do so or ought to have done so. The cause of action in the previous suit was the mutation in the widows' favour which he was attacking, and until it was decided that the mutation was in accordance with his legal position, the present claim could not be maintainable. It follows that Shahdev Singh was not estopped by his previous conduct from bringing his suit for accounts as a co-sharer.

In this case there is no question of the right to sue for accounts having become barred by the setting up of a hostile title, for the widows have all along admitted Shahdev Singh's rights as a co-sharer and tenant-in-common. For the reasons I have given in dealing with Shahdev Singh's appeal No. 2175, Shahdev Singh is liable for accounts only for the six years previous to the date of the institution of his suit, previous accounts being relevant as evidence to show what he had in hand on 5th July 1922. For the reasons given in disposal of the appeal No. 2174 I would set aside the lower Court's decree so far as it relates to interest. As regards costs I would leave parties to bear their own

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costs throughout in the appeal No. 573 of 1935.

Monroe J.—I agree.

R.W./R.K.

Order accordingly.

A. I. R. 1938 Lahore 145

DALIP SINGH AND SKEMP JJ.

Mt. Mohan Devi and others—Plaintiffs
—Appellants.

v.

Nawab Talib Mehdi Khan and others,
Defendants and others, Plaintiffs
—Respondents.

First Appeal No. 231 of 1936, Decided on 15th April 1937, from decree of Senior Sub-Judge, Lahore, D/- 1st February 1936.

(a) Limitation Act (1908), Art. 132—Mortgage of property on 9th March 1918 — Three other successive mortgages of same property in favour of same mortgagee — Third mortgage dated 27th February 1920 containing clause that mortgagor would pay present and previous mortgage money after one year—Suit on basis of mortgages brought on 22nd December 1932 — Art. 132 held applied and suit was within time.

A property was mortgaged on 9th March 1918. The mortgagor effected three other successive mortgages of the same property in favour of the same mortgagee. In the third of these dated 27th February 1920, there was a clause "we agree to pay up the present and the previous mortgage money after one year." The assignee of the mortgage brought a suit on the basis of these mortgages for principal, interest and cost of improvements on 22nd December 1932 :

Held that Art. 132 applied and the suit brought within 12 years from 26th February 1921 was within time. [P 146 C 2]

(b) Transfer of Property Act (1882), S. 67—Prohibition of sale by usufructuary mortgage—Principle underlying stated.

The principle underlying the statutory prohibition of sale by usufructuary mortgagee is that the mortgagee looks to the rents and profits for the satisfaction of his advance and inasmuch as no time is fixed for payment there can be no forfeiture. It is this forfeiture that gives right to the remedies of foreclosure and sale and in its absence the mortgagee is not entitled to the remedies that spring out of it. [P 147 C 1]

(c) Mortgage—Anomalous — One clause in deed making it usufructuary—Another clause providing for recovery of amount from mortgaged property—Mortgage is anomalous.

Where a mortgage deed contained one clause which would make it an usufructuary mortgage but another clause provided in the most explicit terms for recovery of the amount due from the mortgaged property :

Held that the mortgage was not usufructuary but was anomalous. [P 147 C 2]

(d) Mortgage—Mortgagee making sub-mortgage of part of mortgaged property—Suit on mortgage—Sub-mortgagee unwilling to be joined as plaintiff—Original mortgagee can maintain suit.

Where an original mortgagee creates a sub-mortgage over some of the mortgaged property and brings a suit on his mortgage against the mortgagor to which the sub-mortgagee refuses for some reason or other to be joined as plaintiff, the original mortgagee can maintain the suit to assert the right which still vested in him: 18 I C 389, *Expl.*; 15 Bom 692; 31 P R 1900; 18 All 113 and 29 All 385, *Ref.* [P 148 C 1, 2]

Achhru Ram and N. C. Mehra —
for Appellant.

Mohsin Shah — for Respondents.

Skemp J. — This is an appeal against an order of the Senior Subordinate Judge, Lahore, dismissing a suit for the recovery of Rs. 79,492.12.9 as principal, interest and costs of improvements due to the plaintiffs on the basis of certain mortgages and a deed of sale. The facts leading up to the suit are as follows: Kotu Mal defendant 10, Raghu Ram defendant 11 and Lachhman Das, father of defendants 12 and 13, mortgaged (a) a three storied house situate in Anarkali and (b) three shops with a taki and baithak, to Messrs. Mool Chand and Company. They effected in the first instance a mortgage for Rs. 51,000 by a deed dated 9th March 1918 and effected three further mortgages each for Rs. 10,000 on 8th March 1919, on 27th February 1920 and on 26th October 1920. All the deeds were registered. Interest was provided in the first deed at annas nine per cent. per mensem, in the subsequent deeds at rather higher rates; in other respects it was provided that the terms of the first mortgage should apply to the subsequent mortgages. On 31st March 1921 the original mortgagors sold property No. 1, the house, to defendants 1 to 8 and father of defendant 9 for Rupees 1,08,500 out of which Rs. 82,000 were kept in deposit with the vendees for payment to the original mortgagees, Messrs. Mool Chand and Company. The balance was paid to the vendors, Lachhman Das, Raghu Ram and Kotu Mal. The vendors then redeemed property No. 2 from the mortgage. On 5th January 1929 the representatives of Messrs. Mool Chand and Company sold their entire mortgage rights in house no. 1 to the present plaintiffs for Rs. 52,677.4.3. The present plaintiffs are the wives and daughters-in-law of the original mortgagors. On the same date, 5th January 1929, these ladies executed a

sub-mortgage of their mortgage rights to Ral Bahadur Seth Ajudhia Parshad for Rs. 42,000. On 22nd December 1932, the plaintiffs, four ladies of the family of the original owners and mortgagors, brought the present suit for recovery of Rupees 79,492.12.9 principal, interest and cost of improvements.

Defendants 10 to 13 the original owners admitted the claim. Defendant 14 the sub-mortgagee, Seth Ajudhia Parshad, pleaded that he had no objection to a decree being passed in favour of the plaintiffs provided that his rights were preserved. The suit was contested by defendants 1 to 9, the vendees of 1921. They raised numerous objections to the suit as a result of which 16 issues were framed. The Senior Subordinate Judge only really decided three of the issues and found that another issue 8 was redundant. He dismissed the suit (a) as barred by limitation, (b) because a suit for sale on the basis of a usufructuary mortgage was incompetent, and (c) because a suit could only be brought by the sub-mortgagee and not by the present plaintiffs. In my judgment the findings of the Subordinate Judge on all three points are erroneous.

Point No. 1 : Limitation. The suit is one falling under Art. 132 of Sch. 1, Lim. Act: 'To enforce payment of money charged upon immovable property' and the period of limitation is 12 years from the date when the money sued for becomes due. The third mortgage deed dated 27th February 1920 contained a clause: 'We agree to pay up the present and the previous mortgage money after one year'. The mortgagees therefore had a period of 12 years from 26th February 1921 and the suit which was lodged on 22nd December 1932 is well within time. The Senior Subordinate Judge held that the suit was not within limitation because the plaintiffs had not proved this and some other acknowledgments to which he referred, but Lala Bal Kishan, P. W. 11, a partner of the firm Messrs. Mool Chand & Co. said:

The four mortgage deeds P. W. 1-3, P. W. 1-4, P. W. 1-5 and P. W. 1-6 were executed in favour of the old firm Mool Chand & Co. Lachhman Das, Raghu Ram and Kotu Mal were the mortgagors.

He continued his evidence about incidents of the mortgagees' possession and was not cross-examined as to the execution of the mortgages. Elsewhere in his judgment the Subordinate Judge said that

the plaintiffs had succeeded in establishing that the property in dispute was mortgaged to Mool Chand & Co. by the four mortgage deeds. The highly technical ground on which the Subordinate Judge held that the suit was barred by limitation is therefore ill-founded.

Point No. 2. That the suit is barred because the mortgage is a usufructuary mortgage. The authority cited is a Division Bench ruling of this Court—141 I C 377.¹ In that judgment, it was held that a certain mortgage was purely a usufructuary mortgage as defined in S. 58 (d), T. P. Act, and that under S. 67 a suit for sale would be incompetent. It was also held that the insertion of a personal covenant to pay the mortgage debt on demand would not alter the character of the mortgage and give the mortgagee a right to sell the mortgaged property. The following is the definition of a usufructuary mortgage in S. 58 (d), T. P. Act, as amended in 1929 :

Where the mortgagor delivers possession [or expressly or by implication binds himself to deliver possession] of the mortgaged property to the mortgagee and authorises him to retain such possession until payment of the mortgage money and to receive the rents and profits accruing from the property [or any part of such rents and profits and to appropriate the same] in lieu of interest, or in payment of the mortgage money, or partly in lieu of interest [or] partly in payment of the mortgage money, the transaction is called a usufructuary mortgage and the mortgagee a usufructuary mortgagee.

The Exception to S. 67 states that nothing shall authorise a usufructuary mortgagee as such to institute a suit for sale. A familiar example of a usufructuary mortgage is a Mustajri under the Alienation of Land Act. The principle underlying the statutory prohibition is :

The essence of a usufructuary mortgage is that the mortgagee looks to the rents and profits for the satisfaction of his advance and inasmuch as no time is fixed for payment there can be no forfeiture. It is this forfeiture that gives right to the remedies of foreclosure and sale and in its absence the mortgagee is not entitled to the remedies that spring out of it (*Gour's Law of Transfer in British India*, Vol. 2, p. 909).

But in my opinion the present series of mortgages do not constitute an usufructuary mortgage. Cl. (2) of the original mortgage dated 9th March 1918 no doubt says : 'The amount of rent of the mortgaged property realised by the said mort-

gagee shall be taken credit for', but cl. (6) says :

If the entire mortgage money and the balance of interest are not paid at the termination of the said period, the rate of interest and the conditions of this mortgage deed shall continue as before even after the expiry of the term. The said mortgagee shall be competent to recover the amount due to him on demand. In case of default, the said mortgagee can recover the entire amount due to him from the mortgaged property, our person and our other property of all kinds, jointly and severally, through Court, together with the costs of Court.

A mortgage with these clauses is an anomalous mortgage as defined in S. 58 (g), T. P. Act :

A mortgage which is not a simple mortgage, a mortgage by conditional sale, a usufructuary mortgage, an English mortgage or a mortgage by deposit of title deeds within the meaning of this section is called an anomalous mortgage.

The name is suitable because while this mortgage contains one clause which would make it a usufructuary mortgage, another clause provides in the most explicit terms for recovery of the amount due from the mortgaged property. Therefore as the mortgage relied upon is not a usufructuary mortgage the ban of S. 68 has no application nor has the judgment: 141 I C 377.¹

Point No. 3. That where there is a submortgagee he alone can sue. The Subordinate Judge relied for this proposition on 18 I C 389² and 31 P R 1900.³ A headnote to 18 I C 389² does indeed contain a passage :

After the original mortgagee has made an assignment by way of submortgage, he is not entitled to exercise a power of sale as against the mortgagor.

In that case however it would appear that the original mortgagee transferred her entire rights to the submortgagee as the body of the judgment uses the word "assignment". In the present case the submortgage was not for the full rights of the present plaintiffs which they purchased for Rs. 52,000 odd and submortgaged for Rs. 40,000, i. e. they retained a substantial interest in the property. The body of the judgment in 18 I C 389² is not quite the same as the headnote. It says :

The submortgagee by virtue of the assignment is not only entitled to the usual remedies against his own mortgagor but he is also entitled to a remedy against the original mortgagor. The position of the original mortgagee after a submortgage

1. Mohammad Abdullah v. Mohammad Yasin, A I R 1933 Lah 151=141 I C 377=34 P L R 245.

2. Kanhai Lal v. Malu Deo Prasad, (1913) 18 I C 389.

3. Chela Ram v. Walldad, (1900) 31 P R 1900=219 P L R 1900 (F B).

becomes as it were that of a surety, the sub-mortgagee becoming the creditor while the original mortgagor remains the debtor. After assignment the original mortgagee is not in a position to bring a suit for sale against his mortgagor.

I agree if the assignment is of the mortgagee's entire rights. 31 P R 1900³ laid down that :

The purchasers of a submortgage of property are entitled to retain possession of it against the original mortgagor's representatives until the amount due under the submortgage is paid off, and are not obliged to see their remedy against their own transferor, i. e. the original mortgagee.

The judgment also laid down at page 111 that the submortgagee may sue the mortgagor for recovery of his money from the mortgaged property. The only thing that can possibly help the present defendants is a dictum that there is no essential difference between assignment and submortgage. Gour's Law of Transfer in British India, Volume (II), page 888, in discussing the incidents of submortgage states :

The position of the mortgagee in relation to the submortgagee is closely analogous to that of a surety and he is thus entitled to recover the debt from the original debtor but which he is bound to pay over to the submortgagee in discharge of the submortgage.

In 18 All 113⁴ a distinction was made between a submortgage and an assignment. The mortgagee made a submortgage without assigning his mortgage and it was held that the submortgagee could not bring a suit for the sale of the property originally mortgaged. This was no doubt distinguished in 29 All 385⁵ which held that :

A submortgagee of mortgagee rights in immovable property is entitled to a decree for sale of the mortgagee rights of his mortgagor.

It was not said that the prior mortgagee could not bring a suit. We were referred to 15 Bom 692⁶ which lays down:

In a suit for the redemption of land which has been submortgaged by the mortgagee in which suit the submortgagees are co-defendants, the mortgagee is entitled to have an account taken of the submortgage. The judgment should direct an account of what is due to the original mortgagee and then of what is due to the submortgagee.

The present case is almost the converse of that one. The matter would be free from difficulty if the mortgagees and the submortgagees had united to bring their

suit, but if the submortgagee for any reason does not wish to be joined as a plaintiff I cannot see either in authority or in principle any ground for holding that the mortgagee cannot bring the suit to assert the right which is still vested in him. I would therefore accept the appeal, reverse the judgment of the Subordinate Judge and remit the case to his Court for procedure in accordance with law. Stamp on appeal to be refunded. Costs of this hearing to be borne by the defendants. In the course of his judgment the Senior Subordinate Judge said :

In view of my findings on Issues 6 and 9 it is needless for me to comment on any other issue except Issue 7 which relates to limitation.

He went on however to add that the plaintiffs had succeeded in establishing that the property in dispute was mortgaged to Mool Chand and Company, that the plaintiffs were their legal successors-in-interest and that the sale in favour of the plaintiffs was not benami. He gave no reasons for these opinions and none of these points have been argued before us especially in view of the introductory words of his paragraph. I would hold that there is no finding on these points, and as the issues dealing with them have to be re-decided, reasons may be given for the findings.

Dalip Singh J.—I agree.

S.C./D.S.

Case remanded.

* A. I. R. 1938 Lahore 148

BHIDE J.

Sadhu Ram — Decree holder —

Appellant.

v.

Kishori Lal — Judgment-debtor —

Respondent.

Exn. Second Appeal No. 339 of 1937, Decided on 29th October 1937, from order of Dist. Judge, Ambala, D/- 14th Dec. 1936.

* Provincial Insolvency Act (1920), S. 4 (2) — Execution of decree — Decree declared to be fictitious by Insolvency Court — Decree becomes non-existent — Decree cannot be executed — Insolvency decisions are binding on parties for all purposes even after proceedings are dismissed.

The scope of S. 4 (2) is not limited to the insolvency proceedings only. According to it the decision of the Insolvency Court is final for all purposes. Hence, a decretal debt which has been declared by an Insolvency Court to be fictitious in proceedings on an application by the judgment-debtor for being declared insolvent to which the decree-holder was also a party cannot be re-

4. Ganga Prasad v. Chunni Lal, (1896) 18 All 118=1896 A W N 8.

5. Ram Sankar Lal v. Ganesh Prasad, (1907) 29 All 385=4 A L J 273=1907 A W N 97 (FB).

6. Narayan Vithal v. Ganojl, (1891) 15 Bom 692.

covered by an execution of that decree. The decision of the Insolvency Court is tantamount to a declaration that the decree was non-existent and the finding is binding on the judgment-debtor as well as on the creditor even though the insolvency proceedings have been dismissed. [P 149 C 2]

Tek Chand — for Appellant.

Ram Lal Anand II — for Respondent.

Judgment. — This appeal arises out of execution proceedings relating to a decree obtained by one Sadhu Ram against Kishori Lal. It appears that Kishori Lal had applied for being declared an insolvent, but his claim was resisted by one of the creditors on the ground that the debts mentioned in the petition for insolvency with the exception of one were fictitious. Amongst the debts thus alleged to have been fictitious was the debt of Sadhu Ram. The learned Judge of the Insolvency Court came to the conclusion that the decretal debt claimed by Sadhu Ram was fictitious and that the petitioner Kishori Lal was in a position to pay his debts and his application was consequently dismissed. Sadhu Ram appealed from the finding given by the learned Insolvency Judge as regards his decretal debt being fictitious but the appeal was also dismissed. Sadhu Ram thereafter applied for execution of his decree when Kishori Lal raised a plea that as the decretal debt of Sadhu Ram had been declared to be fictitious in the insolvency proceedings the decree could not be executed. The executing Court disallowed the objection but on appeal the learned District Judge has allowed it and held that the decree could not be executed. From this decision the present appeal has been preferred. The learned counsel for the appellant contended that the executing Court was not competent to go behind the decree which had not been yet set aside by any competent Court and that the decision of the Insolvency Court, which was not given on any issue arising between the present parties was no bar to execution. The learned counsel for the respondent, on the other hand, contended that the decision of the Insolvency Court was final and binding on the present parties by virtue of sub.s. (2) of S. 4, Insolvency Act, which runs as follows :

(2) Subject to the provisions of this Act and notwithstanding anything contained in any other law for the time being in force, every such decision shall be final and binding for all purposes as between, on the one hand, the debtor and the debtor's estate and, on the other hand, all claimants against him or it and all persons claiming through or under them or any of them.

The point is not free from doubt ; but in view of the wording of the sub-section referred to above, it seems to me that the contention of the learned counsel for the respondent should prevail. According to that sub-section, the decision of the Insolvency Court is final and binding "for all purposes." The scope of the section does not seem to be limited to the insolvency proceedings only. Under the circumstances there seems to be no reason why the present execution proceedings should not be held to be covered by the words "for all purposes." The judgment-debtor is not really going behind the decree but is relying on a decision subsequently given in the insolvency proceedings to which both the decree-holder and the judgment-debtor were parties and which according to the sub-section referred to above is binding on them. It is true that there was no issue on the point as between the judgment-debtor and the decree-holder ; but both of them were apparently colluding with each other. The issue was certainly necessary for the purpose of the petition filed by the judgment-debtor and I see no good reason why it should not be held to be binding on all parties to that petition, in view of the provisions of S. 4 (2) quoted above. There is authority for the proposition that the executing Court can go into the question whether the decree sought to be executed is still subsisting and operative : *cf.* 25 Cal 175¹ and 19 I C 630.² In the present instance the finding of the Insolvency Court had, I think, the effect of rendering the decree inoperative, as it was tantamount to a declaration that the decree was non-existent and the finding was binding on the decree-holder as well as the judgment-debtor.

It might be urged that the judgment-debtor was himself a party to the fraud and therefore cannot plead it ; but so was the decree-holder ; and hence the plea could be entertained : *cf.* 114 P R 1879,³ 21 P R 1916⁴ and 13 Lah 713.⁵ Besides

1. Doyamoyi Dasi v. Sarat Chunder Mozumdar, (1898) 25 Cal 175=1 O W N 656.
2. Ugra Narain Singh v. Basan Narayan Singh, (1913) 19 I C 630=17 O W N 868=18 O L J 209.
3. Dasondhi v. Sirdar Khan, (1879) 114 P R 1879.
4. Nand Lal v. Jethu Mal, (1916) 3 A I R Lah 130=33 I C 255=21 P R 1916.
5. Qadir Bukhsh v. Hakam, (1932) 19 A I R Lah 503=139 I C 17=13 Lah 713=38 P L R 851 (F B).

the real plea to be considered was that the decree had ceased to be operative and binding. The decision of the learned District Judge appears to me to be correct. I therefore dismiss the appeal but in view of all the circumstances I leave the parties to bear their costs.

B.D./R.K.

Appeal dismissed.

A. I. R. 1938 Lahore 150

YOUNG C. J. AND MONROE J.

Jowand Singh and others

Convicts — Appellants.

v.

Emperor.

Criminal Appeal No. 191 of 1937,
Decided on 6th May 1937, from order of
Sess. Judge, Jullundur, D/- 27th January
1937.

(a) Criminal Trial — Evidence—Testimony of witnesses cannot be rejected merely because they are relations or partisans of one side—Such testimony can be rejected when witnesses tell lies.

Where a bitter feud exists between the party which supplied the prosecution witnesses, and the party of the accused, the testimony of witnesses cannot be rejected merely because they are relations or partisans of one side unless such witnesses tell lies on material points and their conduct is unnatural. [P 150 C 2]

(b) Criminal Trial — Circumstantial evidence
Presence of injuries on body—Presumption.

Where a person has injuries on his body, it cannot be presumed merely from such circumstance that he was present at the scene of occurrence.

[P 150 C 2; P 151 C 1]

Kesar Singh — *for Appellants.*Jhanda Singh for Advocate-General —
for the Crown.

Young C. J. — Eight persons were charged under Ss. 302 and 148, I. P. C., with the murder of Harbans Singh. It was stated that Kartar Singh also who had absconded had taken part in the murder. These eight persons were tried by the learned Sessions Judge, Jullundur. He sentenced Amar Singh, Jowand Singh and Musha Singh to death. In the case of Puran Singh and Resham Singh, on account of their youth, he reduced the sentence to one of transportation for life. He acquitted the other three accused. It is unnecessary to go in detail into the facts of the case. In the village a bitter feud existed between the party which supplied the prosecution witnesses and the

party of the appellants, and for a considerable period there had been cases and cross-cases arising out of their quarrels, some of them being cases in which one party alleged an assault by the other. It may certainly be taken, as the learned Judge has found, that there was a motive for the crime in the present case if a crime has been made out. The case for the prosecution as presented to the learned Judge was that at Chhawela on 23rd October 1936 the eight persons who were charged together with Kartar Singh went to Harbans Singh's field where he was ploughing his land together with the witness Chaina. They immediately attacked Harbans Singh, Lachhman Singh, one of them, with a takwa and the others with dangs. They beat him to death. Chaina's evidence was that he raised an outcry and the prosecution witnesses arrived on the scene, that after the deceased had been knocked down Amar Singh turned and gave him a couple of lathi blows on which he immediately ran away. He went to his house, remained there and gave no information to anybody. The learned Judge says in discussing the evidence that in view of the conditions prevailing in most villages, it would be wrong to reject the testimony of witnesses merely because they were related or were partisans of one side but that the trouble in the present case was that the witnesses told lies on material points and their conduct was unnatural. There were no less than six people present watching this occurrence, if in fact it happened as alleged. The six people, of whom five were Jats, stood by and watched Harbans Singh being beaten to death. We agree with the view of the learned Judge that such conduct is not natural and with him we find it hard to believe that this took place.

The learned Judge came to the view that Chaina's story that he was present was true because Chaina had injuries. We are not at all sure that this conclusion is justified by the injuries which Chaina had. Anyone might well have two small bruises and a scrape without having been beaten with a lathi or indeed having taken part in any fight. Apart from believing that Chaina was there, the learned Judge puts no faith whatever in his evidence; he says that he would only believe Chaina's evidence where he finds that it is corroborated otherwise. He does not accept the evidence of the other witnesses at all, and rightly we think, because he found them to

be telling lies in material particulars. We ourselves would not accept the evidence of Chaina as the learned Sessions Judge has done, but if we were to accept it even to the extent to which he has accepted it, we do not think that the points relied upon by the learned Judge as corroborating it in fact do so. His argument really amounts to saying that because the appellants belonged to the opposite party and were interested in the various points at issue between the two parties, it is incredible to think that if Harbans Singh was assaulted they would have remained out of the fight. This of course is really begging the question. In the case of Resham Singh and Amar Singh, there is perhaps a little more than this presumption that active members of the party would join in the party's activities. It is said that when after the assault, Harbans Singh, then an injured man, was being taken to hospital at Jullundur, Resham Singh and Amar Singh followed and tried to prevent the person in charge of him from going on to Jullundur, the object obviously being to prevent a complaint being made to the police. There is also evidence that Amar Singh went to a doctor with the object of creating a false alibi. We do not think that this evidence necessarily indicates that Resham Singh and Amar Singh took any part in the fight. They are connected with the party and if some members of the party did murder Harbans Singh they would as friends possibly have been sufficiently interested to try to prevent the report being made to the police. They have not been charged with an offence arising out of this action and we therefore can consider it no further than evidence to indicate their participation in the murder. As we have said, in itself it is not enough to show that they actually took part in the murder.

In our opinion the true view to take of this case is that the evidence for the prosecution is wholly untrustworthy and we cannot therefore base on it a verdict of guilty against the accused. We allow the appeal and acquit Amar Singh, Jowand Singh, Musha Singh, Resham Singh and Puran Singh.

K.B./A.L.

Appeal allowed.

* A. I. R. 1938 Lahore 151

DALIP SINGH J.

Rev. L. T. Dineen — Appellant.

v.

Emperor.

First Appeal No. 139 of 1937, Decided on 8th November 1937.

* Succession Act (1925), S. 291—Order of Court granting probate of estate of a deceased Christian and requiring petitioner to furnish security for which no time limit was fixed—Grant held conditional on furnishing security and order therefore held appealable—Deceased being Christian, security could not be demanded.

On an application for the grant of probate of the estate of a deceased Christian, the Court granted the probate for which it called upon the petitioner to pay probate duty, required an inventory and accounts to be filed, and added a clause that the petitioner should furnish security. No time however was fixed within which the security was to be furnished :

Held that on the proper construction of the order, the grant of probate was made conditional on the petitioner furnishing security and hence the order was appealable : 8 C W N ccviii; 20 Cal 245 and A I R 1929 Cal 733, Ref. [P 152 O 1]

Held further that as the deceased was a Christian, security could not be demanded under S. 291 and there was no other section under which the Court had power to demand a bond. [P 151 O 2 ; P 152 O 1]

Eric Banerji — *for Appellant.*

Edmunds, Administrator General—

for the Crown.

Judgment.—In this case the learned Senior Subordinate Judge, Lahore, on an application made by the Rev. Brother L. T. Dineen for grant of probate of the estate of the late Mr. Benjamin Joseph Moran, granted the probate, valued the estate at Rs. 6324.5.0 for which he called upon the petitioner to pay probate duty, required an inventory and accounts to be filed by the petitioner within the prescribed period of six months and one year respectively, and added a clause that the petitioner should furnish security for Rs. 6400. An application for review of this order was put in on the ground that as the deceased Moran was a Christian, security could not be demanded. The learned Judge however held that S. 291, Succession Act, was no bar to demanding security in probate cases and dismissed the review petition. The petitioner has come in appeal. A preliminary objection has been raised by the Administrator General that no appeal lies and 8 C W N ccviii (Notes)¹, 20 Cal 245²

1. Rangini Das v. Debendra Narain Singha, (1904) 8 C W N ccviii (Notes).

2. Lucas v. Lucas, (1893) 20 Cal 245.

and 125 I C 99³ have been cited in support. In this case however, it seems to me, on a proper construction of the order, that the grant of probate was made conditional on the petitioner furnishing security for Rs. 6400. This is obvious when one considers that no time was fixed in the order within which the petitioner had to furnish the security. It would follow therefore either that the Court meant to keep this application in a state of suspense until the petitioner happened to furnish the security required, or it intended that the grant of probate should be conditional on his furnishing security. It seems to me the latter construction is the only reasonable one to take in the circumstances and I therefore hold that this order is appealable.

On the merits, it again appears clear from the terms of S. 291 that the District Judge is given a discretion to demand a bond from a person to whom probate is granted only when the deceased was a Hindu, Mahomedan, Buddhist, Sikh or Jain or an exempted person, as defined in S. 3 of the Act. It is conceded very properly by the learned Administrator General that the present deceased was not within any of the categories above detailed. There is no other section which gives a District Judge or any one else power to demand a bond from a person to whom probate is granted. It seems that there has been a change under the new Act which is pointed out in the commentary on this section by Mr. Sen Gupta at page 928. I therefore accept this appeal and make the order granting probate unconditional, that is to say I set aside the order demanding security. There will be no order as to costs.

D.S./R.K.

Appeal accepted.

3. Monmohini Dassi v. Taramoni, (1929) 16 A I R Cal 788=125 I C 99.

A. I. R. 1938 Lahore 152

COLDSTREAM AND DIN MOHAMMAD JJ.

Indar Ram and another—

Judgment-debtors — Appellants.

v.

Lila Dhar — Decree-holder —

Respondent.

Letters Patent Appeal No. 24 of 1937, Decided on 28th April 1937, from judgment of Tek Chand J., D/- 21st November 1936.

(a) Execution — Execution of mortgage decree by Revenue Officer—Procedure.

The procedure to be followed by a Revenue Officer carrying out a sale of land in satisfaction of a mortgage decree is that laid down in the Civil Procedure Code, the rules applicable being Rr. 65 to 69, 71, 72, 73, 84, 85, 88 and 89 of O. 21 in the absence of any rules by the Financial Commissioner or declaration by the Local Government.

[P 153 C 2]

(b) Civil P. C. (1908), O. 21, R. 66 (2)—Application for sale giving required information—No presumption that proclamation issued by Collector did so.

The fact that the decree-holder's application for sale gave most of the information required by sub-r. (2) of R. 66 of O. 21, raises no presumption that the proclamation issued by the Collector did so.

[P 154 C 1]

(c) Civil P. C. (1908), O. 21, R. 90—Material irregularity in publishing and conducting sale—Auction price grossly inadequate—Substantial loss may be presumed.

Where there has been material irregularity in publishing and conducting a sale, and the price fetched by the auction is proved to be grossly inadequate, the Court may presume that substantial loss has been suffered by reason of the irregularity: 40 Cal 635 (P C), Rel. on.

[P 154 C 2]

Sardar Sahib Sardar Iqbal Singh —
for Appellants.

Mehr Chand Mahajan and Krishna Swarup — *for Respondent.*

Coldstream J.—On 15th March 1935 two properties belonging to Indar and Rawat, (1) a half-share in 1307 bighas of land with shamilat rights in Risaliya Khera and (2) a half-share in 234 bighas in Ratta Khera with shamilat rights in Sirsa Tahsil, were sold by auction in execution of a final mortgage decree for Rs. 17,375 with costs and future interest passed on 1st October 1934 in favour of Lila Dhar against the owners. The purchaser was the decree-holder. Indar and Rawat filed objections to the sale under O. 21, R. 90, Civil P. C. These were dismissed by the (executing Court, Senior Subordinate Judge of Hissar), on 9th May 1936 who confirmed the sale. An appeal by the judgment-debtors was dismissed on 21st November 1936 by Tek Chand J. and the judgment-debtors have preferred an appeal under S. 10, Letters Patent of the Court.

The executing Court was moved to sell the land by a regular application submitted on 10th November 1934 by Lila Dhar under R. 66 of O. 21 and a notice to settle the terms of the proclamation was served on the judgment-debtors for appearance on 25th January 1935. The judgment-debtors refused (and this is clearly proved) to accept these notices, but on 12th January 1935, Indar and Rawat put in an application asking that the lands be not sold but

leased as the owners were members of an agricultural tribe. On 25th January, on which date Indar appeared in Court, the Senior Subordinate Judge dismissed the application for having the land leased instead of sold as it was found that the judgment-debtors were not members of an agricultural tribe, and ordered the sale to be conducted through the Collector to whom the papers were to be sent. The Collector was asked to sell, or have the land sold, by an Extra Assistant Commissioner ('deputy') after proper proclamation. The executing Court at the same time allowed the decree-holder to bid at the auction on condition that the Court might reject his bid. Next day the Collector ordered that the warrants of sale with sale proclamations be issued, that the sale be conducted by the Tahsildar to whom the papers were to be sent and that the Tahsildar should report about the sale before 30th March. The warrants were sent to the Tahsildar and a note on them shows that copies of the sale proclamations had been affixed to the Court door. On 2nd February the Tahsildar forwarded the papers to the Naib Tahsildar of Dabwali and on 6th February the Naib Tahsildar passed an order that the sales be proclaimed and the sale be held on 24th February 1935.

On 22nd February the sale was proclaimed by beat of drum, in both the villages in which the land is situated, for the 24th February. On the 24th the Naib Tahsildar postponed the sale to 15th March because he could not go to the place that day. He ordered that the sale be proclaimed again for 15th March. On 4th March the sale was proclaimed in one village Risalia Khera by beat of drum and the proclamation was put up in the village. The sale of all the land was held in Risalia Khera on 15th March, and as already stated, the decree-holder's bids were successful. It is contended that the procedure in ordering proclamation and conducting the sale was materially irregular throughout, that the prices fetched by the two parcels of land were ridiculously low and that the inadequacy of the prices may fairly be attributed to the irregularities.

It must be conceded that the procedure in ordering and conducting the sale was not regular. In view of the provisions of S. 141, Punjab Land Revenue Act, the executing Court acted rightly in forwarding the order for sale to the Collector. According to that section, the Collector in

such cases has to proceed in conformity with the law applicable to the Court issuing the order for sale and with any rules made by the Financial Commissioner. The rules in the Financial Commissioner's Standing Order 64 about the attachment and sale of agricultural produce and of land, which embody the rules made by this Court and set forth in Chs. 12M and N, of its Rules and Orders, Vol. I, do not appear to relate to sales in execution of mortgage decrees. To such sales, S. 72, Civil P. C. has no application nor has the Local Government issued any declaration under S. 68 of the Code. In the execution of mortgage decrees no attachment is necessary. It follows that the procedure to be followed by a revenue officer carrying out a sale of land in satisfaction of a mortgage decree is that laid down in the Civil Procedure Code, the rules applicable being Rr. 65 to 69, 71, 72, 73, 84, 85, 88 and 89 of O. 21.

Assuming that R. 11 (i) of the High Court Rules in Ch. 12M of Vol. I of the Rules and Orders does not apply, the sale ought to have been carried out by the Collector himself for the order for sale was not addressed to any other officer. The executing Court did authorize the Collector to depute his Extra Assistant Commissioner (described as 'deputy' in the order) but there was no order authorizing a sale by a Tahsildar or by a nominee of the Tahsildar. If R. 11 of the High Court Rules is applicable to sales under a mortgage decree, the sale of property worth many thousand rupees by a Naib Tahsildar was not only not authorized by that Rule but contrary to its provisions.

It is contended that no proclamation under R. 66 of O. 21 of the Procedure Code was issued by the Collector. It is clear that some kind of proclamation was issued by the Collector, for the warrant of sale issued by the Collector on 26th January 1935 bears a note that one copy of the "notice" had been affixed to the door of the Court and an order that the warrant with a notice of the sale be sent to the Tahsildar of Sirsa. The Naib Tahsildar's order of 6th February that the sale be proclaimed and that it be held on 24th February 1935 contravened the provision of Rule 68 of O. 21 of the Code and the fixing of the sale for a date before the expiry of thirty days from 26th January was a material irregularity. The Naib Tahsildar, as already mentioned,

postponed the date of the sale to 24th February 1935. Power to postpone in the circumstances is nowhere expressly conferred upon a delegate of the Collector. The postponement by the Naib Tahsildar was not an adjournment under R. 69 of O. 21. That Rule contemplates an adjournment when the sale is beginning or has begun, that is to say when the bidders are present and can take notice of the date when the sale will be held. R. 83 does not apply to sales in execution of mortgage decrees, but allows adjournment of sales in other cases to make a judgment-debtor to raise the amount of the decree. The adjournment was materially irregular.

Next it is contended that the proclamation issued by the Collector was not in conformity with the provisions of R. 66 of O. 21. Unfortunately we do not know what the contents of the proclamation published were, for no copy is on the record of the proceedings either of the executing Court or of the Collector. The executing Court as already mentioned issued notice under sub-r. 2 of the Rule which notice was refused. I can find nothing on the record to show that the executing Court drew up any proclamation, the record indicates that it did not. As the executing Court could not fix the time and date of sale, it could not have drawn up a proper proclamation which only the Collector could do. The Collector did not issue any notice under that sub-rule at all. The fact that the decree-holder's application for sale gave most of the information required by the sub-rule (it did not state the estimated value of the land) raises no presumption that the proclamation issued by the Collector did so. It follows that the sale took place without the Court having given notice to the judgment-debtor under sub-r. 2. This was certainly a material irregularity. Proclamation for sale on 24th February was made in both Ratta Khera and Risalia Khera. But no proclamation for the sale on 15th March was published in Ratta Khera which is about two miles from Risalia Khera. The omission contravened R. 67 read with R. 54 of the Procedure Code.

As regards the auction itself, I may mention that besides the decree-holder himself, five persons bid for the property in Ratta Khera and six for the land in Risalia Khera, the number of bids made being 24 and 43 respectively. The bidders were all Mahajans except one who was a Khatri.

It is not proved that the other bidders colluded with the decree-holder. A large number of local zamindars was present but, as stated by them to the Naib Tahsildar, they were unable to bid as they had not the money ready for the required deposit. (They asked for postponement of the sale until July by which time their crops would be sold). There was also a suit of the usual obstructive kind pending by a son of a judgment-debtor for a declaration that the mortgage was invalid. That there were material irregularities in proclaiming and selling the lands is not now disputed before us for it is clear that the procedure in the Revenue Courts leading up to the sale was wholly irregular, but the sale cannot be set aside unless upon the facts proved, we are satisfied that the appellants have sustained substantial injury by reason of the irregularities.

That where there has been material irregularity in publishing and conducting a sale, and the price fetched by the auction is proved to be grossly inadequate, the Court may presume that substantial loss has been suffered by reason of the irregularity seems clear from the judgment of their Lordships of the Privy Council in 40 Cal 635¹ at p. 643. The question is whether it is satisfactorily proved that the price obtained in this case was substantially below the real value of the property. The area sold in Ratta Khera fetched about Rs. 19 and that in Risalia Khera about Rs. 24 per acre not including the shamilat rights which in Ratta Khera extended to about 100 acres. The revenue payable on the Ratta Khera land was Rs. 61-15-0 and on the Risalia Khera land Rs. 340-4-10 and the price fetched was roughly 35 times the revenue in Ratta Khera and 46 times the revenue in Risalia Khera. This is certainly a low price if we compare it with that fetched on the average for land sold in the Province which in the five years ending 1930-31 was 260 times the revenue, in 1933-34, 311 times the revenue, and in 1934-35, 241 times the revenue (see Report on the Land Revenue Administration of the Punjab for the year ending 30th September 1935). Unfortunately we do not know what was the quality of the land sold, nor what was the estimate of its value (if any estimate was made) pro-

1. *Tekait Krishna Prasad Singh v. Moti Chand*, (1913) 40 Cal 635=19 I O 296=40 I A 140 (P O).

claimed by the Collector. One witness, a potter by caste, produced by the judgment-debtor, stated that the land was worth Rs. 50,000 or 60,000 but he had never bought land himself. Another, a nephew of the judgment-debtor, Indar stated he had bought 160 bighas (about 80 acres) of land for Rs. 10,000 (Rs. 125 per acre) jointly with nine other men. For his share he had paid Rs. 500. This sale was, however, about six months after the auction. A copy of the sale deed was produced (it is on the record). The decree-holder produced no evidence about value. One Ghuman offered Rs. 17,000 for the land in Risalia Khera, that is to say, Rs. 1300 more than the auction price. He was allowed ten days to deposit a fourth of the sum offered. This he failed to do.

From the judgment of the executing Court confirming the sale, it appears that the only objections raised before it (although the application set forth a great number of other objections) were that there was no proclamation and no beat of drum so that only a few bidders came to the auction, that the institution of the declaratory suit by one of the judgment-debtor's sons made people afraid to bid, and that the land was not saleable because the owners were members of an agricultural tribe. Having regard to the objections pressed before the executing Court and the inconclusive nature of the evidence regarding the real value of the property sold, I am unable to find it proved that substantial loss was caused to the judgment-debtors by reason of the irregularities in the proclamation and sale of the land. I would accordingly dismiss the appeal with costs.

Din Mohammad J.—I agree.

T.M./D.S. *Appeal dismissed.*

* A. I. R. 1938 Lahore 155

BHIDE J.

Ram Lal and another — Defendants
— Appellants.

v.

Firm Karam Chand-Gopal Chand,
Plaintiff and another, Defendant
— Respondents.

Second Appeal No. 128 of 1937, Decided on 21st April 1937, from decree of Dist. Judge, Jhelum, D/- 30th October 1936.

* Contract Act (1872), S. 25—Promise to pay—Entry signed by debtor but not containing words amounting to promise to pay—Entry does not fulfil requirements of S. 25.

Mere implied promise to pay is not sufficient for the purposes of S. 25. [P 156 C 1]

More than three years from the last item of account the balance was struck and signed by the debtor. The entry however contained no words which could amount to a promise to pay. On a suit being brought on the basis of such entry:

Held that the entry did not fulfil the requirements of S. 25: *A I R 1933 Lah 209 and C. A. No. 1675 of 1935, Rel. on; A I R 1929 Lah 263 and A I R 1934 Lah 835, Disting.* [P 156 C 1]

Achhru Ram — *for Appellants.*

Sant Singh for Brij Lal —

for Respondents.

Judgment.—This is a second appeal arising out of a suit for recovery of Rs. 580 inclusive of principal and interest. The suit was dismissed by the trial Court but was decreed on appeal by the learned District Judge. From this decision the present appeal has been preferred. The suit was based on a balance, dated the 30th December 1929, which was struck more than three years after the last item of account. The contention of the plaintiff was that this balance amounted to a promise to pay within the meaning of S. 25, Contract Act, and therefore the suit was maintainable, although the balance was struck after the expiry of the period of limitation since the last item. The trial Court held that the wording of the balance did not fulfil the requirements of S. 25, as there was no express promise to pay to be found in the wording of the balance. The learned District Judge however took a contrary view and held that the requirements of that section were fulfilled. The learned District Judge has referred to two rulings of this Court, namely *A I R 1929 Lah 263*¹ and *A I R 1934 Lah 835*.² In the first ruling, in view of the relations between the parties and the nature of the entry relating to the balance, it was held that the entry amounted to a novation of contract within the meaning of Art. 64, Limitation Act. In the present instance no reliance was placed before me on this Article. The second ruling *A I R 1934 Lah 835*² was based on the specific words "dewne kite" used in the entry in that case which were taken to amount to an express promise to pay. In the present instance no such words are to be found in the entry in

1. *Kahanchand Dula Ram v. Daya Ram Amrit Ram*, *A I R 1929 Lah 263*=115 I C 764=10 Lah 745=30 P LR 240.

2. *Nihal Ram Chela Ram v. Radhu Ram Hukmi Ram*, *A I R 1934 Lah 835*=155 I C 1074=16 Lah 258.

question. The entry is merely to the effect that "Rs. 489-6-0 *baqi kadhi lekha uprle wichon sambat 1986, pohdin 15*". This is followed by the signatures of the debtor. There are no words in this entry which could be held to amount to a promise to pay. The question whether the entry imports a promise to pay seems to be irrelevant for the purpose of S. 25, Contract Act, for there is ample authority in support of the proposition that a mere implied promise to pay is not sufficient for the purposes of that section. The question was discussed by me in A I R 1933 Lah 209³ and in C. A. No. 1675 of 1935 recently decided by Jai Lal J. in which the case law has been considered at length.

The learned counsel for the respondent was not able to cite any authority in which an entry of which the wording was similar to the entry in the present case was held to fulfil the requirements of S. 25, Contract Act. I therefore accept this appeal and setting aside the order of the learned District Judge restore that of the trial Court with costs throughout.

W.D./A.L.

Appeal allowed.

3. Mukhilal Chand v. Gul Muhammad, A I R 1933 Lah 209=141 I O 617=34 P L R 430.

*** A. I. R. 1938 Lahore 156**

DALIP SINGH AND SKEMP JJ.

Mila—Plaintiff—Appellant.

v.

Mangal Ram and another—

Defendants—Respondents.

Second Appeal No. 138 of 1937, Decided on 2nd June 1937, from decree of Dist. Judge, Jullundur, D/- 12th November 1936.

(a) Transfer of Property Act (1882)—Applicability to Punjab.

The principles of the Transfer of Property Act are enforced in the Punjab. [P 157 O 1]

* (b) Transfer of Property Act (1882), S. 53—Transfer preferring one creditor to another is not void if debtor retains no benefit for himself—Debtor, during execution of decree against him of one creditor, mortgaging his property to third person and keeping consideration of mortgage in mortgagee's hand to be paid to debtor's prior mortgagee—Transfer is not affected by S. 53.

The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes property from the creditors to the benefit of the

debtor. The debtor must not retain any benefit for himself. He may pay one creditor and leave another unpaid. [P 157 O 1]

A debtor, during the execution of a simple money decree against him of a creditor and while in civil prison executed a mortgage in favour of a third person. The consideration of the mortgage was not received by him in cash but was left in the hands of the mortgagee to be paid to the debtor's prior mortgagee. The debtor did not retain any benefit to himself:

Held that the transfer was in principle only a transfer which paid off previous creditor to the disadvantage of another creditor and therefore was not affected by S. 53, T. P. Act. [P 158 O 1]

Held further that the circumstance that the debtor's action was prompted by revenge against the creditor who got him imprisoned was irrelevant: A I R 1915 P C 115, *Foll.*; A I R 1934 Lah 161, *Disting.* [P 158 O 1]

Aohhru Ram and Inder Dev Dua—

for Appellant.

Jhanda Singh—*for Respondents.*

Skemp J.—The facts which have led to this second appeal are not in dispute. On 20th February 1932 one Mangal Ram obtained a simple money decree for Rs. 1600 and Rs. 200 costs against Batna, a Jat. On 29th June 1934 Mangal Ram applied for execution of the decree by attachment of the judgment-debtor's land measuring 25 kanals 7 marlas and by arrest of the judgment-debtor. The judgment-debtor was arrested on 3rd July and on 24th July, while still in the civil prison, he executed a deed of mortgage of his land in favour of Mila Arain which was registered the following day. The land was not attached until 31st July although the field Kanungo had received the warrant of attachment on 12th July. On 17th January 1927 Batna had mortgaged his house in favour of Ram Lal, Walaiti Ram and Khairati Ram, a father and his two sons, by three separate deeds each for Rs. 80 bearing interest at 2 per cent. per mensem. The consideration for the mortgage deed of 24th July 1934 was Rs. 560 being Rs. 28 for expenses of the deed and Rs. 532 to be retained by Mila mortgagee for payment to the three mortgagees of the house. Mila preferred an objection in the execution of Mangal Ram's decree to the attachment of Batna's land. This objection was dismissed and he then brought the present suit for a declaration that he was a mortgagee of the land. The defendant Mangal Ram relied on S. 53, T. P. Act. The trial Judge found that S. 53 did not govern the case, that the transfer was not fraudulent and granted the plaintiff a decree uphold-

ing the mortgage. On appeal the learned District Judge took the contrary view that the mortgage in favour of Mila was fraudulent and avoided by S. 53. The sole question for determination in this appeal is whether the mortgage is avoided by S. 53, T. P. Act. The principles of the Transfer of Property Act are of course enforced in the Punjab. The relevant part of S. 53 runs :

Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.

It took its present form in 1929. In England the law was contained in certain statutes of Queen Elizabeth which have recently been repealed and replaced by S. 173 (2), Law of Property Act (1925), which the amended section of the Transfer of Property Act follows closely. The prohibition is statutory. In the principles of the common law there is nothing to prevent a man from doing what he likes with his own property. The limitations have been introduced by statutes from motives of equity. The first thing to notice about the statute both in this country and in England is that the transfer must not be made with intent to delay or defeat the creditors, i. e. the creditors as a body and accordingly it has been laid down by their Lordships of the Privy Council in 43 Cal 521¹ at page 525 that :

The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes property from the creditors to the benefit of the debtor. The debtor must not retain a benefit for himself. He may pay one creditor and leave another unpaid.

The record in the present case makes no mention of any other creditors except Mangal Ram and Ram Lal and his two sons. Prima facie the case would appear to be a preference of one creditor (Ram Lal and his sons were practically one creditor) to another. If this is so, then the fact that the transfer was made deliberately to defeat the creditor who had imprisoned Batna makes no difference. A possible point of distinction in this case is that the transfer was made not to Ram Lal and his sons but to Mila an outsider and not a creditor. This is the argument relied on by the learned District Judge who says :

The case of a transferee who happens to be a previous creditor is entirely different from that of a person to whom the transfer is made for cash consideration. In the former case there was no duty cast upon a previous creditor to forgo his claim in favour of the other creditor. But a transferee who pays cash consideration . . . has to satisfy the Court that the transaction was bona fide and was not a contrivance to defraud the attaching creditors.

As has been shown above, the consideration for Mila's mortgage deed was not cash but Mila was to retain the money for payment to the previous creditors. The respondent's counsel argues that it is the same as if Mila had paid Batna in cash and then Batna had paid off the mortgagees. Mr. Achhru Ram for the appellant on the other hand argues that in principle the transaction is the same as if the land had been mortgaged to pay off the prior mortgagees. An important point is whether Batna the debtor retained any benefit for himself. He obtained so much that by virtue of S. 60, Civil P. C., the house would probably have been exempt from attachment in execution of Mangal Ram's decree, whereas Ram Lal and his sons to whom the house was mortgaged could have obtained foreclosure, but this benefit is more apparent than real because by virtue of S. 5, Punjab Debtors' Protection Act 1936, it would probably now be held that the judgment-debtor's land was partly exempted from temporary alienation. As a matter of fact, S. 5 did not do much more than crystallize previous practice. I do not think, therefore, that the judgment-debtor retained much advantage for himself out of the transaction. The learned District Judge relied on a passage in 35 P L R 163², a Single Bench Judgment. In that judgment Jai Lal J. said:

There is ample authority in support of the proposition that where the transfer is in favour of a creditor for a pre-existing debt, the knowledge of the creditor that the transfer is likely to defeat or delay the other creditors does not make the transfer 'in his favour voidable under S. 53'.

He cited seven judgments in support of this proposition and proceeded:

A distinction has been drawn in these cases between a transfer made in consideration of ready cash and a transfer made in discharge of pre-existing debts. In the first mentioned case the question of good faith of the transferee does arise. In the second class of cases, however, it has been held that no question of good faith arises.

I have already pointed out that Batna did not obtain ready cash by means of the

1. *Musahar Sahu v. Hakim Lal*, A I R 1915 P O 115=82 I O 848=48 I A 104=48 Cal 521 (P O).

2. *Gobind Ram v. Ohbog Mal*, A I R 1934 Lah 161=152 I O 472=35 PLR 163.

mortgage to Mila. I have however examined the seven rulings cited and find that the reference to ready cash is made in only one of them, i. e. A I R 1930 Mad 665.³ There it was said at page 668:

If the transfer be for cash and be made to a stranger who had knowledge of the intention of the transferor to convert the immovable property (which cannot be secreted), into money, (which could easily be secreted) and to defeat the creditors of the transferor, then the transfer would be invalid.

Put in this way, it will be seen that the obiter dictum of Jai Lal J. has no application to the present case. In my judgment this transfer is in principle a transfer which paid off three previous creditors to the disadvantage of one. The debtor retained nothing substantial for himself and the circumstance that his action was prompted by revenge against Mangal Ram for getting him imprisoned is irrelevant. I would therefore accept this appeal but direct the parties to bear their own costs throughout. It would indeed appear that this is the first occasion on which the point has arisen in its present form.

Dalip Singh J.—I agree.

D.S./R.K.

Appeal accepted.

3. Mohideen Tharagan v. Muhammad Mustappah Rowther, A I R 1930 Mad 665=126 I C 604.

A. I. R. 1938 Lahore 158

ADDISON AND DIN MOHAMMAD JJ.

Naman — Defendant — Appellant.

v.

Uttam — Plaintiff — Respondent.

Second Appeal No. 945 of 1937, Decided on 6th December 1937, from decree of Dist. Judge, Jullundur, D/- 16th April 1937.

(a) Punjab Limitation (Custom) Act (1 of 1920), Art. 1 — Suit attacking will—Limitation cannot be avoided by cleverly wording plaint.

Alienation includes a testamentary disposition of property and where a suit in substance is a suit attacking a will, it is not open to the plaintiff by cleverly wording his plaint to avoid the proper limitation for the suit : A I R 1934 Lah 913, *Approved*; A I R 1935 Lah 313, *Dissent.*; A I R 1934 Lah 725, *Rel. on.* [P 159 C 1]

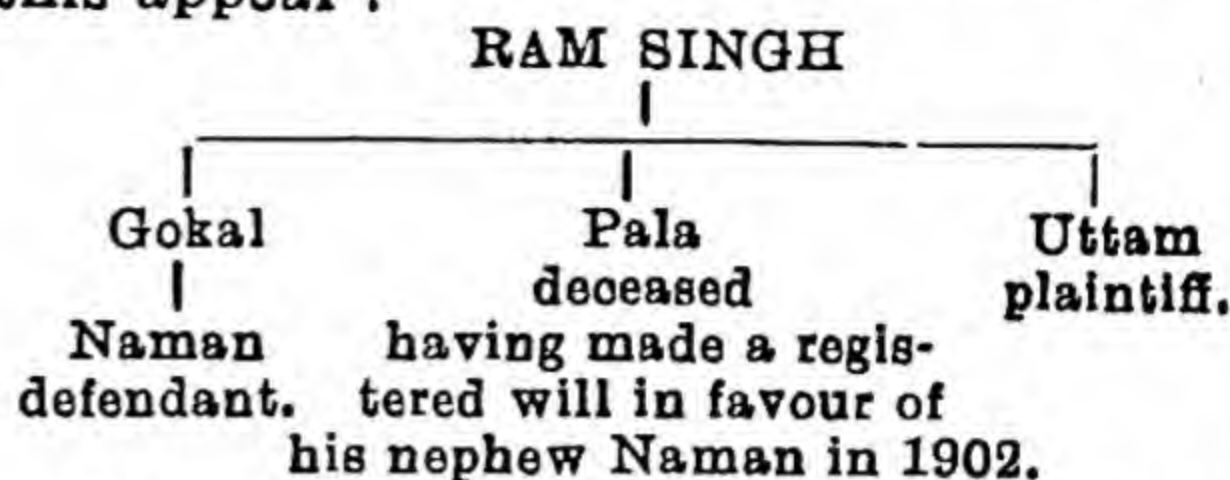
(b) Interpretation of Statutes — Duty of Court.

It is not for Judges where the words are clear to attempt to get round a statute. [P 159 C 1]

Shamair Chand — for Appellant.

Prem Nath Bhardwaj — for Respondent.

Addison J. — The following pedigree-table is necessary in order to understand this appeal :



Uttam instituted a suit, stating that his nephew Naman had taken possession of the entire land left by Pala and that Uttam and Naman were equally entitled to the land. Uttam accordingly brought a suit for possession of one-half of the land left by Pala. Naman contended that Pala had executed a registered will in his favour on 10th January 1902 and that as that will had not been challenged within the period of limitation allowed by the Punjab Limitation (Custom) Act 1 of 1920, the suit was barred by time. It was also asserted that the land was not ancestral and therefore the plaintiff had no right to recover any portion thereof. The Courts below have held that only 16 kanals of land were ancestral qua the plaintiff, that the plaintiff could only succeed with respect to the ancestral land and that the suit was not time-barred. They therefore granted a decree for possession of 16 kanals of land with a proportionate share in the shamilat to the plaintiff. Against this decision Naman defendant has preferred this second appeal. Apparently, on the findings arrived at, the Courts below should have granted the plaintiff a decree for only one-half of 16 kanals of land with a proportionate share in the shamilat, as Naman is obviously entitled to half of that area along with Uttam.

In coming to the conclusion that the suit was not barred by time, the Courts below have based their decision on A I R 1935 Lah 313.¹ They did set out, as held in 6 Lah 206² and 16 Lah 237³ that what has to be regarded is the true effect of the suit, not its formal or verbal description; but as in A I R 1935 Lah 313,¹ this consideration was not given effect to, the Courts below held that the plaintiff

1. Gopal Singh v. Thakar Singh, (1935) 22 A I R Lah 313.

2. Kaura v. Ramchand, (1925) 12 A I R Lah 985=88 I C 945=6 Lah 206=26 P L R 383.

3. Milkha Singh v. Ramkishan, (1934) 21 A I R Lah 725=154 I C 988=16 Lah 287=37 P L R 353.

could frame his suit so as to get round the provisions of Punjab Act 1 of 1920. It was stated there that a suit, which was based purely on the right of inheritance and in which there was an alienation set up and relied upon by the defendant, could not be considered to be a suit on the ground that the alienation was not binding on the plaintiff so as to bring it within the provisions of section 7 of the Act. Curiously enough, one of the Judges who decided A I R 1935 Lah 313¹ was one of the Judges who decided 16 Lah 237,³ where the contrary was held to be the correct view. The matter has come before another Division Bench which in A I R 1934 Lah 913⁴ has held that where a suit in substance is a suit attacking a will, it is not open to the plaintiffs by cleverly wording their plaint to avoid the proper limitation for the suit. We have no hesitation in endorsing this view. "Alienation" is defined in section 3 of the Act to include any testamentary disposition of property. Limitation is provided for in the Schedule to the Act. Art. 1 gives the limitation for a suit for a declaration that an alienation of ancestral immovable property will not, according to custom, be binding on the plaintiff after the death of the alienor, and if the alienation is by a registered deed, the date of registration of such deed provides the starting point for limitation which is six years. Under section 6 of the Act, therefore, a suit for a declaration should have been brought in 1921, seeing that "alienation" includes a testamentary disposition of property. It was said in A I R 1935 Lah 313¹ that though a will was registered, no one except the executant or his agent was competent to take inspection or copies and it would be scarcely justifiable to take registration as sufficient notice for the purposes of limitation. This question however does not arise, for, according to Article 1 of the Schedule, limitation starts from the date of registration of the deed effecting the alienation which, according to section 3 of the Act, includes a testamentary disposition of property. It is not for Judges, where the words are clear, to attempt to get round a statute.

Article 2 of the Schedule provides that in a suit for possession of ancestral immovable property which has been alienated

on the ground that the alienation is not binding on the plaintiff according to custom, where no declaratory decree of the nature referred to in Article 1 is obtained, the period of limitation is six years from the date of registration of the document. This suit for possession therefore is clearly time-barred. For the reasons given we accept the appeal and, setting aside the decrees of the Courts below, we dismiss the plaintiff's suit. The parties will, however, bear their own costs throughout.

D.S./R.K.

Appeal accepted.

* A. I. R. 1938 Lahore 159

DIN MOHAMMAD J.

Nazir Ahmad — Defendant —

Petitioner.

v.

*Jiwan Das and another — Plaintiffs
— Respondents.*

Civil Revn. Appln. No. 837 of 1936, Decided on 26th April 1937, from decree of Senior Sub-Judge, Shahpur, Sargodha, D/- 31st August 1936.

* Contract Act (1872), S. 25 (2)—Contract by minor—Ratification on attaining majority—Effect—Consideration in earlier contract cannot be imported into subsequent contract—S. 25 (2) does not apply.

A contract entered into by a minor, being null and void, its subsequent ratification by the minor on attaining the age of majority cannot form a valid contract on which a suit can be maintained. The consideration which passed under the earlier contract cannot be imported into the contract into which the minor entered on attaining majority. S. 25 (2) has no application to the contract of this kind : A I R 1935 Lah 561 (F B), *Foll.*

[P 160 C 1]

* (b) Contract Act (1872), S. 25 (3)—Petitioner entering into money bond to pay off father's time-barred debts—Decree can be passed only against estate of deceased in petitioner's hands — He is not personally liable.

Where the petitioner enters into a money bond not to raise personal loan but only to pay off his deceased father's time-barred debts, a decree on the bond can be passed only against the estate of the deceased in his hands, but no personal decree can be passed against the petitioner : A I R 1934 Cal 178 and A I R 1929 All 586, *Rel. on.*

[P 160 C 2]

Mohsin Shah — for Petitioner.

S. D. Puri — for Respondents.

Order. — Jiwan Das and his brother instituted a suit against Nazir Ahmad for recovery of Rs. 340 on the footing of an instalment bond said to have been executed by Nazir Ahmad in their favour on 16th January 1934. Nazir Ahmad resisted

⁴ Mohammad Ali Khan v. Anwar Hussain (1934) 21 A I R Lah 918=155 I C 1104.

the suit mainly on the ground that the bond was without consideration. At the trial, it transpired that the bond in suit was executed in lieu of another bond which had been jointly executed on 9th January 1931, by Nazir Ahmad and one Ilam Din, the second husband of Nazir Ahmad's mother. That bond too had been executed in lieu of a previous bond dated 17th March 1930, by Nazir Ahmad and Ilam Din. The consideration of that bond was a previous bond executed on 30th July 1926, by Nazir Ahmad's mother Mt. Kaki as a guardian of Nazir Ahmad, minor, and her second husband Ilam Din, the consideration of the bond being some old debts owed by Nazir Ahmad's father, Lal Din, to Jiwan Das and his brother in relation to which a balance was said to have been struck by Lal Din on 23rd August 1923. Holding that Nazir Ahmad was a minor in 1930, when he along with Ilam Din executed the first bond in favour of Jiwan Das and his brother and that consequently the bond was void qua him and so were his subsequent ratifications thereof, the trial Court dismissed the suit. On appeal, the Senior Subordinate Judge, while agreeing with the finding of the trial Court as to the original bond executed by Nazir Ahmad being void, decreed the suit on the ground that his execution of the last bond dated 16th January 1934 was for consideration, having been executed in lieu of a bond that was valid qua Ilam Din. It is against this decision that the present petition has been lodged by Nazir Ahmad.

Counsel for the petitioner relies on 16 Lah 546,¹ where a Full Bench of this Court has held that a contract entered into by a minor being null and void, its subsequent ratification by the minor on attaining the age of majority cannot form a valid contract on which a suit can be maintained. The consideration which passed under the earlier contract cannot be imported into the contract into which the minor entered on attaining majority. The learned Judges have also observed that S. 25 (2), Contract Act, has no application to a contract of this kind. In my view, in the absence of any circumstances distinguishing the present case from the one before the Full Bench, there can be no question but that the present petition must succeed.

1. Govind Ram v. Piran Ditta, A I R 1935 Lah 561=158 I O 248=16 Lah 546=87 P L R 690 (F B).

The only point of distinction that has been urged by the respondent's counsel is that in the bond of 1931, Ilam Din was a joint executant with Nazir Ahmad and that it was on account of the inducement made by Nazir Ahmad that Jiwan Das and his brother gave up their claim against Ilam Din and contented themselves with a bond from Nazir Ahmad alone. There is however not a shred of evidence on the record in support of this allegation. This point does not appear to have been raised even before the Court below. The statement of Jiwan Das himself before the trial Court is inconsistent with the position now taken up on his behalf. The only thing he stated there was that he gave up his claim against Ilam Din as Nazir Ahmad assented to executing a bond on his own account. This in my view is quite different from saying that Nazir Ahmad had induced Jiwan Das and his brother to abstain from proceeding against Ilam Din. This ground therefore fails leaving the present case clearly within the purview of the Full Bench judgment alluded to above.

Counsel for the petitioner has further urged that, inasmuch as no personal loan had been raised by Nazir Ahmad, it was not open to the Senior Sub-Judge to have passed a personal decree against him. At the most a decree could be passed against the estate of the deceased in his hands. He has relied in this connexion on A I R 1934 Cal 178² and 51 All 983.³ Counsel for the respondent concedes that the law is as stated by the petitioner's counsel. In any circumstances therefore, no personal decree could be passed against Nazir Ahmad. In view however of my finding on the first point that the bond was without consideration, and that the subsequent ratifications of Nazir Ahmad could not validate a contract which was void ab initio, I allow this petition, set aside the order of the Senior Subordinate Judge and dismiss the plaintiffs' suit. In view of the fact however that Nazir Ahmad's father did owe something to Jiwan Das and his brother which is now lost, I leave the parties to bear their own costs throughout.

V.B.B./A.L.

Application allowed.

2. Abani Bilas v. Kantil Chandra, A I R 1934 Cal 178=148 I O 1035=88 O W N 258.

3. Asa Ram v. Karam Singh, A I R 1929 All 586=119 I O 109=51 All 983=1929 A L J 901.

* A. I. R. 1938 Lahore 161*

SKEMP J.

Bur Singh — Defendant — Appellant.
v.*Santa Singh and others, Plaintiffs and another, Defendant — Respondents.*

Second Appeal No. 1156 of 1936, Decided on 15th March 1937, from decree of Dist. Judge, Lyallpur, D/- 20th June 1936.

* Civil P. C. (1908,) O. 41, R. 27 (1) (b)—Test laid down in Cl. (b) is one relating to state of mind of Appellate Court and not external standard.

The test laid down in Clause (b) of O. 41, R. 27, viz. 'If the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment' is one relating to the state of mind of the Appellate Court and not an external standard. In other words, the test is not, whether any tribunal would be unable to pronounce any judgment without the production of the additional evidence in question, but, whether the mind of the appellate Judge is in such a condition on the evidence on record that he requires any document to be produced or any witness to be examined to enable him to pronounce judgment. The object is to enable the appellate Judge to satisfy his own mind, when he entertains a doubt; the test proposed is therefore not an external one, viz. whether some other mind or an average mind would require additional evidence to be produced in order to pronounce some judgment or other : *A I R 1916 Mad 816 and 36 Mad 477. Rel. on.*

[P 162 O 1]

J. N. Aggarwal and Amar Singh —
for Appellant.

Anant Ram Khosla — for Respondents.

Judgment.—This second appeal has arisen from an alienation effected by a childless proprietor, Wadhawa Singh adopted son of Jowand Singh, who had mortgaged his property for Rs. 3900. The Senior Sub. Judge of Sheikhpura found that the transfer was not for consideration and legal necessity. In fact he said that the debt appeared to be bogus; but he dismissed the suit of the collaterals on the ground that the land was not proved to be ancestral. In the circumstances he directed the parties to bear their own costs. On appeal, the learned District Judge, without any application being made by the parties, directed the special qanungo to produce further excerpts from the revenue records, after consideration of which he found that the land was ancestral. He also found that the mortgage was binding on the reversioners to the extent of Rs. 1500 and decreed accordingly. He

directed the parties to bear their own costs throughout "as the alienee has taken a good deal of advantage of the alienor." The alienee Bur Singh has appealed through Mr. Jagan Nath Aggarwal. The main point is that the learned District Judge should not have taken additional evidence. There are grounds for attacking the finding as to consideration and necessity, but they were given up. Mr. J. N. Aggarwal relied upon the wording of O. 41, R. 27, Civil P. C. which runs :

27 (1). The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if : (a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or (b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.

Admittedly (a) has no application, but Mr. Jagan Nath urged that the learned District Judge did not comply with the express provisions of O. 41, R. 27 (1) (b).

In discussing the issue as to the ancestral character of the land, the trial Judge had said :

The plaintiffs have entirely failed because one serious omission has been committed by them . . . that the land in the line of Jiwan Singh has not been traced

The appeal was first heard by the District Judge on 4th May 1936. He discussed the excerpts and said: "From these entries one could not come to any finding whether all this land was ancestral or not"; and after considering the history of the land and certain rulings at length he said:

In view of the cautious attitude prescribed by these later rulings, I will certainly give the parties an opportunity to bring up before me the extent of holdings by all the descendants of Sahib Singh in the year 1856, so that we might be able to see how far those holdings in this entire village were conformable to ancestral shares.

Accordingly, at the next hearing on 20th May 1936 he gave a brief order to the special qanungo to prepare a statement showing the respective areas owned by the three sons of Koer Singh in 1856 and by the descendants of Sahib Singh. On 10th June 1936 having considered these new excerpts he came to the conclusion that the land was ancestral, and he concluded the case at a further hearing on 20th May by a finding as to considera-

* Affirmed on Letters Patent Appeal by Addison and Dln Mohammad JJ.

tion and necessity. Mr. J. N. Aggarwal relies on 10 Pat 654,¹ A I R 1935 Rang 21² and 37 I C 1008.³ In the first case at page 668 their Lordships of the Privy Council discussing R. 27 (1) (b) said :

It is only where the Appellate Court "requires" it (i. e. finds it needful) that additional evidence can be admitted. It may be required to enable the Court to pronounce judgment, or for any other substantial cause, but in either case it must be the Court that requires it. This is the plain grammatical reading of the sub-clause. The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but 'when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent'.

They said that the provisions of R. 27 are clearly not intended to allow a litigant who has been unsuccessful in the lower Court to patch up the weak parts of his case and fill up omissions in the Court of Appeal.

In this case however it was not the Court that called for the evidence but a party which before the hearing of the appeal wished to produce it. Similar opinions in similar circumstances were given in A I R 1935 Rang 21.² 37 I C 1008³ is a Division Bench judgment of the Patna High Court upholding the action of the District Judge who had refused to admit a document tendered in appeal. In the present case, it is the Court that itself called for the evidence. In 38 Mad 414,⁴ where the Appellate Court had admitted additional documents on appeal, a Division Bench of the Madras High Court said of Rule 27 :

Considering the clause apart from the decided cases, it appears to me that the test laid down in Cl. (b) "if the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment", is one relating to the state of mind of the Appellate Court and not an external standard. In other words, the test is not, whether any tribunal would be unable to pronounce any judgment without the production of the additional evidence in question, but, whether the mind of the appellate Judge is in such a condition on the evidence on record that he requires any document to be produced or any witness to be examined to enable him to pronounce judgment. The object appears to me to be to enable the appellate Judge to satisfy his own mind when he entertains a doubt; the test proposed is therefore not an external one, viz. whether some other mind or an average mind would require additional evidence to be produced in order to pronounce some judgment or other.

1. Parsotim Thakur v. Lal Mohar, A I R 1931 P O 148=182 I C 721=58 I A 254 = 10 Pat 654 (P O).

2. U Kya v. U Nyo, A I R 1935 Rang 21.

3. Kalika Dutt Mandar v. Tulsi Mandar, A I R 1918 Pat 253=37 I C 1008=1 Pat L J 435.

4. Ambuja Ammal v. Appadurai Mudali, A I R 1916 Mad 816=80 I C 402=38 Mad 414.

To much the same effect is a previous Division Bench judgment of the Madras High Court, 36 Mad 477;⁵ indeed, one of the learned Judges was common to both Benches. Mr. J. N. Aggarwal did not contest this subjective test, but he said that the learned District Judge had not recorded reasons for the admission of the additional evidence, as required by R. 27 (2). It is true that the District Judge did not use the words "I admit this evidence for the following reasons"; but the whole trend of his order of 4th May is that he could not come to a satisfactory judgment without further evidence. I think that there was sufficient compliance therefore with R. 27 (2). The circumstances are unusual. The parties are illiterate peasants; and do not accurately know the early history of the land they have inherited. In order to help them in ascertaining the truth in such cases, Government has appointed a revenue expert — the special qanungo or special patwari — to trace out the history of the land in dispute. If the history supplied in the excerpt is incomplete, and the District Judge does not feel that he can come to a satisfactory judgment, I do not think it is wrong for him to obtain further information from the old revenue records through the special qanungo. There is no question of fabrication of evidence; it is simply a case of search of old records by a Government expert. At the time the order was given to the special qanungo nobody knew what would be the result of his research and the opposite party made no objection. I therefore think that the District Judge was within the legitimate limits of judicial discretion in his action.

Mr. Anant Ram Khosla for the respondents also sought to justify the finding of the District Judge by an admission of Wadhawa Singh made in the year 1904. Wadhawa Singh had shortly before been adopted by Jowand Singh and one Jiwan Singh brought a suit for possession of Jowand Singh's land after his death on the ground that he had no right to adopt. Para. 1 of the plaint set forth the brief history of the land, and para. 2 said :

Out of the lands aforesaid in the ancestral ownership of Jowand Singh and the plaintiffs the owners have divided some of the lands and kept some of them joint.

5. Andlipa Pillai v. Muthu Kumara Thevan, (1918) 86 Mad 477=14 I C 140.

These two paragraphs were admitted by Wadhawa Singh in his statement. The trial Judge did not think that this admission amounted to anything and I am inclined to agree. The District Judge held that it lent support to his finding. I exclude the admission on the ground that it was not tendered in evidence or exhibited. It was also not specifically put to Wadhawa Singh who however said: "I had appeared in that previous suit, and I do not know if I put in the written statement". The trial Judge has remarked that the witness was trying to suppress the facts. Although the documents are 30 years old and do not require formal proof, they ought to have been formally tendered and exhibited. Mr. J. N. Aggarwal began to argue that the documentary evidence did not prove that the land was ancestral; but in this case the documents relied on are not documents of title, and I think the finding is one of fact. The District Judge went into the matter at considerable length. The result is therefore that this appeal is dismissed but in the circumstances, like the lower Courts, I direct that the parties bear their own costs throughout.

[This judgment was affirmed by Addison and Din Mohammad JJ. on Letters Patent Appeal.]

T.M./D.S.

Appeal dismissed.

A. I. R. 1938 Lahore 163

DALIP SINGH AND SKEMP JJ.

Madan Lal — Plaintiff — Appellant.

Diwan Chand and others — Defendants — Respondents.

First Appeal No. 342 of 1936, Decided on 15th April 1937, from decree of Senior Sub-Judge, Rawalpindi, D/- 18th May 1936.

Hindu Law—Family arrangement—Mother of deceased making gift of property to sister of deceased—Reversioners challenging gift — Compromise between parties to suit — Sister thereby getting share in such property — Compromise arrived at when sister and sister's son were not recognized as heirs — Subsequently Act passed recognizing them as heirs nearer than collaterals—Suit by sister's son afterwards challenging compromise — Compromise held bona fide family arrangement and prudent act on part of sister and therefore binding on her son.

A family arrangement can be arrived at so as to be binding on a reversioner not party to the suit brought by other reversioners, declaratory in its nature, to set aside or challenge a gift by the

limited owner. Whether such arrangement can be binding on such reversioner depends on the circumstances of each case: *A I R 1936 All 507 (F B), Dissent.* [P 165 C 1]

A Hindu died leaving behind him his sister, mother and two cousins who were the then reversioners. The mother gifted the property to the sister and thereupon the two cousins brought a suit for declaration challenging the gift. In that suit, a compromise was arrived at between the two reversioners, the mother and sister whereby each got one-third share in the property. This was before the Hindu law of Inheritance (Amendment) Act 2 of 1929 came into force. The sister thus got a share in the property left by her brother at a time when she would not have been entitled to it at all. After the Act came into force, the sister and the sister's son were recognized as heirs and the sister's son then brought a suit to set aside the compromise:

Held that inasmuch as all the possible near heirs of the deceased were parties to the reversioners' suit and the compromise was entered into bona fide by the plaintiff's mother and grandmother, and further that as it was really an act of prudence on the part of the plaintiff's mother to enter into such compromise at a time when no one contemplated that an Act would be passed making the plaintiff a nearer heir than the suing reversioners, the compromise under such circumstances could well be described as a family settlement or arrangement binding on the plaintiff: *A I R 1919 P O 27, Rel. on.* [P 165 C 2]

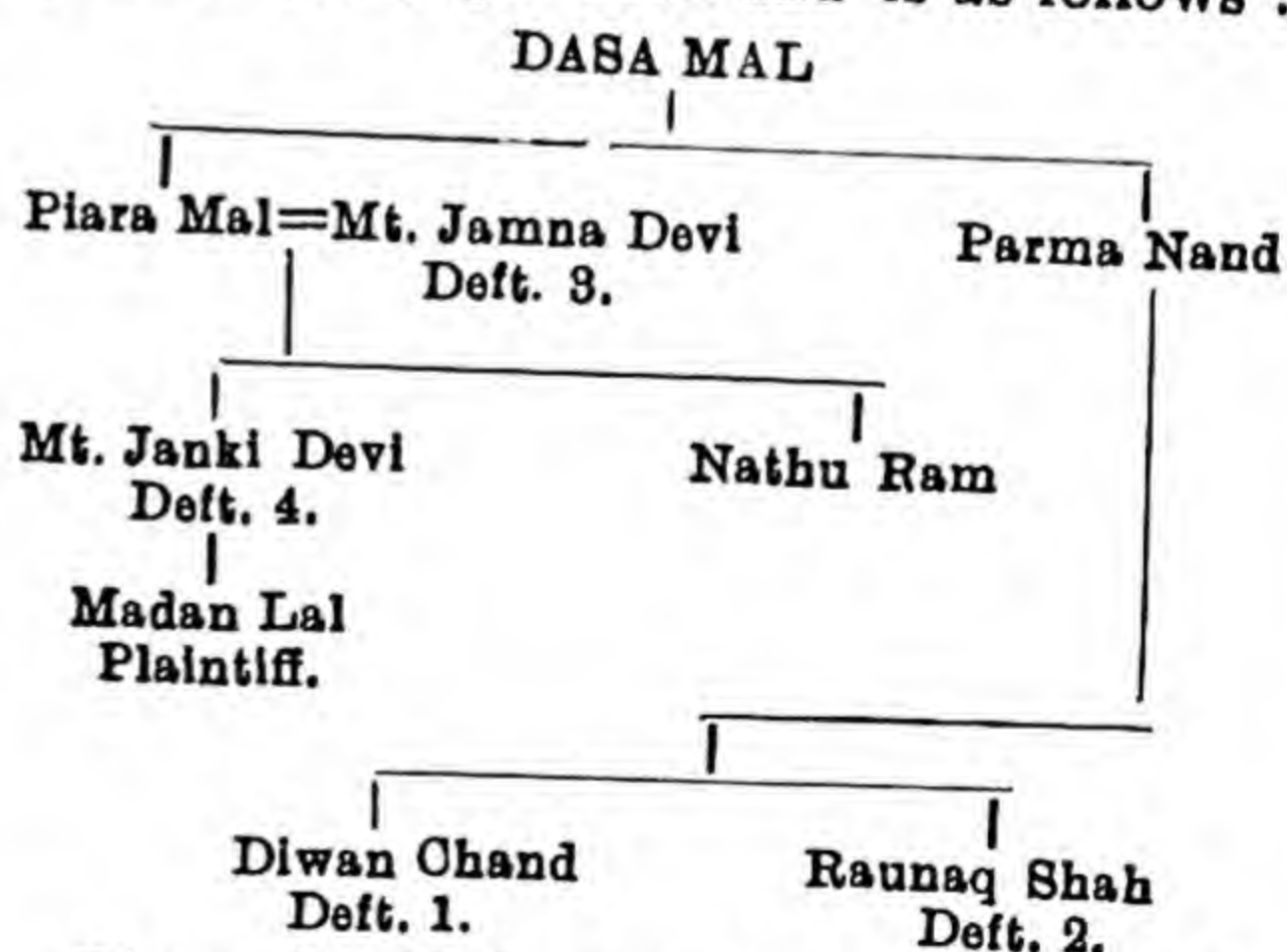
D. R. Sawhney and S. N. Bali —

for Appellant.

Achhru Ram and Indar Dev —

for Respondents.

Dalip Singh J. — The pedigree table necessary for the facts of this case is at p. 24 of the paper book and is as follows:



Piara Mal died somewhere about 1907, the exact date not being known. His son Nathu Ram died in 1911. In 1917 Mt. Jamna Devi made a gift in favour of her daughter Mt. Janki Devi. Diwan Chand and Raunaq Shah, then the nearest and so far as appears from the record, the only reversioners of Nathu Ram, brought the usual declaratory suit challenging the gift made by Mt. Jamna Devi. A com-

promise was arrived at in that suit, by which one-third of certain shops included in the gift was to belong in full ownership to Diwan Chand and Raunaq Shah: one-third was to go in full ownership to Mt. Janki Devi and one-third was left with Mt. Jamna Devi with the condition that after Mt. Jamna Devi's death, the one-third share would go to Diwan Chand and Raunaq Shah. Mt. Jamna Devi was declared owner of the whole of a certain haveli. She already owned one-half of this haveli in her own right and the result was that she got the whole haveli as full owner. After her death presumably the haveli would descend to her heir Mt. Janki Devi. This happened in 1925. In 1933 Mt. Jamna Devi, Diwan Chand, Raunaq Shah and Mt. Janki Devi and one Kishan Chand, defendant 6, sold a shop, which was the joint property of Kishan Chand and Piara Mal originally, in favour of defendant 5, Ram Ditta Mal, and divided the sale proceeds among themselves according to the shares in the compromise referred to above. The present plaintiff, the son of Mt. Janki Devi, brought a declaratory suit in which he asked for two declarations: (1) that the compromise referred to above should not affect his reversionary rights after the death of Mt. Jamna Devi and Mt. Janki Devi and (2) that the sale of the shop should similarly not affect his reversionary rights. He contended that both the compromise and the sale were made without consideration and necessity, that Nathu Ram had suffered from certain incurable diseases which debarred him from inheritance and that he having become an heir by the Hindu Law of Inheritance (Amendment) Act 2 of 1929, his rights were unaffected by either the compromise or the sale. Mt. Jamna Devi and Mt. Janki Devi admitted the claim. The suit was resisted by Diwan Chand and Raunaq Shah and the vendee Ram Ditta Mal. The other party to the sale had no objection to the plaintiff's claim. Various issues were framed which do not now concern us, but the relevant issues were:

(1) Whether Nathu Ram suffered from such a disease as to exclude him from inheritance? (2) What was the effect of Act 2 of 1929 on the compromise and the decree which was passed in that suit in accordance with the compromise?

There was no evidence on the question of Nathu Ram's exclusion from inheritance and the learned trial Court decided that Nathu Ram was not proved to

have been excluded from inheriting. On the question of the effect of Act 2 of 1929 on the compromise, the trial Court held that the plaintiff was competent to sue by reason of Act 2 of 1929, but he was bound by the compromise deed and hence his suit failed and was dismissed. The plaintiff has come in appeal and the only points argued before us are as follows: Firstly it is contended that by reason of Act 2 of 1929 the plaintiff was competent to maintain the suit and the trial Court was wrong in holding that he was bound by the compromise; Secondly it was contended that in any event, the sale was not proved to be for necessity and therefore the second declaration prayed for should have been granted. The second point can be disposed of on the short ground that no issue was framed on the question of necessity and evidently the parties relied simply on the question whether the compromise was binding or not upon the plaintiff. It was therefore unnecessary to go into the question whether there was any necessity for the sale and if not, what the effect of the sale would be.

The only point to be decided in the case is whether the plaintiff is or is not bound by the compromise entered into between the reversioners and his mother and grandmother. The learned counsel for the appellant has relied on A I R 1936 All 507,¹ a Full Bench decision, in which it was held that the plaintiff was competent to sue in that case by reason of Act 2 of 1929 and that where in a declaratory suit a widow and certain reversioners had compromised the case by division of the property among themselves, such a compromise could not possibly be regarded as a family settlement and therefore was not binding on other reversioners. The facts in A I R 1936 All 507¹ were that two co-widows of a deceased Hindu had made a certain gift to a certain person alleged to be a sister's son of the deceased Hindu. The fact that he was the sister's son was challenged and a declaratory suit was brought to set aside the gift. This declaratory suit was compromised and the reversioners, who brought the suit, and the widows, without any reference, it appears, to the donee, compromised the suit between themselves by dividing the property in certain shares. With the

1. *Rajpali Kunwar v. Surju Rai*, A I R 1936 All 507=163 I C 756=1936 A L J 659 = 58 All 1041 (F B).

greatest respect to the ruling, and the learned Judges who decided it, I am unable to accept the proposition broadly laid down that no family arrangement can be arrived at binding on the reversioner in a suit which is only declaratory, to set aside or challenge a certain gift. Much depends on the circumstances of each case. In the Full Bench Allahabad case¹ it was clear that the only persons profiting by the compromise were the donors and the reversioners. In the present case the position was somewhat different. Mt. Jamna Devi when making the gift could only do so on two grounds: either she claimed to be full owner of the property, or she could claim that Mt. Janki Devi, her daughter, was the next heir and therefore the reversioners could have no locus standi to contest the gift to the next heir. Now, it is clear that in the Punjab, before Act 2 of 1929 came into force, a sister could not be a nearer heir than the present reversioners if she was an heir at all. A sister's son was not an heir at all. Mt. Janki Devi could only be an heir nearer than the present reversioners if the contention advanced in the present case, namely that Nathu Ram was incapable of inheritance, was correct. The position therefore was that all the then possible near heirs were concerned in the suit.

The question as to whether Nathu Ram was or was not capable of inheritance made the rights of the parties possibly doubtful to each side. It appears according to the compromise deed itself that the brotherhood intervened and the parties entered into the compromise, the result of which was that the reversioners got immediately one-third of the shops in dispute, the donee Mt. Janki Devi got one-third of the shops, and the remaining one-third remained with Mt. Jamna Devi with subsequent descent to the reversioners and Mt. Jamna Devi got half of a haveli as full owner with subsequent descent presumably to Mt. Janki Devi; in other words, as between the widow and her daughter, about half the estate was left with them and about half the estate was given to the reversioners. At that time the position appears to have been that there were no other possible near heirs of Piara Mal. Had the compromise not been entered into, Mt. Jamna Devi would have held a life-estate only and after her death the reversioners might have got the entire property, or if Nathu Ram was proved to have

been incapable of inheritance, Mt. Janki Devi would have got the whole property. I am unable to see why a compromise entered into at that time, which was obviously bona fide and whose bona fides had not been challenged by all the then probable heirs, should not be considered binding on the present plaintiff who is the son of Mt. Janki Devi. It cannot be considered that his grandmother and his mother were trying to defraud the present plaintiff of his rights. It appears that in the sale which led to the present suit the father of the present plaintiff was an attesting witness of the sale deed. It is thus clear that nobody considered that the plaintiff had in any way been defrauded or wronged by the compromise entered into by his mother and grandmother. On the contrary it was an act of prudence on their part, for, it secured a half-share of the property to Mt. Janki Devi originally with subsequent descent to the plaintiff himself. Nobody at that time could have contemplated that Act 2 of 1929 would make the plaintiff a nearer heir than the collaterals. There is nothing to show that there were any other collaterals of Piara Mal at all, but if there were any such, the reference in the compromise to the brotherhood would tend to show that those reversioners had also joined in arranging this compromise. In these circumstances, it appears to me that such a compromise might well be described as a family settlement or arrangement and as such binding on the reversioners.

In 50 I C 812² where the facts were that a certain widow had divided her property among her daughters and her then living grandsons, one of the daughters having subsequently brought a suit to succeed to her sisters' property setting aside the compromise, their Lordships of the Privy Council held that she having entered into the compromise and benefited thereby, was estopped from contesting the compromise. Their Lordships left open the question as to whether the grandsons were bound or not; but their Lordships spoke of the compromise as a family arrangement to which favour has always been shown by the Courts. If their Lordships had been of opinion that such a compromise could never be called a family arrangement at all, they would not have expressed them-

2. *Hardel v. Bhagwan Singh*, A I R 1919 P C 27 = 50 I C 812 (P O).

selves as they did in that case. It is true that this point was not before their Lordships of the Privy Council, but the fact remains that their Lordships did not regard it as impossible that such a compromise should be called a family arrangement. I would therefore hold, in agreement with the trial Court, that the present plaintiff is bound by the said compromise; and it is conceded that if he is so bound, the suit must fail. I would therefore dismiss the appeal with costs. The order of the trial Court on costs in that Court stands.

Skemp J.—I agree.

A.L./R.K.

Appeal dismissed.

A. I. R. 1938 Lahore 166

TEK CHAND AND ABDUL RASHID JJ.

*Mohammad Nawaz and another —
Judgment-debtors — Appellants.*

v.

Kaura Ram — Decree-holder —

Respondent.

Second Appeal No. 205 of 1936, Decided on 18th May 1937, from order of Dist. Judge, Mianwali, D/- 13th November 1935.

(a) Punjab Laws Act (4 of 1872), S. 5—Person asserting that he is ruled by custom — Burden lies on him to prove that he is so governed — There is no presumption in favour of custom.

In all cases under the (Punjab Laws) Act it lies upon the person asserting that he is ruled in regard to a particular matter by custom, to prove that he is so governed, and not by personal law, and further to prove what the particular custom is. There is no presumption created by S. 5 of the Act in favour of custom; on the contrary, it is only when the custom is established that it is to be the rule of decision: 110 P R 1906 (F B) and A I R 1917 P C 181, *Foll.* [P 167 C 1]

(b) Custom (Punjab)—Alienation — Ancestral property — Sanda Jats and agriculturists of Mianwali District — Male proprietor has unrestricted powers of alienation.

Among Sanda Jats and the agriculturists of Mianwali District, generally, a male proprietor has unrestricted power of alienation in respect of ancestral property and such property can be attached and temporarily alienated for realization of his unsecured debts after his death.

[P 166 C 2; P 167 C 2]

Abdul Karim — *for Appellants.*

J. G. Sethi — *for Respondent.*

Tek Chand J.—Sarwar, a Sanda Jat of Chah Sandanwala, Dakhli Harnoli, Tahsil and District Mianwali, had money dealings with Kaura Ram. After Sarwar's death, Kaura Ram brought a suit against Mohammad Nawaz and Mohammad Zaman, sons of Sarwar (defendants-appellants),

for recovery of the amount due to him by their father. In this suit a decree was passed for the sum claimed against the appellants, realizable from the estate of Sarwar in their hands. In execution of the decree the decree-holder attached the land in dispute and applied for its temporary alienation for a period not exceeding 20 years. The appellants objected that the land was ancestral and was not liable to attachment and temporary alienation in execution of a decree for an unsecured debt of their father obtained after his death. The decree-holder replied that the land was not ancestral, and that among Sanda Jats, and the agriculturists of Mianwali District generally, a male proprietor had unrestricted power of alienation in respect of ancestral property and that such property could be attached and temporarily alienated for realization of his unsecured debts after his death.

The Subordinate Judge found the land to be ancestral, but held that among the agricultural tribes of Mianwali District, a male proprietor could alienate ancestral land without necessity, uncontrolled by his reversioners, and that after his death such land was liable in the hands of his legal representatives for payment of his unsecured debts. On appeal by the judgment-debtors, the learned District Judge, after further inquiry, held that the powers of alienation possessed by a proprietor in the Mianwali District, though extensive, were not unrestricted, but that it had been proved that in this District, or at least in the tribe to which the judgment-debtors belonged, ancestral property is considered to be that of the last male-holder and the judgment-debtors are his legal representatives so that such property in the hands of the latter is liable to attachment in execution of a decree for an unsecured debt obtained against the deceased's estate. He accordingly dismissed the judgment-debtors' appeal, but left the parties to bear their own costs. On an application by the judgment-debtors, the learned Judge granted a certificate under S. 41 (3), Punjab Courts Act, for a second appeal to this Court on the question of custom involved.

Before discussing the evidence on the record bearing on this question, the learned counsel for the appellants asked us to raise certain initial presumptions as to the inalienability of ancestral agricultural land in the Punjab, and from these

presumptions to infer by a process of inductive reasoning the existence of certain customs. This is a line of argument which we cannot accept. We do not think in a matter like this, we can start with any presumption in favour of the existence of any particular custom. As laid down by their Lordships of the Privy Council in 45 Cal 450¹ at p. 459, approving the dictum of Robertson J. in 110 P R 1906² at page 410,

In all cases under the (Punjab Laws) Act it lies upon the person asserting that he is ruled in regard to a particular matter by custom, to prove that he is so governed, and not by personal law, and further to prove what the particular custom is. There is no presumption created (by S. 5 of the Act) in favour of custom; on the contrary it is only when the custom is established that it is to be the rule of decision. The Legislature did not show itself enamoured of custom rather than law, nor does it show any tendency to extend the principle of custom to any matter to which a rule of custom is not clearly proved to apply. It is not the spirit of Customary law, nor any theory of custom, or deductions from other customs, which is to be a rule of decision, but only, "any custom applicable to the parties concerned which is not . . .", and it therefore appears to me clear that when either party to a suit sets up custom as a rule of decision, it lies upon him to prove the custom which he seeks to apply; if he fails to do so, Cl. (b) of S. 5, Laws Act, applies, and the rule of decision must be the personal law of the parties subject to the other provisions of the clause. It is not sufficient to show that in regard to certain other matters the parties are governed by custom.

Sarwar, deceased, was a Mahomedan, and admittedly his personal law was Mahomedan law. It lay therefore on those who asserted that in any particular matter he was governed by custom, to prove the existence of the alleged custom. This they could do by entries in the *Riwaj-i-am* to which a presumption of correctness attaches or by proof of instances of the exercise of the custom in the tribe. No copy of the *Riwaj-i-am* has been placed on the record; and the "Customary Law of Mianwali District", published in 1908, does not contain any entry to the effect that in this tribe, or among agricultural tribes of this district generally, a male proprietor has restricted power of alienation in respect of ancestral property. Nor does the Customary Law of the Mianwali District deal specifically with the question of the liability of ancestral property for payment of unsecured debts of a male proprietor in

his life time, or after his death. The presumption arising from the correctness of entries in the *Riwaj-i-am* is therefore not available to the appellants in this case, and the matter must be decided on the evidence produced by the parties. The extracts from the revenue papers which have been placed on the record, show that in the village of Harnoli to which Sarwar, deceased belonged, there have been no less than 252 sales and 1461 other alienations of agricultural land from 1907 to 1927 and that not a single one of these alienations had been challenged by the sons or other reversioners of the alienor. We also find that Sanda Jats living in this village had effected 209 sales and 29 mortgages from 1878 to 1923; but during this long period none of them was assailed by the reversioners.

The absence of any entry in the *Riwaj-i-am* restricting the power of alienation and the fact that male proprietors of this and other tribes living in this village have so extensively exercised their power of alienation from 1878 up to the present day without control or challenge by the reversioners, clearly indicates that the proprietors in this village enjoy unrestricted right of alienation. In addition to this, as has been pointed out by the learned District Judge, there is on the record proof of seven instances in which ancestral property has been attached and alienated in execution of money-decrees, or otherwise alienated for satisfaction of unsecured debts of male proprietors, and there is not a single instance cited on behalf of the appellants to show that any such alienation or attachment was challenged by the reversioners. Further, there is the significant fact, that every one of the witnesses produced by the judgment-debtors admitted that he had alienated his ancestral land, without objection by his reversioners, and as found by the learned District Judge none of these alienations was effected for valid necessity. The learned counsel for the appellants contended that in certain other matters this tribe is governed by custom, but as ruled by their Lordships of the Privy Council in the case cited above, this circumstance by itself is not sufficient to prove that the tribe is governed by custom in this particular matter also. We are of opinion that the decision of the learned District Judge overruling the appellants' objection is correct. The appeal fails and is dismissed. Having regard to all the

1. Abdul Hussain Khan v. Bibi Sona Dero, A I R 19 7 P O 181=48 I O 806=45 I A 10=45 Cal 450=12 S L R 104 (P O).

2. Daya Ram v. Sohail Singh, (1908) 110 P R 1906=81 P L R 1907=59 P W R 1907 (F B).

circumstances we leave the parties to bear their own costs throughout.

P.R./D.S.

Appeal dismissed.

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DALIP SINGH AND SKEMP JJ.

Sheikh Abdul Majid — Plaintiff

— Appellant.

v.

Motor Union Insurance Co. Ltd. —

Defendant — Respondent.

First Appeal No. 105 of 1936, Decided on 21st May 1937, from decree of Senior Sub-Judge, Rawalpindi D/- 9th December 1935.

(a) Insurance — Fire — Policy is document complete in itself — Warranty in policy that no hazardous goods are to be stored — Assured cannot plead that he can store one per cent. of hazardous goods because other companies allow it.

The contract between the insured and the company is the policy. The policy is a document complete in itself. [P 169 O 2]

Where therefore in a fire insurance policy there is a warranty by the assured that no hazardous goods will be stored, he cannot plead that he can store one per cent. of hazardous goods because under the terms on which the insurance company generally does business or according to warranties in force at other times or allowed by other companies one per cent. might have been allowed. [P 169 O 2]

(b) Insurance — Fire insurance — Warranty by assured not to store any hazardous goods — Breach — Building destroyed by fire — Claim of assured must fail.

Where under a fire insurance policy there is a warranty by the assured that no hazardous goods will be stored by the assured in the premises, the assured if he commits breach of the warranty and if the building is destroyed by fire, will not be entitled to any claim against the company. [P 172 O 2]

(c) Insurance — Fire insurance — Company by merely taking possession of salvage and keeping it for month is not estopped from contesting claim of insured.

When in a fire insurance policy there is no clause relating to salvage, the mere fact that the insurance company takes the salvage and keeps it for about a month does not operate as an estoppel against its pleading that the insured cannot make a claim under the policy : (1922) 2 A C 541, *Distinguishing*. [P 171 O 2; P 172 O 1]

J. N. Aggarwal and S. N. Bali —

for Appellant.

S. C. Isaacs and R. B. Sawhney —

for Respondent.

Skemp J.—This appeal has been lodged against a judgment of the Senior Subordinate Judge, Rawalpindi, dismissing a claim brought on a policy of fire insurance. The

plaintiff Sheikh Abdul Majid of Abdul Majid and Sons of Majid's house, Murree and Rawalpindi, was insured with the defendant Company, the Motor Union Insurance Company of Calcutta. He was insured with them in respect both of his Rawalpindi and Murree premises. On 12th April 1933 his premises and stock as a general retail merchant at Murree were largely destroyed by fire. The Company refused to pay the amount claimed on the grounds of misdescription of the premises and breach of a warranty not to store hazardous goods. The plaintiff then on 1st August 1933 brought the present suit for Rs. 48,000. His building was insured under the policy for Rs. 20,000 and his stock for Rs. 15,000 (reduced to Rs. 10,000) but the plaintiff claimed Rs. 48,000 including building Rs. 20,000, stock Rs. 22,684, furniture Rs. 1315 and other items including rent and interest. The defendant Company resisted the claim on a large number of grounds including fraudulent claim, misdescription of building and breach of warranty. The learned Senior Subordinate Judge framed no less than 25 issues, and after a trial which was unusually expeditious considering the complexity of the case disposed of them in a clear and exhaustive judgment. He found most of the issues for the plaintiff but dismissed the suit on a finding that the plaintiff had stored on the premises hazardous goods in breach of his warranty.

The plaintiff has appealed and the first point for determination is, what are the actual terms of the warranty on the plaintiff's policy? The original of the plaintiff's Policy No. 5251014 with the defendant Company was recovered in a half burnt condition after the fire and is marked Ex. P-1. The defendant Company produced a duplicate, Commissioner's Ex. 31. This is proved by the evidence of Mr. V. J. Alexander, Secretary of the Calcutta Branch of the defendant Company. It appears from his evidence (pp. 73, 74, 75, Vol. 4 of the printed books) that two carbon copies of every fire policy are made, one for the Company's London office and one for the Calcutta office. They are typed together and bound in a book, the duplicate being Commissioner's Ex. 31. The warranties are impressed by stamps automatically. The warranty in question on given as Commissioner's Ex. 32 is Ex. 31 in the following terms :

During the currency of the policy it is hereby warranted :

That no hazardous goods are stored and that no hazardous trade or process is carried on in the building described or in any building communicating therewith.

On the half-burnt policy Ex. P-1, the following words and letters can be read in fragmentary form :

... the currency of this ... it is hereby warranted :

... dous goods are stor ... d ... ied ... ng

The learned Senior Subordinate Judge found :

A comparison of the warranties on these two policies made it clear beyond a shadow of doubt that these two warranties were the same

and I agree. The plaintiff's case was that the warranty was the same as that stamped on his Rawalpindi policy Ex. P-3, which is as follows :

That no hazardous goods be contained in the premises described but allowing storage of hazardous goods to the extent of 1 per cent. only of the total value of stock such quantity of hazardous goods not to include more than six gallons of petrol or other volatile spirits.

A comparison of legible parts of the warranty on Ex. P-1 with this warranty made it quite clear that they are not the same and this was ultimately admitted by Mr. J. N. Aggarwal for the appellant. Agreeing with the Subordinate Judge, I would find that the terms of the warranty are as stamped on Ex. P-31, the material part being 'that no hazardous goods are stored'. The plaintiff's pleadings about hazardous goods are found in para. 13 of the plaint :

That while repudiating the plaintiff's claim, the defendants based their repudiation on misdescription of property and storage of hazardous goods, which the plaintiff totally denies and whereof he puts the defendants to proof ...

No hazardous goods were stored in the premises and what goods were stored could not and did not constitute hazardous goods causing any change in the rate of premium applicable. In any case according to the warranty applicable to retail premises as those of plaintiff's hazardous of the value of 1 per cent. of total stock were exempt ...

The defendants dealt with these pleas in paras. 15 (iv) and 17 (b) of their written statement. Para. 15 (iv) "denies the allegation that no hazardous goods were stored in the premises". Para. 17 (b) alleges that at the time of fire

there were stored on the said premises not less than 10 rolls of coir matting, not less than six dozen tins of paint and/or enamel. All of these were hazardous goods for insurance purposes.

The Subordinate Judge framed three main issues dealing with hazardous goods:

(5) Was the plaintiff entitled to store hazardous goods to the extent of 1 per cent. of the total value

of stock ? (6) Was the plaintiff entitled to store 5 per cent. hazardous goods in tins, bottles, or cartridges according to the terms of the warranty attached to the retail premises ? (8) Did the plaintiff store any hazardous goods, and if so, what was the percentage of hazardous goods to the total stock ?

On these issues he found : (5) that according to the terms of the warranty on the policy 'the plaintiff was not entitled to store hazardous goods to the extent of even one per cent. of the total value of the stock on account of the warranty being the essence of the contract'. On Issue (6) he found that according to the warranty, the plaintiff was entitled to store goods of which the detail is mentioned in the copy of the rule Ex. P-46 provided their value did not exceed in all 5 per cent. of the total value of the stock. On Issue (8) he found that the plaintiff had in stock at the time of the fire ten rolls of coir matting, three dozen coir doormats and three or four dozen tins of paints, the total value of which was approximately Rs. 263.10.0, more than 1 per cent. of the stock insured.

Mr. Isaac for the respondent Company urged that the findings were inconsistent and apparently this is so ; though perhaps the Subordinate Judge gave a finding on every issue which he had framed for the sake of completeness. It is clear that in face of the warranty that no hazardous goods are stored, the plaintiff could not be allowed to plead that he might keep 1 per cent. of hazardous goods or under certain conditions 5 per cent. The policy is a document complete in itself. As Mr. Maitland said 'The contract between the insured and the Company is the policy'. It is irrelevant that under the terms on which Calcutta fire insurance companies generally do business or according to other rates of premium or according to warranties in force at other times or allowed by other companies 1 per cent. might have been allowed.

The plaintiff relied on Ex. P-46, a manuscript extract from Ex. P-152. Ex. P-152 and Ex. P-153 are mofussil tariffs of the Calcutta Fire Insurance Association. Ex. P-153 is marked "Private and Confidential", and these tariffs must have come into the hands of the plaintiff by backdoor methods. They were used for cross-examination of witnesses and at the very end of the case placed on the record by consent of both parties. It is pointed out to us that neither of these tariffs apply to the policy in suit which was

entered into with effect from 13th June 1931 and renewed from 13th June 1932. Ex. P-152 expired in the year 1925 and Ex. P-153 began in October 1932. Mr. Isaac for the respondent company stated that he had with him the tariff relating to the date on which the policy was entered into and offered to produce it; but it appears to us that the whole discussion is irrelevant and that the matter is concluded by the terms of the warranty 'that no hazardous goods are stored'. The findings on Issues 6 and 8 are irrelevant. It was also argued that coir matting was not 'stored' but was in use on the floor of the shop. This point was not pleaded or put in issue nor referred to in the judgment of the Subordinate Judge, although Mr. Bali says that it was raised in final arguments. The argument really depends on expressions used by Mr. Warrington, who took over the salvage on behalf of the defendant Company, and Kahan Chand, a clerk of Lloyds Bank. Mr. Warrington said :

The coir matting rolls were spread throughout the debris and from the position of these rolls it was evident that they were situate on the floor at the shop at the time of the fire, as the masonry had fallen on the top of these rolls. (Vol. 2, p. 54).

Kahan Chand said, "the coir matting was not lying in a heap but scattered inside the shop" (Vol. 2, p. 22). I do not think weight can be attached to such expressions, used when the point was not in issue or before the minds of the witnesses. Mr. Isaac drew our attention to the fact that several of the witnesses spoke of rolls of coir matting, and relied on this as showing that the matting was not spread; but in most instances the word "rolls" or any equivalent is not found on the vernacular record. Kahan Chand however said, according to both records, that he saw two rolls one day and eight rolls the next. Mainly because the point was not pleaded, I think it is without force.

The next question that would appear to arise is, what are hazardous goods? I do not think however that it arises in this case. The pleadings of both parties and the issues have been quoted and it will be seen that the plaintiff did not say clearly that coir matting, coir mats and oil paints were not hazardous goods or that he did not know that they were hazardous goods. The plaintiff put in no replication and his counsel's opening statement was merely a repetition or summary of what had been pleaded. This is particularly important because in their letter Ex. P. 62, dated the

13th May 1933, the defendant Company had rejected the claim on the ground inter alia of breach of warranty. They said :

Requisite warranty appears on the policy, i. e. that no hazardous goods are stored Whereas we find that there were hazardous goods such as coir matting, coir mats, oil paints etc., in the premises at the outbreak of the fire'.

If the plaintiff had not known that these goods were hazardous, one would have expected him to say so in the plaint and before it. If he had been able to plead that no doubt he had coir matting, etc., but that he had never been told and did not know that these things were hazardous goods, this case might have been on a very different footing. One would expect the Company when insisting on warranty that hazardous goods should not be stored to specify the hazardous goods and this is done generally or at any rate frequently; for instance, the plaintiff's father Mohammad Din produced his policy with a list of hazardous goods attached and Macgillivray, Law of Insurance, page 884, refers to three cases on the construction of the words "hazardous goods", (two from the United States and one from Canada) in which articles denominated "hazardous" were annexed to the policy. The point does not arise in this case because the plaintiff did not plead it specifically although he knew that it was a specific ground of the Company's refusal to pay his claim. This consideration is re-enforced by some others. The plaintiff produced Ex. P-46, a list of hazardous goods. His father produced Ex. P. W. 10/5, a list of hazardous goods attached to his policy by another company. His witness Inayat Ullah stated :

I read out the list of hazardous goods to the plaintiff and asked him whether he stored any of these goods I told the plaintiff that according to the rules of the Insurance Company he could store one per cent. of the hazardous goods in accordance with the rates quoted by me. The plaintiff told me that he did not deal in hazardous goods.

I doubt very much whether this evidence is true, and if it is, what Inayat Ullah told the plaintiff is unavailing in face of the terms of the warranty. I mention it only as tending to show that the plaintiff knew what hazardous goods were. Thus we now come to the question whether the plaintiff had in his shop hazardous goods at the time of the fire. As already noted, the learned Subordinate Judge found that he had ten rolls of coir matting, three dozen coir doormats, three dozen tins of paints valued approximately

Rs. 263-10-0. The plaintiff admitted in his evidence that he had in his shop one roll of coir matting, three dozen doormats and less than six dozen of paint tins valued about Rs. 30. The plaintiff gave evidence that the value of the coir matting and the doormats was Rs. 48-1-0 and this was substantiated by the invoice Ex. P-91 produced by the vendor.

The defendants' case is founded on the salvage reports. They appointed Mr. War-rington, Manager of Messrs. Cox and Kings Ltd., Murree, to represent their interest, and he prepared a number of reports which were signed by Abdul Majid and himself (Vol. 2, p. 43). The most important of these reports is Ex. D.26 dated 15th April 1933, the correctness of which the plaintiff admitted in cross-examination with the exception of two details which do not affect this point (Vol. 2, P. 7). Ex. D.26 says :

Two rolls of coir matting have today been stored in the same godown as used for remainder of today's salvage and that salvaged yesterday (approximate total eight rolls) has been stored outside the said godown.

That is why the Subordinate Judge found that there were ten rolls of coir matting. He did not believe the evidence of the plaintiff that some of it came from his father's shop adjacent and was mixed up with the salvage of his own shop. The plaintiff's evidence consists of his father Mohammad Din, Rattan Singh and Suleman; the defendants produced Kahan Chand but Mohammad Din said: "I had two rolls of coir matting and three bundles of doormats." The doormats are irrelevant, because the plaintiff's own statement proved that he had three dozen doormats and not more are asserted. If Mohammad Din's evidence be accepted, it still leaves the plaintiff with eight rolls of coir matting to be accounted for. I am inclined to agree with the learned Subordinate Judge for the reasons which he gave and notice that Kahan Chand, Head Clerk of Lloyds Bank, said that he had seen two rolls of coir matting one day and eight rolls of coir matting the next day when the goods were sorted. He added that the plaintiff gave no explanation and did not say that the coir matting did not belong to him. He also said that after the salvage was sorted, a statement was prepared every evening. But even if two rolls be deducted it still leaves the plaintiff with eight rolls of coir matting. These rolls were valued by the Subordinate Judge at Rs. 20-14-0 per roll

and the valuation has not been objected to. Three bundles of coir mats valued at Rs. 30 are admitted and as the plaintiff himself admitted "less than six dozen of paint tins" it seems unduly to favour him to hold that there were only three dozen. Taking the figure at five dozen tins, the total value of the goods by this calculation would amount approximately to Rupees 223-3-0 which cannot be called entirely negligible.

It may be noted in passing that although the plaintiff's case is that only liquid paint was hazardous goods, there is nothing on the record to show how much of this paint was dry or how much liquid. The question of kerosine oil was also raised, two or three bottles being found in the salvage, but it was dropped by the Company because it was found that the kerosine oil was introduced the evening before the fire. A British Officer deposed that he wanted to try a lamp and the plaintiff sent a servant for oil. The Company did not press this point and indeed the important part of their argument is that ten (or at the very least eight) rolls of coir matting were found among the salvage of the plaintiff's shop. It was also argued that the defendant Company took possession of the salvage, and that this operated as an estoppel against their pleading that the plaintiff could not make a claim under the policy. This question formed the subject of Issue 14 : the Subordinate Judge found that the defendants took possession of the salvage, but that this had no effect on the suit. After hearing arguments we are not prepared to find otherwise on the facts ; Mr. Alexander, Secretary of the defendant Company himself wrote, in disclaiming liability in letter Ex. P-62 dated 13th May 1933 : "We are advising our assessors to make over to you all salvage in their possession immediately".

But how does the mere fact that the assessors took the salvage and kept it for about a month operate as an estoppel? The plaintiff-appellant's learned counsel was quite unable to explain this on principle. He relied on a passage in (1922) 2 A C 541¹ at p. 546. That proceeded on the construction of Cl. 12, relating to salvage in the policy in question; whereas in policy Ex. P-1 there is no corresponding clause

1. *Yorkshire Insurance Co. v. Craine*, (1922) 2 A C 541=91 L J P C 226=66 S J 703=38 T L R 845.

about salvage. The facts were also different: in that case the Insurance Company had taken possession of the assured's premises, his machinery and plant (which were not insured) and his stock of motor cars and remained in possession despite the protests of the assured for four months. Here the Company took possession only of the salvage stock which was of little or no value and for one month. There is no force in this point. The plaintiff's main case however is that he was covered against additional risks caused by the storage of these goods. This case falls under two main heads: (1) that he had actually received cover notes and (2) that he was covered by reason of certain correspondence between himself and Messrs. Laurels, Lahore Agents of the defendant Company. The plaintiff mainly relies on (1) a post card marked Ex. P. W. 18/2 dated 23rd March 1933, (2) a letter Ex. P. 118 dated 25th March 1933, and (3) a post card Ex. P. 119 dated 7th April 1933. (After discussing evidence his Lordship came to the conclusion that cover notes were not received and correspondence was not sent and then proceeded further.) In final arguments, for the first time Mr. Bali contended that leaving everything else, the plaintiff was covered by reason of the action taken by the defendant Company on the admitted part of the post card Ex. P. W. 18-2. This was not pleaded. In my opinion it is not covered by any of the Issues Nos. 5, 8 or 13, it is not referred to in the judgment and it was not even raised in opening arguments.

The admitted part of the post card was communicated to the defendant Company by Laurels by letter Ex. P. W. 18/3, dated 27th March 1933 in reply to which the Company issued a letter, the original of which is Ex. P. W. 18/16 and the copy supplied to the plaintiff is Ex. P. 49, dated 30th March 1933. This letter repeats the information received, asks for the exact amount of cover as soon as possible in order that the requisite endorsement may issue and says that "in the meantime we are holding the risk covered". After the fire in a letter Ex. P. 55, dated 19th April 1933, the defendant Company said that in the latter portion of the letter (Ex. P. W. 18/2)

you requested us to hold you covered for a week when the shop would open and you could supply us with full details. In reply we agreed to hold you covered for the period mentioned in your

letter but no further particulars have been received up to date and as the fire occurred nearly three weeks afterwards

the Company disclaimed liability except for amounts for which endorsements had issued. This letter strikes me as a bit of sharp practice. It is not really what the plaintiff wrote but I do not think that the plaintiff can be held covered by reason of the admitted part of his post card dated 23rd March and of the defendant Company's communication to Laurels not only because the point was no part of the plaintiff's original case but because this reply was never communicated to the plaintiff and was simply a communication from the defendant Company to their own agents. This point therefore also fails. The result of all this is that the appeal fails and must be dismissed with costs. It is unnecessary to consider the issues as to misdescription of the property, fraudulent claim, and some other minor points and these issues were not argued before us. In his judgment the Senior Subordinate Judge directed the parties to bear their own costs because "the plaintiff had suffered heavy loss and the suit fails on a technical plea". The defendant-respondent in cross-objections applied for costs in the trial Court. They also applied for special costs of the appeal which was argued before us on 12 days.

On consideration I would not interfere with the discretion of the trial Judge as to the costs, although it would appear that the plaintiff has fabricated some evidence to support his case. At the same time he did suffer a heavy loss by the fire after being insured with the defendant Company for some years and it has not been suggested that the fire was anything but accidental or that the loss was not severe. His case has failed because he stored hazardous goods. The nature of the hazardous goods forbidden was never communicated to him by the Company and it has not been shown that they contributed in any way to the fire. Indeed as eight or ten rolls of coir matting were recovered they could not have been burnt. I would therefore leave the order of the Senior Subordinate Judge as it stands. The appellant must pay the costs of this appeal because we have substantially agreed with the Senior Subordinate Judge and when we have differed it has been to the disadvantage of the plaintiff but I see no reason to grant more than the ordinary costs of

this appeal. There will be no order as to the costs of the cross-objection.

Dalip Singh J.—I agree.

D.S./R.K.

Appeal dismissed.

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TEK CHAND AND ABDUL RASHID JJ.

William Butler Yeats, (through E. M. Chambers) — Plaintiff — Appellant.
v.

Prof. Eric Dickinson and others — Defendants — Respondents.

First Appeal No. 420 of 1936, Decided on 19th May 1937, from decree of Addl. Dist. Judge, Lahore, D/- 18th July 1936.

(a) Contract—Construction—Author agreeing to grant to publishers sole and exclusive license to print, publish and sell his work—Author reserving to him copyright of such volume and also other rights—Agreement held amounted to only publishing agreement and not assignment of copyright.

The author agreed to grant the publishers the sole and exclusive license to print, publish and sell his works in book form in the English language in certain parts of the world but reserved the entire copyright of the volume as his property and also reserved to himself all other rights except those mentioned in the agreement :

Held that the agreement merely amounted to a publishing agreement and could not be regarded as an assignment of copyright : (1907) 1 Ch D 651, Rel. on; (1929) A C 151, Disting.

[P 175 C 1]

(b) Copyright Act (1911, 1 & 2 Geo. V, Ch. 46) Ss. 6 and 7—Scope—Remedies given by Ss. 6 and 7 are not alternative—Yet owner of copyright getting damages under S. 6 is not generally entitled to anything as damages under S. 7.

Though the remedies given by S. 6, Copyright Act, are not alternative to those given by S. 7, yet when an owner of a copyright right obtains damages under S. 6, it often happens that he can recover nothing further in respect of damages under S. 7. Where the amount of damages awarded under S. 6 covers the price for permission to publish the work in question, the author is not entitled to damages also under S. 7 : 52 T L R 280, Rel. on.

[P 175 C 2]

Ishar Das Khanna — for Appellant.

Bishan Nath and H. S. Ray — for Respondents Nos. 2, 3 and 1.

Abdul Rashid J.—In the year 1933 a book entitled 'A Recession of English Poetry' was published by Messrs. Uttar Chand Kapur and Sons, Lahore. This book contains a large number of poems by various authors from the earliest times upto the present day. Mr. Eric Dickinson, Senior Professor of English Government

College, Lahore, is the author of this compilation of English poetry. The book contains two poems by Mr. William Butler Yeats, the plaintiff in this case, entitled 'Adam's Curse' and 'The Stolen Child'. On 23rd August 1934 a letter was addressed by the Acting Manager of Messrs. Macmillan and Co. Ltd. to Messrs. Uttar Chand Kapur and Sons enquiring as to who had given them permission for including Mr. Yeats' poems 'Adam's Curse' and 'The Stolen Child' in the book entitled 'A Recession of English Poetry' by Dickinson. In the concluding sentence of this letter, it was mentioned by Messrs. Macmillan and Co. Ltd. that they had the copyright of these poems. The suit, which has given rise to the present appeal was instituted by Mr. Yeats on 19th July 1935. Messrs. Macmillan and Co. Ltd. did not join Mr. Yeats in instituting the suit. Mr. Dickinson author of 'A Recession of English Poetry' was defendant 1 and Guran Ditta Kapur and Uttar Chand Kapur were also made defendants on the ground that the former was the printer and the latter the publisher of the work in question. It was alleged in the plaint that the plaintiff was a well-known poet and was the author of numerous poems in the English language and that two of his poems entitled 'The Stolen Child' and 'Adam's Curse' had first been published in 1889 and 1904 respectively. It was further stated that Messrs. Macmillan and Co. Ltd. had the exclusive right to print all poetical works written by the plaintiff, that Messrs. Macmillan and Co. Ltd. had published a book entitled 'The Collected Poems of W. B. Yeats', and that the defendants had infringed the copyright of the plaintiff by including two of his poems in the book entitled 'A Recession of English Poetry'.

The defendants pleaded inter alia, that the plaintiff had no locus standi to sue as he had assigned the copyright in his poems to Messrs. Macmillan and Co. Ltd. by an agreement dated 15th March 1933. It was further pleaded that copyright does not exist in individual poems, that the defendants had not infringed any copyright belonging to the plaintiff and that the plaintiff was not entitled to any damages. On the pleadings of the parties, the trial Court framed the following issues :

(1) Is the plaintiff entitled to bring the suit in view of Macmillan's letter and allegation in the plaint that that firm is entitled to print and publish solely the poems of the plaintiff? (2) Is there no copyright in individual poems? (3) To

what damages, if any, is the plaintiff entitled to?
 (4) Is plaintiff entitled to the injunction sought?
 (5) Whether the defendants have not infringed the copyright of the poems "Stolen Child" and "Adam's Curse"?

On Issue 1 it was held by the trial Court that the plaintiff had a *locus standi* to bring the present suit, as the agreement dated 15th March 1933 was a publishing agreement only and not an assignment of copyright. It was also held that copyright exists in individual poems and that the defendants had infringed the copyright of the plaintiff by including the poems "The Stolen Child" and "Adam's Curse" in their book entitled "A Recession of English Poetry". The trial Court also found that Mr. Dickinson, defendant 1, had included the two poems of Mr. Yeats in his book owing to a bona fide mistake as he was under the impression that he had obtained permission from Messrs. Macmillan & Co. Ltd. for the inclusion of these poems in his book. On these findings, the trial Court awarded the plaintiff a decree in the following terms: (a) For an injunction restraining the defendants from infringing the plaintiff's copyright in the two poems "The Stolen Child" and "Adam's Curse"; (b) for an injunction restraining the defendants from printing, producing or publishing these two poems; (c) for Rs. 25 to be paid as damages by the defendants; and (d) for an order that the defendants shall extract from the copies of their work at present unsold these two poems and make them over to the plaintiff along with printed proof sheets, pages or other papers designed to be or prepared as parts of any work in connexion with the publication of these two poems. The plaintiff was also granted proportionate costs.

Against the decision of the trial Court, the plaintiff has preferred an appeal to this Court praying that the damages granted by the trial Court may be enhanced and that the decree may be modified so as to include damages for conversion under S. 7 of the Act in addition to the penalties leviable under S. 6. The defendants have filed cross-objections under O. 41, R. 22, Civil P. C., praying inter alia that the suit of the plaintiff may be dismissed as he had no *locus standi* to sue. The first question for consideration in this case is whether the agreement dated 15th March 1933, between the plaintiff and Messrs. Macmillan & Co. Ltd. amounts to an assignment of copyright in favour of the latter.

The relevant provisions of this agreement may be reproduced in extenso:

1. That the author (W. B. Yeats) shall grant the publishers the sole and exclusive license to print, publish and sell in book form in the English language in the United Kingdom of Great Britain, its Colonies and dependencies and in Ireland a volume containing all the poetical, nondramatic works written by him and at present entitled "Collected poems" and he shall also grant to the publishers a license to sell the said volume in book form in the English language in any other part of the world except the United States of America.

2. That the published price of the said volume shall be fixed by the publishers at or about ten shillings and six pence (10-6d.) net and they shall pay to the author a royalty of twenty per cent. of the published price on all copies of the said volume which they may sell.

5. That all rights in the said volume other than those herein granted are reserved by the author.

11. That the entire copyright of the said volume is to remain the property of the author and at the expiration of five years from the day on which it is first published in book form by the publishers or at the expiration of any subsequent period of one year thereafter this agreement may be terminated by either party on giving six months' notice to that effect.

It was contended by the learned counsel for the respondent that Cl. (1) of this agreement amounts to a complete assignment of the copyright in favour of Messrs. Macmillan & Co. Ltd. and that Cl. (11) which lays down that the entire copyright of the said volume is to remain the property of the author cannot be so construed as to outdown the plain grant which is embodied in Cl. (1). It was further urged by the learned counsel for the respondent that if the agreement in question amounts to an assignment of the copyright in favour of Messrs. Macmillan & Co. Ltd. the mere use of the word "license" and "licensee" in the agreement cannot alter the legal effect of the various terms of this document. Reliance was placed in this connexion on a ruling of the House of Lords in (1929) A C 151.¹ In the reported case, the plaintiff-appellant *Messenger* was the composer of the music in a play known as "Les Petites Michus" and two other persons were the authors of the play. The authors and the composer granted a license to Mr. George Edwards of Daly's Theatre in London giving him the sole and exclusive right of representing or performing the play in the United Kingdom of Great Britain and Ireland, America and the British Colonies

1. *Messenger v. British Broadcasting Co. Ltd.*, (1929) A C 151=98 L J K B 189=140 L T 227=45 T L R 50.

and Dominions. Cl. (2) of the agreement provided that :

The copyright in the music of the play shall remain the property of the said Andre Messenger and he shall be at liberty to use the English lyrics for sale with the music.

The British Broadcasting Co. in pursuance of permission granted to them by the licensee gave a broadcast performance of the play at their studio in London. In an action brought by Messenger for infringement of copyright, it was held that the agreement as a whole amounted to an absolute assignment of the performing rights of the play within the prescribed area and was not a mere license, that it was not limited to representation on the stage of a theatre and that the defendants had therefore not infringed the copyright of the plaintiff. This ruling is not applicable to the facts of the present case as by Cl. (2) of the agreement, the copyright in the music of the play remained the property of the plaintiff Messenger, but so far as the rights of representing or performing the play were concerned, the agreement amounted to a complete assignment in favour of the licensee. Lord Sumner in his judgment indicated that Cl. (2) stated what rights had not been included in the grant. In the present case it is definitely laid down in the agreement, dated 15th March 1933, that the entire copyright of the said volume is to remain the property of the author and that all rights in the said volume other than those therein granted are reserved by the author. In these circumstances the agreement between Mr. Yeats and Messrs. Macmillan & Co. Ltd, amounts merely to a publishing agreement and cannot be regarded as an assignment of copyright in the poems of Mr. Yeats. Reference may be made in this connexion to the case in (1907) 1 Ch D 651.² The trial Court was right therefore in holding that the plaintiff had a *locus standi* to institute the present suit.

The plaintiff has examined two witnesses on commission who have stated it as their opinion that five guineas (5 Gns.) would be a reasonable fee to charge for the publication of each of the poems. Mr. Francis, Manager of Messrs. Macmillan & Co. Ltd. was however compelled to admit that only two guineas had been charged for the reproduction of a poem of

Mr. Yeats by the Karnatak Press, Bombay. This fee was collected by Messrs. Macmillan & Co. Ltd. on behalf of Mr. Yeats, and therefore the amount of the fee charged was within the personal knowledge of Mr. Francis. I am of the opinion that in the present case also, a sum of two guineas would be a reasonable fee for permission to publish each of the two poems which form the subject matter of the present litigation. It was contended by the learned counsel for the appellant that in addition to damages under S. 6, Copyright Act, the plaintiff should be awarded a substantial sum for conversion under S. 7 of the Act. Reference was made in this connexion by the learned counsel to the case in 52 T L R 230.³ It was held in that case that the remedies given by Ss. 6 and 7, Copyright Act, respectively, whereby damages can be recovered for the infringement of copyright and for conversion of any infringing copies are cumulative and not alternative. It was however observed by their Lordships that though the remedies given by S. 6 are not alternative to those given by S. 7, it must often happen that where an owner of copyright obtains damages under the former section he can recover nothing further in respect of damages under the latter. In my opinion, if a sum of four guineas be awarded to the plaintiff in the present case under S. 6, he would not be entitled to any damages under S. 7, as four guineas would be the price of the permission given by him to the defendants to publish the two poems.

For the reasons given above, I would accept this appeal only in so far as to enhance the amount of damages from Rs. 25 to Rs. 56. I would dismiss the cross-objections. The parties will bear their own costs in this Court. The order of the trial Court regarding costs in that Court will stand.

Tek Chand J.—I agree.

K.B./A.L. *Appeal partly accepted.*

3. Sutherland Publishing Co. Ltd. v. Caxton Publishing Co. Ltd., (1935) 52 T L R 280.

2. In re Jude's Musical Compositions, (1907) 1 Ch D 651=76 L J Ch 542=96 L T 766=28 T L R 461.

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YOUNG C J. AND MONROE J.

Bahadur Singh Arjan Singh
Convict — Appellant.

v.

Emperor.

Criminal Appeal No. 534 of 1937,
Decided on 28th June 1937, from order
of Addl. Sess. Judge, Amritsar, D/- 30th
April 1937.

**Criminal Trial—Evidence—Medical officer
examined before trying Magistrate should be
insisted to come before Sessions Court.**

It is likely to cause a miscarriage of justice of
a grave character if a medical officer witness is
examined in the Court of committing Magistrate
but he is not examined before the Sessions Judge.
Counsel for accused should insist upon his coming
before the Sessions Court. [P 176 C 2]

B. R. Puri — *for Appellant.*D. R. Sawhney — *for the Crown.*

Judgment.—Bahadur Singh has been
condemned to death by the learned Addi-
tional Sessions Judge of Amritsar for the
murder of Chanan Singh. Tara Singh, it
is said by the prosecution, had a row on
the morning of 5th April 1936, with Pritu
and Labhu, because his buffalo had tres-
passed into their field. It is said there
was abuse and a threat by Pritu and
Labhu. That afternoon Tara Singh was
in his field sowing sugarcane. Chanan
Singh and some others came to get him to
attend some religious ceremony of the
Sikhs. In order that Tara Singh might
go with them, all of them took part in the
sugar-cane planting so that Tara could
finish and get away. While they were
thus engaged, it is said that Bahadur Singh
with Pritu, Labhu and another man
named Chanan, came armed with dangs
and spears, it is said, to attack Tara.
Chanan Singh said he would protect Tara
and when the opposite party came for-
ward, it is said that Chanan Singh hit
Chanan a blow with his dang on the
shoulder. Thereupon, Bahadur Singh thrust
his spear into the chest of Chanan Singh,
inflicting a very severe wound which, ac-
cording to the doctor, Lieutenant-Colonel
Dargan, I. M. S. went into the chest
between the fourth and fifth rib-cartilages
on the right side; the covering of the
heart was incised and there was blood in
the sac round the heart. The diaphragm
had been cut and there was blood in the
right lung cavity. The left lobe of the

liver had been cut to the extent of nearly
three inches and there was much blood in
the abdominal cavity. Death was due to
the irritation of the heart and loss of
blood. It is said that Tara ran away
upon this and that Chanan Singh also ran
a distance of about 240 yards to the bank
of a canal in the vicinity and there fell
down and died.

There were several eye-witnesses who
bore out this story. It is to be noticed
that if Chanan Singh was killed in the
field of Tara Singh, that would clearly
connote that Bahadur Singh and his party
were the aggressors. On the other hand,
if Chanan Singh was killed on the bank
of the canal, it is not at all necessary that
the accused were the aggressors. That was
neutral ground. It struck us that this
was a very important point and it ap-
peared to us that the prosecution witnes-
ses may have made Chanan Singh run,
after receiving this deadly wound, a dis-
tance of 240 yards in order that the plea
of aggression might be maintained. We
were so impressed with the evidence of
Lieutenant Colonel Dargan on the record
that we adjourned the case and asked
Colonel Dargan to come here to give evi-
dence. He has given evidence this morn-
ing and the result of it is that he thinks
it extremely unlikely that a man, who
had received a wound of this character,
would have moved from the place where
he was hit, and certainly unlikely that he
ran a distance of 240 yards. It is an
amazing thing to us that an obvious point
of this nature was never taken in the
lower Court at all. Of course, Colonel
Dargan was examined in the committing
Magistrate's Court and not in the Sessions
Court; and this is another instance where
a miscarriage of justice of a grave cha-
racter might have been caused by the
examination of the medical officer not
taking place in the Sessions Court. In
any event, counsel who acted for the ac-
cused in the Sessions Court should have
noticed this point and insisted upon Colo-
nel Dargan coming to the Sessions Court.

The result of Colonel Dargan's evidence
to us, acting as ordinary prudent persons,
is that there is grave doubt as to the evi-
dence of the eye-witnesses that Chanan
Singh ran this distance after receiving the
wound. We must therefore conclude that
Chanan Singh probably was not killed in
Tara Singh's field but that he was either
killed on the canal or carried there after

he had been killed. From this point of view it is interesting to note that although the inspecting officer of police says that he collected blood-stained earth from Tara Singh's field and from the canal, no blood has been discovered in any of these exhibits. We do not know what has happened in this case. All we know is that the prosecution story is probably untrue as regards Chanan Singh running the distance he is said to have run to the canal bank. This means that the whole case is in the air and we do not know the true facts. Therefore we must obviously allow this appeal, set aside the sentence of death and the conviction of Bahadur Singh and order that he be set at liberty.

B.D./R.K.

Appeal allowed.

A. I. R. 1938 Lahore 177

TEK CHAND AND ABDUL RASHID JJ.

Sant Lal and others—Decree-holders—Appellants.

v.

Ramaya Ram and another—Judgment-debtors—Respondents.

Exn. First Appeal No. 9 of 1937, Decided on 20th May 1937, from order of Sub-Judge, First Class, Jhang, D/- 5th October 1936.

(a) Arbitration — Award — Partition proceedings — Award declaring rights of parties in property without giving them possession — Award is declaratory and possession cannot be given in execution proceedings.

In partition proceedings, the award declared the rights of the parties in the property and did not state that possession was to be given to the parties:

Held that the award was merely declaratory and hence possession of the properties could not be given to the parties in the execution proceedings. [P 178 O 1]

(b) Civil P. C. (1908) S. 47 (2) — Partition proceedings—Award declaring rights of parties without giving possession — Decree in accordance with award — Bona fide application for execution claiming possession with alternative prayer to treat application as suit — Case held was fit for application of S. 47 (2).

In a partition proceedings the award declared the rights of the parties without giving them possession. A decree was passed in accordance with the award. In a bona fide application for execution of the decree, the applicant claimed possession of the property and made an alternative prayer that in case possession might not be given, the application should be treated as a suit under S. 47 (2), Civil P. O., on payment of additional Court-fee:

Held that the question of payment of additional court-fee could arise only when the Court

had decided that application for execution did not lie. After this had been done, the applicant could have been called upon to make good the deficiency in the court-fee. The case was a fit one in which the salutary provisions of S. 47 (2) should have been applied. [P 178 O 2]

J. L. Kapur—*for Appellants.*

Aohhru Ram and Indar Dev—

for Respondents.

Tek Chand J.—Sant Lal and Ramaya Ram are two brothers, residents of Maghiana (Jhang). On 29th October 1929 Sant Lal and his sons brought a suit against Ramaya Ram and his son for partition of certain properties, alleging that they were members of a joint Hindu family and that the properties in dispute were held by them in coparcenary. The properties consisted of agricultural land, houses, jewellery, money, decrees and outstandings. After some proceedings had been taken in the suit, it was referred to the sole arbitration of Rai Bahadur Nihal Chand. On 10th August 1930 the arbitrator, with the consent of the parties, gave a preliminary award laying down the mode of partition and on 23rd December 1930 he delivered his final award. On 17th August 1931 the Subordinate Judge passed a decree in accordance with the award. A few months later, Sant Lal applied to the revenue authorities for mutation of properties mentioned in list N attached to the award, alleging that in the award and the decree which followed thereon he had been declared to be the sole owner thereof. The Assistant Collector held that Sant Lal had been granted only one-half share in these properties and that he was not the owner of the whole as alleged by him. He accordingly sanctioned mutation in his favour as owner of one-half. Sant Lal appealed to the Collector, who held that the portions of the award and the decree, dealing with the agricultural land in question, were obscure and that it was not possible for Revenue Officers to give effect to the decree as it stood. He accordingly cancelled the mutation and directed that the revenue entries should stand as before, until the matter had been made clear by a competent Court. Sant Lal appealed to the Commissioner who upheld the order of the Collector.

Sant Lal then applied to the Senior Subordinate Judge, Jhang, for execution of the decree passed in accordance with the award on 17th August 1931, praying that

possession of the properties mentioned in list N be delivered to him as sole owner. In the alternative, he prayed that if the Court held that possession could not be handed over in execution proceedings, the application might be treated as a suit under S. 47 (2), Civil P. C., on payment of additional court-fee by him. The Senior Subordinate Judge held that the decree was not executable as it was merely declaratory so far as the properties in list N were concerned and therefore the application for execution did not lie. As to the alternative prayer, the learned Judge came to the conclusion that this was not a fit case in which the discretion given to him under S. 47 (2) should be exercised. On the merits, he found that the plaintiff had not been declared in the award to be the exclusive owner of the properties in list N. For all these reasons he dismissed the application. Sant Lal appeals.

The first contention raised by his learned counsel is that para. 8 of the final award which deals with the properties in list N, read with paras. 7 and 12 of the preliminary award, dated 10th August 1930, shows that the arbitrator had awarded possession of the properties in list N to the appellant. After examining the two awards and hearing counsel, I see no force in this contention. The award is merely declaratory of the rights of Sant Lal in the properties in question. It nowhere states that possession of those properties was to be given to him. I would therefore affirm the finding of the lower Court on this point and hold that possession of the properties could not be given to the defendant in execution proceedings.

The second question is whether in the circumstances of this case, the alternative prayer should have been granted and the execution proceedings converted into a suit on payment of the proper court-fee. The learned Judge has given two reasons for not acceding to this prayer : (1) that the question of court-fee payable could not be determined on the materials on the record, the appellant not having produced the sadar qanungo to prove the amount of revenue assessed on the land in dispute, and (2) that the application for execution did not appear to have been made bona fide. In my opinion both these grounds are untenable, and in the very peculiar circumstances of this case, the learned Judge should have granted the prayer. The

question of payment of additional court-fee could only arise when the Court had decided that the application for execution did not lie. After this had been done, the plaintiff could have been called upon to make good the deficiency in the court-fee, and if necessary the sadar qanungo should have been summoned. There is nothing on the record to indicate that the application for execution had not been made bona fide. As already stated, the decree had been passed in August 1931. In May 1932 the appellant applied to the revenue authorities for mutation of the properties in dispute in accordance with what he alleged had been awarded to him by the decree. The defendants themselves then objected that the Revenue Court had no jurisdiction to deal with the matter and that the proper remedy of the appellant was to apply to the Civil Court for execution of the decree. The proceedings remained pending before the Revenue Officers for more than two years, and as soon as they finally directed him to have the matter settled in the Civil Court, he filed the present application before the Senior Subordinate Judge asking, in the first instance, for execution of the decree, and in the alternative, praying that if that application did not lie, it might be treated as a suit on payment of appropriate court-fee. There is nothing to indicate bad faith on the part of the appellant in making these alternative prayers. In my opinion this was a fit case in which the salutary provisions of S. 47 (2) should have been applied.

I would accordingly accept the appeal, set aside the order of the lower Court and remand the case to it with the direction that the execution proceedings be converted into a suit for possession of the properties mentioned in list N on payment of appropriate court-fee. Having regard to all the circumstances, I would leave the parties to bear their own costs in this Court. Before concluding, I think it necessary to point out that the Subordinate Judge having decided against the appellant on both the preliminary points ought not to have proceeded to discuss the case on the merits and give a finding thereon. The Court, which will try the suit now, ought not to be influenced, one way or the other, by the finding of the Senior Subordinate Judge in the judgment under appeal. Both counsel have been directed to cause their clients to appear before the Senior Subordinate Judge, Jhang, on 28th June 1937.

when a date for further proceedings will be fixed.

Abdul Rashid J.—I agree.

P.R./D.S.

Appeal accepted.

A. I. R. 1938 Lahore 179

DALIP SINGH AND SKEMP JJ.

Kartar Singh and others —

Defendants — Appellants.

v.

Mt. Bhagan, Plaintiff and others,

Defendants — Respondents.

Second Appeal No. 303 of 1937, Decided on 22nd June 1937, from decree of Dist. Judge, Gujranwala, D/- 2nd December 1936.

Res judicata — Question of plaintiff's title raised in appeal but suit dismissed entirely on other ground — Question of title cannot become *res judicata* in subsequent suit.

Where in appeal to the High Court in a declaratory suit, the plaintiff's title is challenged but the High Court dismisses the plaintiff's suit entirely not going into those grounds because it accepts another ground that the procedure of the lower Court is entirely wrong, the question of title is sub judice and cannot act as *res judicata* in a subsequent suit; 1924 *Mad* 626 and *A I R* 1929 *Cal* 449, *Disting.*; *A I R* 1922 *P C* 241; 11 *Cal* 301; 13 *Cal* 17; *A I R* 1932 *Mad* 207 and *A I R* 1935 *Mad* 701, *Rel. on.* [P 180 C 1]

J. G. Sethi — *for Appellants.*

Bashir Ahmed — *for Respondents.*

Dalip Singh J. — One Taj Din died some time in 1920 and his land, 236 kanals and 14 marlas in area, was mutated in favour of his widow Mt. Bhagan on 29th December 1920. Mt. Bhagan remarried on 25th January 1922. On 21st February 1923 she executed a gift deed in favour of three sets of persons who constituted her own relations as well as her husband's relations. She gifted the property that she had left with her, that is 216 kanals and 14 marlas, to these persons in equal shares in the early portion of the deed. In an addendum to the deed however, she stated that she was only entitled to one-fourth of her husband's property, that is to about 59 kanals, and that she had sold 20 kanals out of this and was therefore only gifting 39 kanals and 3 marlas to the three sets of persons in equal shares. Mutation following this gift took place on 21st June 1924, and the entire landed property which then stood in the name of Mt. Bhagan was transferred to the donees. Defendants 1 and 2, who are some of these donees, on

27th January 1931, mortgaged a portion of the property to defendants 7 to 9. Defendants 4 and 5, who are other donees, on 3rd February 1931 mortgaged certain portions of the property to defendants 10 and 11. After this on 9th February 1931, Mt. Bhagan brought a declaratory suit for a declaration that the gift was void altogether on various pleas.

The trial Court held that the gift was good only so far as 39 kanals and 3 marlas of land was concerned. He dismissed the suit on the ground that it was time-barred and that a suit for a mere declaration did not lie for Mt. Bhagan was not in possession of the suit property. On appeal the District Judge held that the suit was not time-barred, that a suit for a mere declaration did not lie; he held that Mt. Bhagan should have been asked to amend the plaint into one for possession and gave her a decree for possession of 177 kanals and 14 marlas on payment of court-fee presumably converting the plaint into one for possession. The defendants appealed to the High Court and the High Court, holding that the procedure followed by the learned District Judge in allowing amendment which had never been asked for at any stage and, further in not considering that there might be defences open in a possessory suit which were not open in a declaratory suit was wrong and that the learned District Judge should at least have given the defendants a chance of replying to a possessory suit if he had allowed amendment, accepted the appeal and dismissed the suit with costs throughout.

On 10th May 1935, the present suit for possession of 177 kanals and 14 marlas was brought by Mt. Bhagan. Various issues were framed which do not concern us. The trial Court held on the merits that the suit could proceed, was not barred by time, there was no *res judicata*, the defendants 7 to 11 were not shown to be transferees in good faith and without notice, and that the gift was valid only to the extent of 39 kanals and 3 marlas and therefore decreed the suit. On appeal the learned District Judge held that the decision of the learned District Judge in the declaratory suit to which reference has already been made, had held that the gift of Mt. Bhagan was valid only to the extent of 39 kanals and 3 marlas. According to him, this was a finding of fact and could not be disputed by the High Court. Rely.

ing on two rulings A I R 1924 Mad 626¹ and I R 1930 (Cal.) 243² he held that the finding was res judicata and therefore dismissed the appeal. Defendants 7 to 11 have appealed against this decision urging that the rulings cited do not support the inference drawn by the learned District Judge and that there is no res judicata in the finding of the learned District Judge.

In A I R 1924 Mad 626¹ it was held that the decision qua certain rights of the plaintiff was res judicata but the decision proceeded on the ground that as by reason of that finding costs had not been allowed to the defendant, the finding in plaintiff's favour on these rights was res judicata because the defendant could have appealed to the High Court by reason of the costs having been disallowed. It is unnecessary to go into the question whether that ruling was rightly or wrongly decided but it is distinguishable on the simple ground that in this case the judgment and decree of the learned District Judge were not allowed to stand and were appealed against to the High Court. It was sought to be argued that the grounds of the decision about the plaintiff's title to the land were not challenged in the High Court. A reference to the grounds of appeal however shows that the title of the present plaintiff was challenged and the High Court which dismissed the plaintiff's suit throughout did not go into those grounds because it accepted the earlier ground that the procedure of the learned District Judge was entirely wrong. In these circumstances I am unable to see how the matters which became sub judice by reason of the appeal to the High Court became res judicata when the suit of the plaintiff was entirely dismissed by the High Court.

In I R 1930 (Cal.) 243² the suit was both for a declaration of title and for actual possession by judgment. A declaration of title was given, but actual possession was refused on the ground of lack of notice. The defendant had pleaded that he was not a tenant but a cosharer. In a subsequent suit for ejectment after notice, it was held that as the suit had not been dismissed but a declaration of title had been given to the plaintiff, the finding was res judicata on the ground of plaintiff's title. The facts are clearly quite

different and have nothing to do with the present case. There was no decree given in the present case to the plaintiff whose suit was dismissed in toto. The learned counsel for appellants has cited the following rulings, 48 Cal 460,³ 11 Cal 301,⁴ 13 Cal 17,⁵ 55 Mad 483⁶ and 161 I C 103.⁷ These rulings support his contention that the finding is not res judicata. I would therefore accept the appeal and remand the case back to the learned District Judge for decision according to law. Stamp on appeal will be refunded to the appellants who will also have costs of this appeal.

Skemp J.—I agree.

S.C./R.K.

Appeal allowed.

3. Midnapur Zamindari Co. Ltd. v. Nares Narayan Roy, A I R 1922 P C 241=64 I C 231=48 I A 49=48 Cal 460 (P O).
4. Runbahadur Singh v. Luch Koer, (1885) 11 Cal 301=12 I A 23=4 Sar 602 (P O).
5. Nundo Lal Bhattacharjee v. Bidhoo Mookhy Debee, (1886) 13 Cal 17.
6. Kumarappa Chetti v. Muthuvijaya Raghunatha, A I R 1932 Mad 207=137 I C 616=55 Mad 483=62 M L J 141
7. Venkatachala Padayachi v. Velayudha Padayachi, A I R 1935 Mad 701=161 I C 103.

A. I. R. 1938 Lahore 180

DALIP SINGH AND SKEMP JJ.

Labh Singh and another — Plaintiffs
— Appellants.

v.

Mt. Jasso and another — Defendants —
Respondents.

Second Appeal No. 286 of 1937, Decided on 11th June 1937, from decree of Addl. Dist. Judge, Hoshiarpur, D/- 7th January 1937.

(a) Second Appeal—Interpretation of facts found by lower Court can be dealt with in second appeal.

Where the lower Court has arrived at a certain finding of facts, and the facts are clear but the dispute relates not to the facts but to interpretation of facts by the lower Court, it can be dealt with in second appeal. [P 181 C 1]

(b) Custom (Punjab) — Ancestral and non-ancestral proportion of land not distinguishable—Whole is non-ancestral.

If a Court is unable to find what proportion of land is ancestral and which is non-ancestral the whole must be held to be non-ancestral: 42 P R 1910 (P C) and 60 I C 520, Rel. on. [P 181 C 2]

Amar Singh, D. N. Aggarwal for Krishan Swarup — for Appellants.

Harbhajan Das and J. N. Talwar —
for Respondents.

Skemp J.—This appeal concerns the holding measuring 86 kanals 12 marlas of

1. Veerasami Mudali v. Palaniyappan, A I R 1924 Mad 626=84 I C 799=46 M L J 515.

2. Murad Blewas v. Basti Mandal, A I R 1929 Cal 449=122 I C 547=I R 1930 Cal 248.

Khushal Singh who died in 1934. Khushal Singh who had no son made a will leaving this land and also a house to his daughters. The will was contested by the two sons of Khushal Singh's first cousin who brought this suit for possession of the land and the house. The learned trial Judge found that the will was proved and that in accordance with the Customary law of the district, if the land were ancestral, the collaterals were entitled to it, if non-ancestral, the daughters. He found that part of the land was ancestral and part non-ancestral and decreed accordingly. Both sides appealed to the learned District Judge who found that the whole of the property in dispute was non-ancestral. He accepted the appeal and dismissed the suit entirely. The collaterals have come here in second appeal. We overruled the preliminary objection that the finding of the learned District Judge was a finding of fact on the ground that the facts are clear and what is in dispute is his interpretation of the facts.

It was admitted before the District Judge that 9 khasra numbers measuring 42 kanals 14 marlas were ancestral qua the plaintiffs reversioners at the time of the Settlement of 1911-12 but it was contended that the remainder of the land was non-ancestral. The District Judge went through the fourteen numbers alleged to be non-ancestral and divided them into several categories. One he found to be untraceable, two or three non-ancestral simpliciter and his findings about these numbers are not contested. He found that two sets of numbers in the year 1852 belonged in part to Khushal Singh's father Jaimal Singh and in part to a stranger named Ram Dhan. In reference to these areas, he held that as out of the whole it could not be said which was ancestral and which was non-ancestral, the whole must be presumed to be non-ancestral. He applied the same principle to the remaining numbers. These numbers were either part of shamilat which had gone to Jaimal Singh by partition between the Settlements of 1852 and 1884 but it was impossible to say how much was on account of ancestral land held by Jaimal Singh or on account of non-ancestral land held by him. He therefore held that these 14 numbers were all non-ancestral.

Then the District Judge came to a later period and found that the whole of the property held to be ancestral and non-ancestral was exchanged by consolidation

of holdings for other lands, and that it was not possible to say which of the exchanged land corresponded to the ancestral and which corresponded to the non-ancestral land and therefore he held the whole to be non-ancestral. The other findings of the learned District Judge about the house property and about the land which he definitely held to be non-ancestral have not been attacked, what has been attacked being his findings about consolidation and about shamilat. The argument is the same in both cases that if it could be ascertained, as it probably could, how much ancestral and how much non-ancestral Jaimal Singh held the shamilat land which came to him ought to be divided in those proportions; and similarly that at the time of consolidation new consolidated holdings which Khushal Singh acquired should be regarded as ancestral and non-ancestral in the same proportion as his original holdings. In other words, if before consolidation he held 40 kanals ancestral and 60 kanals non-ancestral that out of his new consolidated holding 40 per cent. should be recorded as ancestral and 60 per cent. as non-ancestral. This indeed was the argument adopted by the learned trial Judge and it has undoubtedly the advantage of equity. But I do not myself see and the appellants' counsel was unable to explain how this rule of proportion can be brought into line with any legal principle. Ever since the well-known Privy Council ruling, 42 P R 1910,¹ the principle has been followed that if a Court is unable to find what proportion of land is ancestral and which is non-ancestral, the whole must be held to be non-ancestral. We were referred to a particular case, 60 I C 520,² where that principle was followed in regard to land part of which had been acquired by the common ancestor of the parties and part broken up by his successors. I do not see how any other principle can be applied to the present case, and appellants' counsel cited no authority in support of his argument.

This may possibly have unfortunate results if it is applied to consolidation of holdings but all I am concerned with is the application of a legal principle. If the result is unfortunate, it is either for the revenue authorities to lay down that

1. *Attar Singh v. Thakar Singh*, (1910) 42 P R 1910=35 Cal 1039=6 I C 721=35 I A 206 (P O).

2. *Lehnun v. Gupta*, (1921) 60 I C 520.

at the time of consolidation of holdings, it shall be laid down what area each owner obtains for every field which he exchanges or for the Legislature to remedy the evil by laying down a rule of proportion such as is suggested by counsel for the appellants. I would dismiss the appeal with costs.

Dalip Singh J.—I agree.

V.B.B./R.K. *Appeal dismissed.*

A. I. R. 1938 Lahore 182

DALIP SINGH AND SKEMP JJ.

*Ghulam Mohy-ud-Din and others —
Plaintiffs — Appellants.*
v.

*Mt. Hajran Bibi and another —
Defendants—Respondents.*

Second Appeal No. 336 of 1937, Decided on 14th June 1937, from decree of Dist. Judge, Amritsar, D/- 2nd January 1937.

Second Appeal—Appellate Court erring in law in arriving at conclusion upon facts.

Where the lower Appellate Court errs in law in holding on the facts of a case that the descent has not been from preceptor to disciple, the finding can be interfered with in second appeal: *A I R 1931 Lah 607, Disting.* [P 183 C 1]

Mohammad Monir — *for Appellants.*

Barkat Ali — *for Respondents.*

Skemp J.—This second appeal has arisen from a suit brought by three Muslims of Amritsar as well-wishers of a takya for a declaration that the takya in question known as Takya Billu Sain is wakf property and seeking that Ghulam Mohy-ud-Din, plaintiff 1, be appointed its mutwalli. The plaintiffs obtained sanction of the Collector under S. 92, Civil P. C. to their suit. The suit was mainly contested by Abdul Karim, who had a timber stall on the spot and relied on a will in his favour executed by the last fakir. The Courts below dismissed the suit on the ground that it was not proved that the property was wakf. The plaintiffs have come here in second appeal. The only questions argued before us are: (1) is the property wakf, and (2) is the finding of the learned District Judge on this point a question of fact not assailable in second appeal. From the earliest British records until the year 1934, the Crown has been recorded the owner of the land in question which measures 2 kanals 18 marlas. Various fakirs have been shown in possession: in 1865 Rode Shah Fakir, in 1887 Kamal Shah Fakir, in 1892 Phine Shah

under Kamal Shah and in 1911 certain potters under Kamal Shah. Throughout this period, the land has been described in the column of cultivation as a takya and in the column of revenue as kharij as baohh. On 23rd December 1925, Phine Shah made a will in favour of the contesting defendant in which he described himself as chela Kamal Shah Fakir. In the course of the will Phine Shah stated that the tomb of his dada murshad Billu Sain is situate at the takya which his murshad Kamal Shah had tended and Phine Shah himself for a period of 48 years. The will also mentioned that Abdul Karim had a timber stall of which he was owner, that Abdul Karim and his ancestors had looked after him, that Phine Shah left his so-called "rights of possession" to Abdul Karim. The will also spoke of income from offerings. There is some oral evidence which is not very conclusive, and there is no possible ground for dissenting from the remarks of the learned District Judge that besides the timber stall

the remaining portion contains an akhara or wrestling ground, a mosque, two tombs, a well with two bath rooms, three shops adjoining the road side, a kothri and a verandah. The evidence shows that the mosque is a mere platform without any roof. The well was a gift to Billu Sain by a lady.

A copy of the inscription on the well was brought on to the record; it is both in Gurmukhi and in Persian and is to the effect that "Alif Sain's widow, Jawai, sunk this well in the name of God and gave it to Billu Fakir in charity." The date is 1282 Hijra (1866 A. D.). In the year 1934 by order of the Deputy Commissioner a mutation was sanctioned transferring the rights of Government as owner to Takya Phine Shah. It appears to me that all the facts taken together, namely that the place has always been a takya, that no land revenue has ever been paid, that there are tombs, that Government has ultimately recognized the rights of the takya to ownership, that Phine Shah's will speaks of offerings, that the well was gifted in the name of God and by way of charity, are sufficient to prove that this institution is wakf. Further the succession has been from murshad to balka. The learned District Judge says that:

The presumption in favour of the wakf nature of the property arising from the fact that it descended from preceptor to disciple is not applicable in the present case because it is not shown that there were in existence any natural heirs of Kamal Shah who were excluded. The mutation on the

death of Phine Shah was contested by two men, Nathu Sain and Mahni Shah, both of whom are shown therein to be balkas of Phine Shah. Nathu stated before the Revenue Officer that Phine Shah was his cousin as well as his murshad and that Kamal Shah was his uncle and the murshad of Phine Shah and that Kamal Shah's property was inherited by Phine Shah.

From this it would appear that although Phine Shah was a natural heir of Kamal Shah and so also was Nathu Sain, yet Phine Shah was preferred to Nathu Sain. This can only be explained on the presumption that Phine Shah was preferred as disciple of Kamal Shah. In other words in this instance at least the descent was from preceptor to disciple as such and the mutation order says so. Moreover according to the mutation by which Abdul Karim succeeded to Phine Shah, he succeeded in his capacity as balka. As already noted, it is also argued that in any case, the finding of the learned District Judge is one of fact and 12 Lah 540¹ was quoted as authority, but this is a ruling on very different facts. In this case the learned District Judge has erred in law in holding that on the facts the descent has not been from preceptor to disciple.

For these reasons I would accept the appeal and grant the plaintiffs a declaration that the takya Billu Sain is wakf property. It will be necessary to remand the case for further enquiry into the prayer whether Ghulam Mohy-ud-Din ought to be appointed its mutwalli and for decision of the issues left undecided by the trial Judge. The parties have been told to appear in the Court of the learned trial Judge, Mr. J. N. Kapur, Subordinate Judge, First Class, Amritsar, on 12th July 1937 in order to obtain orders. Costs are to be costs in the litigation.

Dalip Singh J.—I agree.

K.B./R.K.

Appeal allowed.

1. Mehraj Din v. Ghulam Muhammad, A I R 1931 Lah 607=134 I C 492=12 Lah 540=32 P L R 276.

A. I. R. 1938 Lahore 183

TEK CHAND AND ABDUL RASHID JJ.

*Firm Harnam Singh-Sohan Singh —
Defendants—Appellants.*

v.

*Firm Nikka Ram-Parma Nand —
Plaintiffs—Respondents.*

Letters Patent Appeal No. 34 of 1937,
Decided on 19th May 1937, from judgment
of Skemp J., D/- 11th January 1937.

Negotiable Instruments Act (1881), S. 66 —
Applicability — Hundi payable on certain
day on which it is drawn—S. 66 does not
apply — Hundi must be presented within
reasonable time—Hundi drawn at Peshawar
on certain day on which it was made payable
at Bombay—Presentment after three days of
date held was not unreasonable delay.

Where a hundi which is not made payable at a
specified period after date or sight thereof but
purports to have been drawn on a certain day and
is made payable on the same day, the hundi is not
governed by S. 66 and must be presented to the
drawee within reasonable time. [P 184 C 1, 2]

A vendee firm sent a hundi drawn at Peshawar
for a certain amount payable at Bombay on a
certain date on which it purported to have been
drawn in part payment of the unpaid purchase
money. The hundi reached vendor firm two days
before the date on which it was made payable.
The vendor presented it to the drawee three days
after the fixed date but the hundi could not be
cashed due to the insolvency of the drawee :

Held that there was no unreasonable delay in
presentment and therefore the vendee firm was
not discharged from paying the amount of hundi
to the vendor firm. [P 184 C 2]

Nihal Singh — for Appellants.

Jhanda Singh — for Respondents.

Tek Chand J. — This appeal arises out
of a suit instituted by firm Nikka Ram-
Parma Nand of Amritsar against firm
Harnam Singh-Sohan Singh of Peshawar
for recovery of Rs. 1337.0.9 alleged to be
due as balance of the price of goods pur-
chased by the defendant firm from the
plaintiff firm. The trial Judge passed a
decree in favour of the plaintiffs for the
full sum claimed. The defendants appealed
to the District Judge who dismissed their
appeal. They filed a second appeal to this
Court but that appeal also was unsuccess-
ful. They have now filed this appeal under
Cl. 10, Letters Patent. The only disputed
point is whether the defendants were enti-
tled to credit for the sum of Rs. 800 for
which they had sent a hundi to the plain-
tiffs in part payment of the amount due in
the account, but which had not been
cashed. The relevant facts are that a post
dated beopari shahjog hundi for Rs. 800,
bearing date 26th Chet 1990 (= 7th April
1933), was drawn by firm Kishen Das-
Gobind Lal of Peshawar on Seth Kaka
Ram-Kishen Das of Bombay, in favour of
the defendant firm Harnam Singh-Sohan
Singh of Peshawar, payable on 26th Chet,
i. e. the same day on which it purported
to have been drawn. The exact date on
which the hundi was executed is not
known, but it was handed over by the
drawer to the payee (defendant) at Pesh-
war on 20th Chet (=1st April), i. e. six

days before it purported to be drawn, 26th Chet (=7th April). At that time the defendants owed a considerable sum of money to the plaintiffs as balance of the price of goods purchased for which the plaintiffs had made a demand. In part payment of the amount due, the defendants endorsed the hundi in favour of the plaintiffs, and sent it to them by post. It reached the plaintiffs at Amritsar on 24th Chet (=5th April). The next day they sent it to a firm at Bombay for collection. It reached Bombay some time on 27th Chet (=8th April 1933). 28th Chet was a Sunday. The hundi could have been but was not presented to the drawee for payment on 29th. On 30th Chet (=11th April) the drawee firm Kaka Ram-Kishen Das failed. The hundi therefore could not be collected, and was returned to the plaintiffs at Amritsar, who in due course informed the defendants at Peshawar and demanded payment of the full amount due to them. The defendants having failed to pay, the plaintiffs brought the present suit against them for recovery of Rs. 1337.0.9.

In their written statement, the defendants pleaded inter alia that they were entitled to credit for Rs. 800, the amount of the hundi above-mentioned, even though it had not been cashed. They contended that the plaintiffs should have presented the hundi to the drawee at Bombay, at the latest on 29th Chet, when the drawee firm was doing business, and as the plaintiffs or their Bombay agent did not do so, the defendants were discharged. This contention has not been accepted by the Courts, who have concurrently held that the plaintiff firm, as the endorsee of the hundi, should have presented it "within reasonable time" of its receipt by them, and that having regard to the distance between Amritsar and Bombay and the other circumstances, it could not be said that the plaintiffs were guilty of negligence in delaying its presentment till 30th Chet, when the drawee firm suspended its business. Mr Nihal Singh for the defendants-appellants relied on S. 66, Negotiable Instruments Act. That section lays down that :

A promissory note or bill of exchange made payable at a specified period after date or sight thereof, must be presented for payment at maturity.

It is evident that the hundi in question was not made payable at a specified period after date or sight thereof. It purported to have been drawn on 26th Chet and was

made payable on the same day. Evidently it is not governed by S. 66, and the holder was not bound to present it on the third day after the date on which it was expressed to be payable. The learned counsel has referred us to certain rulings under S. 45 (1) of the English Bills of Exchange Act, 1882. These rulings are of no assistance as the wording of that section is materially different from that of S. 66, Indian Negotiable Instruments Act 1881. The hundi having been drawn on 26th Chet and made payable the same day, it should have been presented for payment "within reasonable time". The learned Judge in Chambers, agreeing with the Courts below, has held that in the circumstances of the case the plaintiff, or his Bombay agent, cannot be held to be guilty of unreasonable delay in not presenting the hundi before 30th Chet. No valid ground has been urged for interference with this finding in Letters Patent appeal. On this finding, it must be held that the defendants are not discharged from liability for payment of the amount of the hundi which had been endorsed by them in favour of the plaintiffs, but which could not have been cashed owing to the insolvency of the drawee. The appeal fails and is dismissed with costs.

Abdul Rashid J.—I agree.

K.B./R.K.

Appeal dismissed.

A. I. R. 1938 Lahore 184

TEK CHAND AND ABDUL RASHID JJ.

Abdul Ghafur Khan — Plaintiff — Appellant.

v.

Firm Mangat Rai. Ganga Sahai, Decree-holder and another, Judgment-debtor and others, Defendants — Respondents.

Second Appeal No. 1098 of 1936, Decided on 25th May 1937, from decree of Senior Sub-Judge, Jullundur, D/. 19th May 1936.

Transfer of Property Act (1882 as amended by Act 20 of 1929), S. 92 — Applicability of principles of S. 92 in Punjab — Co-mortgagor redeeming entire mortgage — He is subrogated to rights of original mortgagee to claim contribution from co-mortgagors by foreclosure or sale of their shares.

If a subsequent mortgagee or purchaser pays off a mortgage he is subrogated to the rights of the prior mortgagee whose debt he discharges. Similarly a redeeming co-mortgagor is subrogated to the rights of the original mortgagee, as regards his right to claim contribution from the co-mortgagors by foreclosure or sale of their share

in the mortgaged property. Indeed, the position of the co-mortgagor is much stronger than that of a subsequent mortgagee or purchaser who pays off a prior mortgagee, for, under the law it is incumbent on the mortgagor to pay the entire mortgage charge before he can redeem his own share of the mortgage. This equitable principle is equally applicable in the Punjab: 2 *Mad* 223; 14 *All* 1 (F.B.); *A I R* 1934 *Lah* 248 and 50 *Am Dec* 637, *Rel. on*; *A I R* 1920 *Lah* 234; *A I R* 1923 *Lah* 311 and *A I R* 1926 *Lah* 238, *Disting.* [P 185 C 2; P 186 C 1, 2]

Mela Ram — *for Appellant.*

Krishna Swarup and Mohammad Din Jan — *for Respondents 1 and 3.*

Tek Chand J.—The house in dispute originally belonged to one Jehangir Khan who on 14th July 1920 mortgaged it to defendant 1, firm Mangat Rai-Ganga Sahai, for Rs. 400. Some time after the mortgage Jehangir Khan died, leaving three sons Abdul Ghafur Khan plaintiff, Abdul Majid Khan, defendant 2, and Abdul Shakur Khan, defendant 4, who succeeded to the equity of redemption. On 2nd January 1932, Abdul Ghafur Khan alone redeemed the mortgage paying the entire mortgage money. Subsequently, in execution of a money-decree, obtained by defendant 1 Mangat Rai-Ganga Sahai, against Abdul Majid Khan for a personal debt of his, the one-third share of Abdul Majid Khan in this house was attached and sold to Jan Mahammad, defendant 3. Before the confirmation of the sale, Abdul Ghafur Khan objected before the executing Court that he having paid the entire amount due on the mortgage of 14th July 1920, had stepped into the shoes of the mortgagee qua the share of his brothers and therefore Abdul Majid Khan's share in the house could only be sold subject to his rights as a mortgagee. The objection was dismissed by the executing Court and Abdul Ghafur Khan instituted a suit for a declaration under O. 21, R. 63, Civil P. C.

The suit was resisted by the auction-purchaser Jan Mohammad who pleaded that on payment of his brothers' share of the mortgage money, the plaintiff had acquired merely a "charge" on their share of the property, and had not been subrogated as a mortgagee, and as the auction-purchaser had purchased the property in good faith without notice of the charge, the plaintiff could not claim priority for it. The trial Judge upheld the plea and dismissed the suit. This decision was affirmed on appeal by the Senior Subordi-

nate Judge. On second appeal the case came up before Bhide J. sitting in Single Bench who has referred it to a Division Bench. It is common ground between the parties that after the death of Jehangir Khan, the position of his three sons, Abdul Ghafur Khan, Abdul Majid Khan and Abdul Shakur Khan was that of co-mortgagors of the property, and under the law any one of them could not redeem his own share of the mortgaged property only, but it was incumbent upon him to redeem the mortgage as a whole on payment of the entire amount due on foot of the mortgage. It is also admitted that the redeeming co-mortgagor is entitled to contribution from the other mortgagors for their pro rata share of the amount paid by him. The question for decision is whether for the purpose of claiming this contribution the redeeming co-mortgagor is placed in the position of the mortgagee whom he had redeemed.

In the Punjab there is no statute law applicable to cases of this kind, and therefore the matter has to be decided on principles of equity, justice and good conscience, and I have no doubt that on these principles the answer to this question must be in the affirmative. It is well settled that if a subsequent mortgagee or purchaser pays off a mortgage, he is subrogated to the rights of the prior mortgagee whose debt he discharges. If this is so, there is no reason why one of the co-mortgagors, who pays off the entire mortgage, should not be equally subrogated. Indeed, it seems to me that the position of the co-mortgagor is much stronger than that of a subsequent mortgagee or purchaser who pays off a prior mortgagee, for, under the law, it is incumbent on the co-mortgagor to pay the entire mortgage charge before he can redeem his own share of the mortgage. This equitable principle has long been recognized in England, and it appears to have been followed by the Courts in India before the Transfer of Property Act was passed in 1882: see *inter alia* 2 *Mad* 223¹ at p. 225 and 14 *All* 1.² In 1882 however the Transfer of Property Act was enacted, S. 95 of which ran as follows:

Where one of several mortgagors redeems the mortgaged property and obtains possession thereof

1. *Asansab Ravuthan v. Vamana Rau*, (1879) 2 *Mad* 223.

2. *Ashfaq Ahmad v. Wazir Ali*, (1891) 14 *All* 1 = 1891 *A W N* 211 (F.B.).

he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession.

But, as observed by Dr. Rashbehary Ghose in his *Law of Mortgages in India*, Edn. 5, Vol. 1, p. 372, this "unskillfully drawn and clumsily worded section" gave rise to considerable confusion in the applicability of the equitable doctrine mentioned above. In some Courts, the view was taken that the word "charge" in this section must be construed strictly according to the definition given in S. 100 of the Act and therefore a redeeming co-mortgagor was not subrogated to all the rights of the mortgagee to whom he had redeemed. In other Courts, it was held, on the contrary, that notwithstanding the wording of S. 95 the correct legal position was that the redeeming co-mortgagor stepped into the shoes of the mortgagee and was subrogated to his rights and remedies. In this state of the law, the Legislature intervened in 1929, when the relevant sections of the Transfer of Property Act were amended, and it has now been clearly laid down in S. 92 that any co-mortgagor shall, on redeeming property subject to the mortgage, have so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee, whose mortgage he redeems, may have against the mortgagor or any other mortgagee. The position therefore has now been put beyond doubt in the provinces where the Transfer of Property Act is in force. In the Punjab, where that Act has not been applied so far, the legal position has all along been that the equitable doctrine of subrogation applied to the case of a redeeming co-mortgagor. Reference has however been made to three Single Bench rulings of this Court in 55 I C 450,³ 71 I C 847⁴ and 92 I C 980,⁵ in which, it is contended, the contrary view was taken. The point involved in all these cases was that of limitation, that is whether Art. 148 or Art. 144, Limitation Act, governed a suit brought by one of the co-mortgagors against the others after one of them had redeemed the entire mortgage. For the purposes of the case before us, it is not necessary to decide whether these cases were correctly decided on the parti-

cular question relating to limitation. It is sufficient to say that none of them is an authority for the broad proposition that the redeeming co-mortgagor is not subrogated to the rights of the original mortgagee as regards his right to claim contribution from the co-mortgagors by foreclosure or sale of their share in the mortgaged property. As I have already stated, in this province the matter must be governed by the principles of equity, justice and good conscience. These principles are very clearly explained in Pomeroy on Equity Jurisprudence, Vol. 3, Arts. 1221-2, as follows:

Where a party interested in the premises, who is not personally and primarily liable as the principal debtor for the whole mortgage debt, pays the mortgage to the holder thereof, he is entitled to regard the transaction as an equitable assignment of the mortgage to himself and to keep it alive as security of his own rights against others, who are owners of or interested in the land. Any such person who redeems, no matter how small a portion of the premises he may own, or how partial may be his interest, must redeem the entire mortgage by paying the whole mortgage debt. The doctrine of contribution among all those who are interested in having the mortgage redeemed, in order to refund the redemtor the excess of his payment over and above his own proportionate share, and the doctrine of equitable assignment in order to secure such contribution, are the efficient means by which equity completely and most beautifully works out perfect justice and equality of burden.

Similarly it is stated in Sheldon on Subrogation (Art. 169):

One of several joint debtors will, as against his co-debtors, ordinarily be subrogated to the securities and means of payment of the common creditor whom he has satisfied, so as to enable him to recover from his co-debtors, by means thereof, their proportional share of the indebtedness which he has discharged; and this, as in other cases of subrogation, arises rather from natural justice than from contract. Each joint debtor is regarded as the principal debtor for that part of the debt which he ought to pay, and as a surety for his co-debtors as to that part of the debt which ought to be discharged by them.

The iniquity of the opposite view is very well brought out in an American case, 50 Am Dec 637⁶ at p. 639 cited at p. 371 of Ghose's *Law of Mortgages in India*:

If one who may be obliged to redeem the share of a co-tenant to relieve his own share from incumbrance, could have no right to retain the share of such co-tenant as security and to obtain a reimbursement of the amount equitably chargeable to it, he might utterly fail to obtain compensation. And yet his co-tenant without making any payment might be entitled to the full possession and benefit of his share of the land discharged from the incumbrance. The law cannot justly be charged with such results as pro-

3. *Basanta v. Dhanna Singh*, A I R 1920 Lah 284=55 I C 450.

4. *Wazir v. Gidhari*, A I R 1928 Lah 811=71 I C 847.

5. *Narain Das v. Saraj Din*, A I R 1926 Lah 288=92 I C 980=27 P L R 65.

6. *Walker v. Eaton*, 50 Am Dec 637.

duced by conformity to its provisions. The principle is well-established and is of frequent application in the redemption of mortgages, that one having an interest in an estate under incumbrance may redeem the whole estate when necessary to redeem his own share or to relieve his own title from incumbrance even against the pleasure of a co-tenant or other owner and may be regarded as the assignee of the incumbrance upon the other shares or interests.

The whole position is very clearly put by Straight J. in 14 All 1² at p. 5 in the following words :

A co-mortgagor redeeming the whole mortgage stood in the shoes of the original mortgagee and was entitled to all the rights and the incidents connected with his estate. The principle that underlies that is that he having paid off the obligation to the creditor is entitled to take advantage of all the incidents connected with the security as it stood in the hands of the mortgagee, or in other words he is entitled to all the rights and incidents connected with the mortgage as they were in the hands of the mortgagee at the time the redemption took place.

In a case recently decided in this Court, 15 Lah 746⁷ Hilton J. sitting in Single Bench held that a mortgagor redeeming the entire mortgage was entitled to avail himself of all the creditor's securities and was therefore subrogated to his rights in respect of the mortgage. Applying this principle to this case it must be held that the auction sale of Abdul Majid Khan's share in the house in execution of the money decree obtained by defendant 1 against him was subject to the rights to which the plaintiff had been subrogated on his redeeming the entire mortgage, and that he is entitled to claim priority for the amount which was due to the original mortgagee by Abdul Majid Khan as his proportionate share of the mortgage charge. This amount has been determined by the Courts below to be Rs. 175, and this finding has not been impugned by any of the parties before us.

I would accordingly accept this appeal, set aside the judgment and decree of the learned Senior Subordinate Judge and in lieu thereof pass a decree in favour of Abdul Ghafur Khan plaintiff declaring that the sale of Abdul Majid Khan's one-third share in the house to Jan Muhammad, defendant 3, is subject to the plaintiff's mortgage charge of Rs. 175. Having regard to all the circumstances, I would leave the parties to bear their own costs throughout.

Abdul Rashid J.—I agree.

V.B.B./R.K.

Appeal allowed.

7. Jagan Nath v. Abdullah, A I R 1934 Lah 248 =150 I C 366=15 Lah 746=38 P L R 140.

A. I. R. 1938 Lahore 187

COLDSTREAM AND DIN MOHAMMAD JJ.

Ganga Ram Thandi Mal —

Defendant — Appellant.

v.

Naurata Ram Shadi Ram —

Plaintiff — Respondent.

Second Appeal No. 563 of 1937, Decided on 16th June 1937, from decree of Dist. Judge, Ambala, D/- 4th February 1937.

Hindu Law—Widow—Adverse possession—Widow taking possession of property as limited owner—Character of her possession or title not altered at any time—Her possession is not adverse to that of reversioners—Period of her possession cannot be tacked on to that of her alienee.

Where a widow takes possession of the property after the death of the last male holder as a Hindu widow with a limited estate and there is nothing to show that the character of her title or possession was altered at any time, such possession could not be adverse to her husband's reversioners and any rights which she acquires by reason of her possession would be accretions to the estate of her husband to which her husband's reversioners are entitled to succeed. The period of her possession therefore cannot be tacked on to that of her alienee : 29 Cal 664, *Disting.*; A I R 1924 P C 121; A I R 1930 Lah 504 and A I R 1928 Mad 820, *Rel. on.* [P 188 C 1, 2]

R. L. Anand I and II — *for Appellant.*

Asa Ram Aggarwal — *for Respondent.*

Coldstream J.—The circumstances out of which this second appeal has arisen are made clear in the judgments of the Courts below. Before us, only one point is taken on behalf of the appellant, and that is that the lower Courts ought to have held that the suit was barred by limitation. It is contended for the defendant-appellant Ganga Ram that as Mt. Rughri's possession was adverse to the reversionary rights of Naurata Ram, the respondent, Ganga Ram is entitled to tack on the period of her possession to the period of his own possession and that these two periods exceeded the 12 years adverse possession required to give him a prescriptive right. For the plaintiff-respondent, it is admitted that if Mt. Rughri's possession was adverse to his, and the period of it can be tacked on to that of his possession the suit was time-barred. It is however denied that Mt. Rughri's possession was adverse to Naurata Ram's title and argued that, even if it was, the period of it cannot be tacked on to the time for which Ganga Ram held adversely because Ganga Ram's possession was that of an independent trespasser, the alienation in his favour having been proved

to be void for lack of consideration and necessity.

There is no force in this last argument, namely that Ganga Ram could not in the circumstances of this case tack on his own possession to that of Mt. Rughri for the purpose of his plea of limitation because he was an independent trespasser. He derived his claim to possession from Mt. Rughri, his vendor. No doubt the lower Courts have found that the alienation must be set aside as not binding on Naurata Ram because consideration did not pass, but the sale was for stated consideration and was not void but voidable. The finding that consideration was never paid to Mt. Rughri is not based on any evidence. Indeed the evidence on which the respondent's counsel relies is that consideration did pass, but was forcibly recovered from her subsequently by Ganga Ram or another person. That Rs. 500 was actually paid is proved by the evidence of the Sub-Registrar's endorsement made at the time the deed was registered.

The only question for decision therefore is whether the lower Court erred in holding that Mt. Rughri's possession was possession under a claim and colour of title hostile to the right of the reversioner Naurata Ram. In support of his contention that it was, the appellant's counsel has cited 29 Cal 664.¹ The facts in the case decided by the Privy Council in 29 Cal 664,¹ were not on all fours with those of the present case, the essential difference being that in that case the widow whose possession their Lordships held to have been adverse had repudiated the title of her husband's reversionary heirs at least 13 years before the latter sought to dispossess them. From the appellant's pleas it is clear that he admitted that Mt. Rughri took possession after Rama Nand's death and there is no evidence on the record to show that she took possession immediately on Kundan Lal's death adversely to Rama Nand or that at any time before she sold the suit property she had claimed to be absolute owner of it.

It is clear that Rughri took possession of the property after Rama Nand's death as a Hindu widow with a limited estate. There is nothing to show that the character of her title or possession altered at any time. Such possession could not be adverse

to her husband's reversioners and any rights which she happened to acquire by reason of her possession would be accretions to the estate of her husband to which her husband's reversioners were entitled to succeed: see 5 Lah 192,² 11 Lah 424³ and A I R 1928 Mad 820.⁴ This being so, her possession was not adverse to the reversioners' rights and its period of possession cannot be tacked on to that of her alienee. The appeal accordingly fails and is dismissed with costs.

S.C./R.K.

Appeal dismissed.

2. Lajwanti v. Safa Chand, A I R 1924 P O 121 = 80 I C 788 = 51 I A 171 = 5 Lah 192 (P O).
3. Mahajan v. Mt. Purbho, A I R 1930 Lah 504 = 123 I C 276 = 11 Lah 424 = 31 P L R 233.
4. Muthuswami Kavundan v. Ponnayya Kavundan, A I R 1928 Mad 820 = 110 I C 613 = 51 Mad 815 = 55 M L J 436.

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COLDSTREAM AND DIN MOHAMMAD JJ.

Krishan Lal and another — Defendants
— Appellants.

v.

Siri Jain Mandir Panchaiti at Hansi and others — Plaintiffs — Respondents.

First Appeal No. 439 of 1936, Decided on 27th May 1937, from preliminary decree of Senior Sub-Judge, Hissar, D/- 13th August 1936.

(a) Mortgage—Costs—Trying Court imposing personal liability for costs on mortgagor—Order can be executed against person of mortgagor without selling mortgaged property.

Ordinarily costs awarded to a mortgagee decree-holder in a mortgage suit or appeal in the absence of any express direction to the contrary would be part of the mortgage amount decreed and would be a charge on the mortgaged property. [P 190 C1]

But where the trying Court imposes personal liability for costs on the mortgagor in express terms, the order is *intra vires* and can be executed against the person of the mortgagor apart from the sale of the mortgaged property: A I R 1926 All 424; A I R 1931 All 124; A I R 1934 All 89; A I R 1932 Mad 155; A I R 1935 Mad 101; A I R 1936 Lah 387 and A I R 1936 Lah 607, *Rel. on.* [P 189 C 2; P 190 C 2]

(b) Civil P. C. (1908), O. 41, R. 33—Power to amend decree—Judgment imposing personal liability for costs on mortgagor—Decree drawn up in usual form and making no mention of such liability—Appellate Court can direct the decree to be amended and brought in conformity with judgment.

Where the judgment imposes personal liability for costs on the defendant mortgagor in express terms, but the decree is drawn up in the usual

1. Sham Koer v. Dah Koer, (1902) 29 Cal 664 = 29 I A 182 = 6 O W N 657 = 8 Sar 280 (P O).

form and nowhere imposes any personal liability on the mortgagor for costs, what is executed is the decree and not the judgment, and unless the decree is brought into conformity with the judgment, it will not be permissible to the decree-holder to realize the costs in suit personally from the mortgagor. O. 41, R. 93, invests an Appellate Court with plenary powers and authorizes the Court to pass any decree or order as the case may require and even in favour of any respondent who may not have appealed. Even otherwise under S. 151, Civil P. C., the inherent powers of the Court to make such orders as may be necessary for the ends of justice are unlimited. The Appellate Court can order the decree to be amended and brought in conformity with the judgment.

[P 190 C 2; P 191 C 1]

R. C. Soni — *for Appellants.*

M. L. Sethi, J. G. Sethi and Mehr Chand Sud — *for Respondents.*

Din Mohammad J.—The only question that is raised in this appeal is, whether the defendant-appellant against whom a suit for sale of the property mortgaged by him to the plaintiff-respondent was decreed could be made personally liable for costs, especially when his personal liability for the mortgage debt was held to be time barred. Counsel for the appellant contends that no such liability could under the law be fixed on him and relies in support of his contention on 20 All 523;¹ 30 Mad 464;² 40 All 109³ and A I R 1925 Cal 1135.⁴ In 20 All 523,¹ a case decided by five Judges, a decree was drawn up in accordance with S. 88, T. P. Act, and it was further ordered that the defendant do pay to the plaintiffs the sum of Rs. 876.8.0, the amount of costs incurred by them in the High Court. It was held that the clause about costs was merely a formal compliance with the provisions of the Civil Procedure Code and was not intended to be a direction for the recovery of costs personally from the judgment-debtor. At p. 527 of the report however, it was made clear that the judgment in that case did not in the slightest degree indicate that the Court intended to award costs against the defendant personally. The claim in the plaint was only for a decree for the sale of the

mortgaged property and the judgment directed that a decree should be prepared in accordance with S. 88, T. P. Act. In these circumstances the learned Judges observed :

In our opinion, the judgment so far from indicating, negatives an intention to make the defendant personally liable for the amount of the costs.

In 30 Mad 464,² a Division Bench remarked that it would be contrary to the scheme of the Transfer of Property Act and to the practice of the English Courts of equity to make the mortgagor personally liable for costs in any case before the sale proceeds have proved insufficient to satisfy the mortgage claim. They further observed that the decree under S. 88, T. P. Act, must not order the defendants personally to pay the costs. It might contain a declaration of the personal liability of the defendants for principal or costs but such a declaration could be enforced only under S. 90, T. P. Act. In 40 All 109,³ a decree had been drawn up in the ordinary form and it was consequently held that the intention was that there should be the ordinary mortgage decree awarding the costs incurred in the suit by sale of the mortgaged property. In A I R 1925 Cal 1135,⁴ all the above-mentioned authorities were considered and followed. There the trial Court had dismissed the suit. On appeal, the suit was decreed in the following terms among others: "The appellants are entitled to costs of this Court". A decree was drawn up in accordance with this order. The decree-holder thereafter applied for execution of the decree of the Appellate Court awarding him costs of the appeal against the person and property of the defendants. On the strength of the authorities cited above, it was held that the costs in a mortgage suit are not to be treated as independent claims by the mortgagee irrespective of the right under the mortgage and such costs should form part of the amount decreed in the mortgage suit to be realized in accordance with the procedure laid down in the Code.

Counsel for the respondents does not demur to the general proposition of law indicated above but argues that where, as in the case before us, the trying Court imposes personal liability for costs on the defendant mortgagor in express terms, the order is *intra vires* and can be executed against the person of the mortgagor apart from the sale of the mortgaged property. He places his reliance on A I R 1926 All

1. *Magqud Fatima v. Lata Prasad*, (1898) 20 All 528=1898 A W N 157 (F B).

2. *Kamamma v. Narasimha Charlu*, (1907) 30 Mad 464=17 M L J 817.

3. *Dambar Singh v. Kalyan Singh*, (1918) 5 A I R All 866=48 I O 557=40 All 109=15 A L J 914.

4. *Maharaj Bahadur Singh v. Basiruddin Ahammad*, (1925) 12 A I R Cal 1135=98 I O 864=41 O L J 607.

424,⁵ A I R 1931 All 124,⁶ 151 I C 294,⁷ 55 Mad 332,⁸ 58 Mad 418,⁹ A I R 1936 Lah 387¹⁰ and A I R 1936 Lah 607.¹¹ In A I R 1926 All 424,⁵ a Division Bench composed of Mears C. J. and Lindsay J. observed that it is certainly competent to the Court in the exercise of its discretion to award the costs personally against the mortgagor, but where the terms of the decree are ambiguous, it ought to be construed that they are a charge on the property. The learned Judges in the course of their judgment approvingly referred to the following passage in Ghose's Law of Mortgages in India:

But the costs of the action will as a rule be only added to the amount of the security and the mortgagor will be made personally liable for them only in very exceptional cases of misconduct.

In A I R 1931 All 124,⁶ Dalal J. remarked that unless there is in the judgment a specific direction that the costs should be recovered from the mortgagor personally, the presumption must be that the decree directed costs to be added to the mortgage amount. In 151 I C 294,⁷ which again is a case from Allahabad, a Division Bench observed that ordinarily costs awarded to a mortgagee-decree-holder in a mortgage suit or appeal in the absence of any express direction to the contrary would be part of the mortgage amount decreed and would be a charge on the mortgaged property. But where the form in which the decree was framed made the mortgagors personally liable for the payment of the costs on the interpretation of the decree, the mortgagors were liable to pay the costs of the appeal personally. In 55 Mad 332,⁸ it was remarked by a Division Bench that in a suit by the mortgagee for sale of the mortgaged properties, the Court has power to pass a personal decree for costs of the suit against the

defendants who had not executed the mortgage even at the stage when an application under O. 34, Rule 6 Civil P. C., is made and though the preliminary decree is silent in respect of the same. In 58 Mad 418,⁹ a Division Bench at page 426 of the report said:

As regards the direction for costs in the lower Court's decree, it is no doubt true that in mortgage suits the amount of costs is usually directed to form part of the mortgage money to be realized by sale of the mortgaged property, but when one of the defendants disputes the right of the mortgagee or raises other contentions calculated to negative his right to maintain the suit, this rule cannot be insisted on. The lower Court was right in directing that he and those who sided with him must pay the costs of the plaintiffs.

In A I R 1936 Lah 387,¹⁰ a Division Bench made the mortgagors personally liable for the amount of the costs incurred in the preliminary decree even though the personal remedy in respect of the mortgage debt was barred. In A I R 1936 Lah 607,¹¹ in a similar case, it was observed that the discretion of the Judge trying the suit could not be limited and that the discretion under S. 35, Civil P. C., was absolute. It would be clear therefore that the trend of authority is in favour of the proposition advanced by the respondent, and even the judgments relied upon by the appellant do not go against it. It is difficult to hold in the face of these authorities that the trial Court could not make the mortgagors personally liable for costs, even if the personal remedy against them was barred, especially when the mortgagors had raised all sorts of frivolous pleas in the suit. There is however one consideration which cannot be ignored in the present case. Although the judgment does impose this liability in express terms, the decree has been drawn up in the usual form and it nowhere imposes any personal liability on the mortgagors for costs. What is executed is the decree, and not the judgment, and unless the decree is brought into conformity with the judgment, it will not be permissible to the decree-holder to realize the costs in suit personally from the mortgagors. The question then arises, whether we can and should amend the decree to avoid multiplicity of proceedings. O. 41, R. 33, invests an Appellate Court with plenary powers and authorizes the Court to pass any decree or order as the case may require and even in favour of any respondent who may not have appealed. Even otherwise under S. 151,

5. Sheo Sarshan Singh v. Beni Chaudhuri, (1926) 18 A I R All 424=94 I O 872 = 48 All 425=24 A L J 424.

6. Kannu Lal v. Bhagwan Das, (1931) 18 A I R All 124=129 I O 554.

7. Aziz Ahmad v. Riaz-ul-Hasan, (1934) 21 A I R All 89=151 I O 294=1934 A L J 446.

8. Rajagopalaswami Naicken v. Palaniswami Chettiar, (1932) 19 A I R Mad 155=185 I O 578=55 Mad 332=62 M L J 98.

9. Lakshmi Naidu v. Gunnamma, (1935) 22 A I R Mad 101=154 I O 1053 = 58 Mad 418 = 68 M L J 470.

10. Dost Mahomed v. Miraj Din, (1936) 28 A I R Lah 887=168 I O 100=88 P L R 74.

11. Sital Das v. Punjab and Sind Bank Ltd., Lyallpur, (1936) 28 A I R Lah 607=164 I O 841=17 Lah 520=88 P L R 1024.

Civil P. C., the inherent powers of this Court to make such orders as may be necessary for the ends of justice are unlimited. I would therefore order that the decree be brought in conformity with the judgment and dismiss this appeal with costs. Before concluding, I would draw the attention of the Court to O. 34, R. 4 and O. 34, R. 6, Civil P. C. as well as to Appx. D where the forms to be used in cases of mortgage-decrees are set forth and impress upon it the necessity of imposing the personal liability, if any, at the proper stage. In this connexion 52 All 363¹² may be perused with advantage.

Coldstream J.—I agree.

R.W./R.K.

Appeal dismissed.

12. Sahu Radha Krishna v Tej Saroop, (1930) 17 A I R All 69=128 I O 321=52 All 863=1929 A L J 1294 (F B).

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ADDISON AND DIN MOHAMMAD JJ.

Mt. Gugni and another — Defendants
— Appellants.

v.

Kahan Ram and others, Plaintiffs and others, Defendants — Respondents.

Letters Patent Appeal No. 83 of 1936
Decided on 13th January 1937, from judgment of Agha Haidar, J., D/- 19th March 1936.

(a) Punjab Courts Act (6 of 1918), S. 41 (3) — First appeal to District Judge involving question of existence or validity of custom—District Judge giving finding that custom is valid and existing — Such finding cannot be interfered in second appeal without necessary certificate under S. 41 (3).

One G, a widow, made a gift of her land in favour of A, on which the proprietors of the pattis in which the land in suit was situated instituted a suit for a declaration that the gift should not affect their reversionary rights. At the trial reliance was placed on answer to question 56 of the Manual of Customary Law of the District of Karnal. The Subordinate Judge came to the conclusion that both the widow and the donee had failed to prove that any such permission was given and he consequently decreed the suit. On appeal the District Judge referred to the evidence examined by the donee on this point and, relying upon it, allowed the appeal. On second appeal by the plaintiff to a single Judge of the High Court the plaintiff's suit was decreed. On appeal:

Held that as the defendants attempted to prove by the evidence led on the particular issue covering the question of custom that a declaration made by R in the presence of two or three persons was a sufficient compliance with the requirements of answer to question 56 of the Manual of Customary

Law of the District of Karnal, the finding of the District Judge therefore in their favour amounted to declaring the custom as proved by them to be existing and valid, and this finding could not be impugned on second appeal without the necessary certificate under S. 41, sub-s. (3): *A I R 1916 Lah 276, Rel. on; Case law referred.* [P 192 C 2 ; P 193 C 1]

(b) Second appeal—Finding of fact based upon consideration of evidence on record — Finding cannot be interfered in second appeal.

Where there is no error or defect in the procedure, the finding of the first Appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding. Such finding cannot therefore be interfered in second appeal: *18 Cal 23 (P C) and A I R 1929 P C 152, Rel. on.* [P 193 C 1]

Rama Nand — for Appellants.

Iqbal Singh — for Respondents
(Plaintiffs).

Din Mohammad J. — This appeal has been preferred in the following circumstances. One Mt. Gugni, widow of Ramji Lal, made a gift of her land in favour of one Antu, on which the proprietors of the pattis in which the land in suit was situated instituted a suit for a declaration that the gift should not affect their reversionary rights. At the trial reliance was placed on answer to question 56 of the Manual of Customary Law of the District of Karnal, the material portion of which reads as follows:

The answer of the Indri tribes was that a widow could only adopt if her husband had given her permission before the brotherhood and the collaterals.

The Subordinate Judge came to the conclusion that both the widow and the donee had failed to prove that any such permission was given and he consequently decreed the suit. On appeal, the District Judge referred to the evidence examined by the donee on this point and, relying upon it, allowed the appeal. The plaintiffs preferred a further appeal to this Court which came on for hearing before Agha Haidar J. He observed in his judgment, that in order to succeed, the donee had to prove that the husband of the widow had given her permission to adopt before the brotherhood and the collaterals and, after reviewing the evidence led by the donee on the point, came to the conclusion that the evidence being conflicting was wholly unreliable. He accordingly allowed the appeal and decreed the plaintiffs' suit with costs. From that decision both Mt. Gugni and Antu have appealed.

At the outset, counsel for the respondents has raised a preliminary objection.

that as the appellants have taken new points before us which were not urged before Agha Haidar J., this appeal is not entertainable. In support of his contention, he has relied on 55 I O 983,¹ A I R 1923 Lah 151,² A I R 1929 Lah 536,³ A I R 1930 Lah 632⁴ and A I R 1933 Lah 685.⁵ In 55 I O 983,¹ a Division Bench of this Court held that an appellant was not entitled to ask a Division Bench hearing an appeal under the Letters Patent to set aside the judgment of the Single Bench when it was found that the judgment was correct on all points upon which the Single Judge was called upon to adjudicate; nor was it open to the parties in such an appeal to raise a contention which was not urged before the Court from the judgment of which the appeal was preferred. The principle that no new point can be raised before a Letters Patent Bench was reiterated in the remaining cases. We do not however consider that there is any force in this preliminary objection, as the judgment of Agha Haidar J. is being attacked before us on the points decided by him and not on any new point.

The main contention raised on behalf of the appellants is that the learned Judge was not competent to interfere with the decision of the District Judge as (a) the question involved in the case was one of the existence and validity of the custom relied on by the defendants and no certificate as required by sub-s. (3) of S. 41, Punjab Courts Act, had been obtained; and (b) the finding of the District Judge being a finding of fact arrived at after considering the evidence led by the parties could not be disturbed on second appeal. We are of opinion that these objections go to the root of the jurisdiction exercised by the learned Judge and can therefore be raised on appeal before us.

Counsel for the respondents contends that no such question was involved in the case as would have required a certificate

and refers in this connexion to A I R 1932 Lah 397,⁶ A I R 1932 Lah 473,⁷ A I R 1931 Lah 433,⁸ A I R 1934 Lah 229⁹ and A I R 1934 Lah 300.¹⁰ In A I R 1932 Lah 397⁶, Jai Lal J. remarked that where the question involved was whether the answer to a question of the Customary law was exhaustive, so as to apply to certain cases which were not expressly provided for therein, no certificate was necessary. In A I R 1932 Lah 473,⁷ Abdul Qadir J. observed that where no party had led any evidence as to the existence or non-existence of a custom and the decision had been given purely on a point of law, no certificate was necessary to raise that point in second appeal. In A I R 1931 Lah 433⁸ a Division Bench of this Court held that where the District Judge after pointing out that Customary law was admittedly applicable to the parties came to the conclusion that there existed a lacuna in the answer to a certain question in the Manual of Customary Law, the finding of the District Judge was not one as to the existence of custom. In A I R 1934 Lah 229⁹ Coldstream and Bhide JJ. held that where the plaintiffs merely contended that the District Judge had misunderstood their claim and that he was wrong in holding that the plaint did not disclose any cause of action, no certificate was required in support of the appeal. In A I R 1934 Lah 300,¹⁰ Jai Lal J. expressed his doubt whether a certificate was necessary in a case where the contention of the appellants was that the District Judge had legally erred in not considering their evidence. It would appear therefore that none of the authorities discussed above is helpful to the respondents.

In our view the finding of the District Judge did involve the question of the existence or validity of the custom relied on by the defendants. They attempted to prove by the evidence led on the particular issue covering the question of custom that a declaration made by Ramji Lal in the presence of two or three persons was a

1. Ahmad Shah v. Faujdar, (1920) 7 A I R Lah 824=55 I O 983=28 P L R 1920.

2. Mohammad Taqi v. Abdul Rahman, (1923) 10 A I R Lah 151=79 I O 281.

3. Jal Parshad v. Chartered Bank of India, etc., (1929) 16 A I R Lah 536 = 120 I O 284 = 30 P L R 438.

4. Teja Singh v. Gurcharan Singh, (1930) 17 A I R Lah 682=128 I O 57=11 Lah 535=31 P L R 281.

5. Mewa Singh v. Tara Singh, (1933) 20 A I R Lah 685=145 I O 416=84 P L R 853.

6. Ghafur v. Shahab-ud-din, (1932) 19 A I R Lah 397=138 I O 680=83 P L R 416.

7. Waras Khan v. Mt. Mehran, (1932) 19 A I R Lah 473=139 I O 110=13 Lah 826=33 P L R 564.

8. Sohnu v. Bahga, (1931) 18 A I R Lah 433=135 I O 54.

9. Imam Din v. Roshan Bibi, (1934) 21 A I R Lah 229=149 I O 1049.

10. Alam Bibi v. Jawaya, (1934) 21 A I R Lah 300=150 I O 356=85 P L R 110.

sufficient compliance with the requirements of answer to question 56 of the Manual of Customary Law of the District of Karnal. The finding of the District Judge therefore in their favour amounted to declaring the custom as proved by them to be existing and valid, and in our view this finding could not be impugned on second appeal without the necessary certificate under S. 41, sub.s. (3). As remarked by a Division Bench of the Punjab Chief Court in 22 P R 1916¹¹:

The natural meaning of S. 41 (1) and S. 41 (3), Punjab Courts Act, appears to be: (a) Even though the decision on custom by the lower Appellate Court is wrong; (b) even though the lower Appellate Court has failed to determine a material point of custom; (c) even though the lower Appellate Court's procedure is marred by grave irregularities, still this Court shall not interfere unless the certificate has issued.

Adverting now to the second point. The finding arrived at by the District Judge was clearly a finding of fact based on consideration of the evidence led by the defendants and could not therefore be disturbed on further appeal to this Court. If any authority is needed for this proposition, reference may be made to 18 Cal 23¹² and 52 Mad 538.¹³ In 18 Cal 23¹² their Lordships of the Privy Council remarked:

It is enough in the present case to say that an erroneous finding of fact is a different thing from an error or defect in procedure and that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact however gross or inexcusable the error may seem to be. Where there is no error or defect in the procedure, the finding of the first Appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding.

In 52 Mad 538¹³ these remarks were quoted with approval and followed. It is true that in the case before us, the District Judge has not expressed his opinion in very clear terms, but the fact remains that his conclusion is that the evidence led by the defendants to prove their compliance with the requirements of custom is sufficient and reliable and in face of this finding it was not open to the learned Judge of this Court to go behind that finding and to interfere with it. On these grounds, we hold that Agha Haider J. had no jurisdiction to entertain this appeal without a

certificate, nor was he competent to disturb the finding of fact arrived at by the District Judge. We accordingly allow the appeal and restore the judgment of the District Judge in this case, but the parties will bear their own costs throughout.

K.B./A.L.

Appeal allowed.

A. I. R. 1938 Lahore 193

COLDSTREAM AND DIN MOHAMMAD JJ.

Mt. Manbhari — Plaintiff —

Appellant.

v.

Mt. Surti and another — Defendants — Respondents.

First Appeal No. 448 of 1936, Decided on 1st July 1937, from decree of Senior Sub-Judge, Rohtak, D/- 5th June 1936.

Limitation Act (1908), Art. 118—Brahmin dying leaving behind widow and three daughters—Widow adopting son and mutating her husband's land in his name—Suit by daughter for declaration that adoption and gift could not affect her rights as daughter, after six years of her knowledge of alienation—Suit held barred whether Art. 118 or Art. 3 of Punjab Limitation (Custom) Act was applicable.

A Brahmin died leaving behind him a widow and three daughters. The widow who came into possession of the land of her husband executed a deed adopting a son as heir to her husband. The deed was registered and mutation was effected accordingly in adopted son's name. The collaterals of the husband had brought a suit to contest the adoption. Subsequently after six years of this suit one of the daughters brought a suit for declaration that the adoption and gift could not affect her rights as daughter:

Held that as the starting point of limitation, whether Art. 8, Punjab Limitation (Custom) Act was applicable or Art. 118, Limitation Act, was applicable, was the date of plaintiff's knowledge of the alienation, the suit was barred as it was brought after six years. [P 194 C 1]

S. L. Puri for M. L. Puri and Bishen Narain — *for Appellant.*

Mehr Chand Mahajan and Faqir Chand Mittal — *for Respondents.*

Coldstream J. — One Ramji Lal, a Brahman of Gohana tahsil, in the Rohtak district, died about 19 years ago, leaving a widow Mt. Surti and three daughters Mts. Man Bhari, Dhapan and Darkhan. Surti, who had taken possession of his land for her life executed on 17th May 1927 a deed adopting a boy Ram Richhpal as heir to her husband. The deed was registered on 19th May 1927, and on 7th June 1927, the Patwari entered the muta-

11. *Sohna Mal v. Nanak Chand*, (1916) 8 A I R Lah 276=84 I C 904=22 P R 1916.

12. *Durga Chowdhani v. Jawahir Singh*, (1891) 18 Cal 23=17 I A 122=5 Sar 560 (P O).

13. *Venkata Kumara Mahipati Surya Rao v. Secy. of State*, (1929) 16 A I R P O 152=117 I C 481=56 I A 228=52 Mad 538 (P O) 1938 L/26 & 26

tion in accordance with the deed. This mutation in favour of Ram Richhpal was sanctioned by the Collector on 10th November 1927. On 1st November 1934, Mt. Man Bhari, Ramji Lal's daughter, instituted the suit out of which the present appeal has arisen for a declaration that the adoption and gift in favour of Ram Richhpal would not affect her rights as daughter of Ramji Lal. One of her sisters sided with the plaintiff: the other does not appear to have taken any part in the proceedings. On behalf of Ram Richhpal a number of pleas were raised one of which was that the suit was barred by limitation. On the issues arising out of the pleadings all of them except that of limitation were decided in favour of the plaintiff Mt. Man Bhari, but, holding that the suit was barred by time, the Subordinate Judge dismissed the suit. Against this dismissal Mt. Man Bhari has appealed to this Court.

As we are of opinion that the suit was rightly dismissed on the ground of limitation, it is not necessary to mention all the points on which the parties joined issues in the lower Court. The lower Court appears to have found that the suit was barred by the provisions both of the Punjab Limitation (Custom) Act of 1920 and Art. 118, Limitation Act. It is contended before us on the appellant's behalf that the Punjab Act has no application because the land in suit is not ancestral qua the plaintiff who claims as a daughter and not by reason of her descent from any common ancestor of herself and her mother, and that Art. 118, Limitation Act, does not bar the suit because it is not proved that the plaintiff had knowledge of the alienation more than six years before she instituted her suit.

The learned Subordinate Judge has not referred expressly to the Article of the Punjab Limitation (Custom) Act which he considered to be applicable to the case, but from his discussion regarding the question of the plaintiff's knowledge it seems clear that he has applied Art. 3. Whether Art. 3 of the Punjab Act or Art. 118, Limitation Act, be applicable, it is in our opinion clear that the suit is barred. In either case the starting point of limitation is the date on which the plaintiff had knowledge of the alienation. The lower Court has given good reasons for holding that the plaintiff must have had knowledge of the alienation on 31st July 1928 at the

latest. I have already noticed that the deed of adoption was registered on 19th May 1927, and the mutation sanctioned on 10th November 1927. On 31st July 1928, the collaterals of Ramji Lal brought a suit to contest this same adoption. It is incredible that while all this was going on the plaintiff remained in ignorance of her mother's adoption. The learned counsel for the appellant has not been able to show us any reason for holding that on this point the lower Court's judgment is wrong. On the other hand, counsel for the respondent has referred to evidence which the appellant has not brought on the printed record but of which the appellant's counsel has certified copies showing that the adoption was celebrated in a public manner in which the brotherhood had assembled. Finding that the suit was rightly dismissed as barred by limitation we dismiss the appeal with costs.

K.B./R.K.

Appeal dismissed.

A. I. R. 1938 Lahore 194

COLDSTREAM AND DIN MOHAMMAD JJ.

Messrs. Mohammad Mohsin Maula-Bakhsh — Petitioners.

V.

Commissioner of Income-tax —

Respondent.

Civil Ref. No. 14 of 1937, Decided on 21st April 1937, made by Commissioner of Income-tax, Punjab, North West Frontier and Delhi Provinces, D./ 12th February 1937.

Income-tax Act (1922) S. 26 — Partnership — Application for re-constitution — Mere fact that re-constitution reduces incidence of tax does not make re-constitution unreal — Non-introduction of new capital or failure to value assets, or firm reverting to old constitution on refusal of registration — No presumption that constitution is bogus arrangement.

It is open to any person to reduce the incidence of his income-tax in any legitimate way, and the mere fact that a reconstitution of the firm has reduced the incidence of the tax is by itself no evidence that the reconstitution is not real.

At the time of the reconstitution of a firm, the new capital was not introduced. Nor was there the valuation of assets. After registration had been refused the firm reverted to its old constitution:

Held that these were not sufficient grounds for supposing that the reconstitution was a bogus arrangement. [P 195 O 1]

Bashir Ahmad — *for Petitioner.*

J. N. Aggarwal and S. M. Sikri —
for Respondent.

Coldstream J.—This is a reference by the Commissioner of Income-tax, Punjab and North-West Frontier Provinces, under S. 66 (3), Income-tax Act. The circumstances out of which it has arisen are set forth in the order of this Court in Civil Misc. No. 396 of 1936 of 8th December 1936. The Commissioner, as I understand, in his statement has justified the rejection of the application of the petitioners for registration of their firm on the following grounds: (1) That no fresh capital is shown to have been added for the constitution of the new firm: (2) That no provision for valuation of the assets of the new partners of the partnership appears to have been made: (3) That after the application for registration of the firm was refused, the petitioners reverted to their old constitution; and (4) that the object of the reconstitution of the firm was to reduce the incidence of the income-tax.

As regards the first of these reasons, it is an admitted fact that one of the new partners, that is to say, the wife of Fazal Rahman brought in with her Rs. 3000 in cash. In any case, the fact that the new capital was not introduced would be no material for holding that the reconstitution was not genuine. There is no statutory obligation for the valuation of assets before a firm can be reconstituted. The fact that after registration had been refused the petitioners reverted to their old constitution clearly raises no presumption or affords any ground for supposing that a constitution must be a bogus arrangement; for, after their application for registration had been rejected, there was no other course open to the petitioners than to proceed with their business as the old firm. It is not disputed before us that it is open to any person to reduce the incidence of his income-tax in any legitimate way, and the mere fact that a reconstitution of the firm has reduced the incidence of the tax is by itself no evidence that the reconstitution is not real. We answer the question before us in the negative. The petitioners will be entitled to their costs.

V.B.B./A.L.

Reference answered.

A. I. R. 1938 Lahore 195

ADDISON AND DIN MOHAMMAD JJ.
Bakht Singh — Debtor — Petitioner.
v.

Municipal Committee, Sargodha, and others — Creditors — Respondents.

Civil Revn. No. 170 of 1937, Decided on 7th December 1937, from order of Dist. Judge, Shahpur at Sargodha, D/. 22nd December 1936.

Punjab Relief of Indebtedness Act (7 of 1934), S. 25 — Insolvency Court is Civil Court — Application to Board — Insolvency proceedings respecting same debt — Insolvency Court is bound to stay proceedings.

An Insolvency Court is a Civil Court for the purposes of S. 25. Hence on an application made by the debtor to a Debt Conciliation Board, an Insolvency Court is bound to stay proceedings of an insolvency application in respect of the same debt for the settlement of which an application has been made to the Board: *A I R 1937 Lah 861 and A I R 1937 Lah 680, Rel. on.*

[P 196 C 2]

R. C. Chawla — *for Petitioner.*

Amolak Ram Kapur and Bhagwat Dayal
— *for Respondents.*

Addison J. — The point raised in this civil revision is whether S. 25, Punjab Relief of Indebtedness Act, applies to an Insolvency Court and whether on an application made by the debtor to a Debt Conciliation Board an Insolvency Court is bound to stay proceedings of an insolvency application in respect of a debt for the settlement of which an application has been made to the Board. The Courts below have held that an Insolvency Court is not a Civil Court for the purpose of S. 25, Punjab Relief of Indebtedness Act, and the debtor has preferred this civil revision against their decision. S. 25, Punjab Relief of Indebtedness Act, runs as follows:

When an application has been made to a Board under S. 9, no Civil Court shall entertain any new suit or other proceeding brought for the recovery of any debt for the settlement of which application has been made to the Board, and any suit or other proceeding pending before a Civil Court in respect of any such debt shall be suspended until the Board has dismissed the application or an agreement has been made under S. 17.

An application has been made to a Debt Conciliation Board by the debtor in respect of the debt of the creditor who put in the application in the Insolvency Court, and in respect of other debts. This matter was brought to the notice of the Insolvency Court which has refused to stay the insolvency proceedings. S. 18, Punjab Courts Act, runs as follows:

Besides the Courts of Small Causes established under the Provincial Small Cause Courts Act 1887, and the Courts established under any other enactment for the time being in force, there shall be the following classes of Civil Courts, namely: (1) the Court of the District Judge; (2) the Court of the Additional District Judge, and (3) the Court of the Subordinate Judge.

This seems to us to mean that Civil Courts include the Court of the District Judge, the Court of the Additional District Judge, the Court of the Subordinate Judge, the Court of Small Causes and any other Court established under any other enactment for the time being in force. As this section is worded, that seems to us to be the only possible interpretation of the section. According to S. 18, Punjab Courts Act, therefore an Insolvency Court is a Civil Court. In S. 2 (1) (b), Provincial Insolvency Act, "District Court" means the principal Civil Court of original jurisdiction, that is, the Court of the District Judge, while under the proviso to S. 3 (1) of the same Act a subordinate Court may be invested with jurisdiction as a District Court under the Provincial Insolvency Act. By reason of S. 6, Provincial Insolvency Act, the Insolvency Court, that is the District Court, shall have the same powers and shall follow the same procedure as it has and follows in the exercise of original civil jurisdiction while it has already been pointed out that the District Court, which is the Insolvency Court, is a Civil Court according to S. 18, Punjab Courts Act. There seems therefore to be no doubt that Insolvency Courts are Civil Courts.

It was objected however that in a later Act, the Punjab Debtors' Protection Act, 1936, in S. 2 (4) of that Act "Court" was defined as including a Court acting in the exercise of insolvency jurisdiction and that this showed that "Court" did not include an Insolvency Court without special legislation. This does not follow: by the time this later Act was passed, the point now before us had been raised in many Insolvency Courts and numerous applications were pending in this Court and the Legislature may have specifically defined "Court" to include an Insolvency Court for the purpose of this later Act by reason of its knowledge that this point had been raised under the earlier Act. There is no force therefore in this objection.

In the present case an application has been made to a Debt Conciliation Board under S. 9, Punjab Relief of Indebtedness Act. Under S. 25 of the Act therefore,

any suit or other proceeding pending before a Civil Court in respect of any debt for the settlement of which application has been made to the Board shall be suspended until the Board has dismissed the application or an agreement had been made under S. 17. The application of the creditor in the Insolvency Court to have the debtor adjudicated an insolvent is obviously a proceeding pending before a Civil Court in respect of a debt for the settlement of which application has been made to the Board. It follows that the Insolvency Court must stay proceedings under S. 25. This has already been held by a Division Bench of this Court, the decision of which is published in (1937) 39 P L R 756.¹ It was said there that if an application under S. 9 is made to the Board and this is brought to the notice of the Insolvency Judge the proceedings pending before the Insolvency Court must be suspended under S. 25 of the Act. There is also a decision of a Single Judge to the same effect. This is published in (1937) 39 P L R 338.²

For the reasons given we hold that the Insolvency Court is a Civil Court for the purpose of S. 25, Punjab Relief of Indebtedness Act, and we accept this petition, set aside the orders of the Courts below and direct the Insolvency Court to stay the proceedings pending before it until the Board has dismissed the application of the debtor or an agreement has been made under S. 17. We allow the petitioner his costs in this Court but parties will bear their own costs in the other Courts.

V.B.B./R.K.

Petition allowed.

1. Chanan Das v. Ghulam Mahomed, (1937) 24 A I R Lah 861=170 I O 33=(1937) 39 P L R 756.
2. Murad v. Lala Hans Raj, (1937) 24 A I R Lah 680=39 P L R 338.

* A. I. R. 1938 Lahore 196

ABDUL RASHID J.

Firm Haji Mahbub Baksh Rafi-ud-Din through Mohamad Ashraf — Defendant — Appellant.

v.

Abdul Ghaffar — Plaintiff — Respondent.

Second Appeal No. 488 of 1937, Decided on 25th October 1937, from decree of Addl. Dist. Judge, Delhi, D/- 26th February 1937.

* Limitation Act (1908), Arts. 29 and 83—Suit by *A* for declaration that property attached by *M* in execution of his decree against *H* did not belong to *H* but to himself and also for injunction restraining *M* from auctioning the property—Undertaking by *M* that he would indemnify *A* after auction sale if it would be proved that property belonged to *A*—Suit decreed in favour of *A*—Property auctioned by *M*—Suit by *A* for price of property sold—Suit held not one for damages for wrongful seizure — Art. 83 and not Art. 29 applied.

Article 29 must be interpreted to apply only to the seizure and not govern any suit arising out of what happens at the time of sale : *A I R 1924 Lah 136, foll.* [P 198 O 1, 2]

One *A* brought a suit against *M* for declaration that certain property attached by *M* in execution of his decree against *H* belonged to him and not to *H*. He also applied for temporary injunction forbidding *M* from getting the property auctioned. But *M* undertook to indemnify *A* after the auction sale if it was proved that the property in dispute belonged to *A*. The suit was subsequently decreed in favour of *A* and it was declared that the property belonged to *A*. Meanwhile the property was auctioned by *M*. *A* thereupon brought a suit for the price of the property sold :

Held that the suit was not for damages for wrongful seizure. The cause of action for the suit was the undertaking given by *M* and not the wrongful seizure. Art. 83 and not Art. 29 therefore applied. [P 198 O 2]

Bhagwat Dyal — for Appellant.

Shamair Chand and Madan Lal —

for Respondent.

Judgment. — On 7th December 1929, the firm Mahboob Bakhsh-Rafi-ud-Din got 10 bags of Unab attached in execution of their decree against Hafiz-ud-Din. Abdul Ghaffar plaintiff filed objections against this attachment on 22nd February 1930, stating that the 10 bags of Unab belonged to him and were not the property of Hafiz-ud-Din, judgment-debtor. These objections were dismissed on 25th February. On 17th March Abdul Ghaffar instituted a declaratory suit to the effect that the 10 bags of Unab belonged to him and were not liable to attachment and sale in the decree of Mahboob Bakhsh-Rafi-ud-Din against Hafiz-ud-Din. On 18th March, Abdul Ghaffar presented an application for the issue of a temporary injunction to the defendants forbidding them from getting the 10 bags of Unab sold. On the same day an order was issued to the defendants not to have the 10 bags of Unab auctioned. This prohibitory order was taken by the process-server to the defendant firm but the proprietors of the firm as well as their Mukhtar-i-am refused to receive the order, and a report

to that effect was made by the process server to the Court. On 25th March Abdul Ghaffar made another similar application. An order was therefore issued to Messrs. Beni Parshad-Nasir Din auctioneers restraining them from selling the goods in suit till further order of the Court. Notice was also issued to the defendants to show cause why proceedings should not be taken against them for contempt of Court in refusing to take service of the notice of the temporary injunction issued against them. On 27th March the defendants presented an application to the effect that the temporary injunction should be cancelled as it was illegal. When the parties appeared in Court however Mohammad Ishfaq, Mukhtar-i-am of the defendants, made the following statement on solemn affirmation :

After the auction of the property in dispute if it is proved that the property was of the plaintiff I will be responsible for any damages fixed by the Court.

It appears that the bags of Unab had been auctioned on 25th March but this fact was not revealed to the Court by the defendants, nor was any reservation made in the statement made by the Mukhtar-i-am of the defendants. That statement implied that the defendants would indemnify the plaintiff for any damages suffered by him on account of the auction of the "property in dispute." On 17th March 1931, the plaintiff's suit was decreed and it was held that the ten bags of Unab worth Rupees 580.6.6 belonged to Abdul Ghaffar and were not liable to attachment and sale in execution of the decree secured by the defendants against Hafiz-ud-Din.

The suit, out of which the present appeal has arisen, was instituted by the plaintiff Abdul Ghaffar on 12th March 1932 for recovery of Rs. 896.6.6 from the defendants : Rs. 580.6.6 were claimed as the price of ten bags of Unab, Rs. 116 as interest and Rs. 200 as damages for wrongful seizure. The plaintiff's suit, so far as the claim for interest and damages is concerned, was held as barred by limitation by the trial Court. A decree for Rupees 580.6.6 was however awarded to the plaintiff. The trial Court held that, so far as the price of 10 bags of Unab was concerned, the case fell under Arts. 48 and 49, Lim. Act, and was within time. Against this decision, the defendants preferred an appeal in the Court of the learned Additional District Judge. The learned Additional District Judge held the suit to be

within time under Art. 83, Lim. Act. The defendants have preferred a second appeal to this Court.

It was strenuously contended by the learned counsel for the appellants that on 25th March 1930, ten bags of Unab had already been sold by the auctioneers and that the undertaking given by the Mukhtar of the defendants on 27th March 1930, referred merely to goods that were yet unsold and had no reference to goods that had already been sold. In my opinion this contention is without any force. The undertaking refers to the "property in dispute." The property in dispute was "ten bags of Unab" only which had been sold to the knowledge of the defendants on 25th March. It cannot therefore be said that the undertaking referred to goods that were to be sold in the future. If the defendants' Mukhtar-i-am wanted to make any reservation with respect to the goods that had already been sold it was open to him to state that fact plainly at the time the undertaking was given. The temporary injunction prohibiting the sale of ten bags of Unab had been issued on 18th March. On 25th March a notice had also been issued to the defendants to show cause why they should not be prosecuted for contempt of Court. In view of these eventualities the defendants' Mukhtar gave an unconditional undertaking on 27th March.

The learned counsel for the appellants relied on 31 Mad 431,¹ 53 Mad 621² and 130 I C 157.³ The first two cases, in my opinion, have no applicability to the facts of the present case. The cause of action in the present case is the undertaking given by the defendants' Mukhtar on 27th March 1930. Wrongful seizure is not the cause of action so far as the claim for Rs. 580-6-6 is concerned. 130 I C 157³ is a Single Bench Nagpur case and the view taken therein is in direct conflict with the view taken by a Division Bench of this Court in A I R 1924 Lah 136.⁴ It has been laid down by this Court that Art. 29, Lim. Act must be interpreted to apply only to the seizure and not to govern any suits

arising out of what happens later at the time of sale. The present suit for the price of ten bags of Unab is not a suit for damages for wrongful seizure. Rs. 200 were claimed as damages for wrongful seizure and the suit with respect to that item has been dismissed. The cause of action for the suit for the price of the Unab is the undertaking given by the Mukhtar-i-am on 27th March 1930. The suit is therefore clearly within limitation under Art. 83. For the reasons given above I affirm the decision of the Court below and dismiss this appeal with costs.

D.S./R.K.

Appeal dismissed.

A. I. R. 1938 Lahore 198

TEK CHAND AND ABDUL RASHID JJ.

A. R. Davar — Auction-purchaser — Appellant.

v.

Jhinda Ram, Judgment-debtor and another, Decree-holder — Respondents.

Letters Patent Appeal No. 16 of 1937, Decided on 21st May 1937, from order of Jai Lal J., D/- 8th December 1936.

Civil P. C. (1908), O. 21, Rr. 85, 86 and 90 — Failure to deposit 75 per cent. of purchase money within fortnight does not amount to material irregularity in conducting or publishing sale—Court cannot extend time for making such deposit and must resell property—Discretion given in Rule 86 is only with respect to forfeiture of deposit and not resale.

The 'publishing' of the sale has reference to all proceedings that take place till the sale is actually held. Any proceedings that take place after the deposit of 25 per cent. of the purchase money has been made cannot be regarded as falling within the meaning of the words 'publishing' or 'conducting the sale'. The failure to deposit 75 per cent. of the sale price within a fortnight as required by O. 21, R. 85, Civil P. C., does not therefore amount to a material irregularity in publishing or conducting a sale within the meaning of O. 21, R. 90. When default is made by the auction-purchaser in paying into Court full amount of the purchase money within the time allowed by O. 21, R. 85, the Court has no jurisdiction to extend the time but must order a resale under R. 86. The only discretion given by R. 86 is in the matter of forfeiture of the deposit of 25 per cent. made by the auction-purchaser, and not in the matter of resale: *A I R 1935 All 243, Rel. on; A I R 1937 Lah 113; A I R 1924 Rang 81; A I R 1933 Oudh 345 and 28 All 238, Disting.* [P 199 C 2; P 200 C 1]

Mela Ram and Faqir Chand Mital for Manohar Lal — for Appellant.

J. L. Kapur — for Respondent (Judgment-debtor.)

Manohar Lal Sachdeva — for Respondent No. 2.

1. Damaraju Narasimha Rao v. T. Gangaraju, (1908) 31 Mad 431=18 M L J 590.

2. Pannaji Devi Chand & Co. v. Sanaji Kapur Chand, (1930) 17 A I R Mad 695=126 I C 721=53 Mad 621=59 M L J 859.

3. Krishna v. Sitaram, (1931) 18 A I R Nag 47=130 I C 157.

4. Chanda Singh v. Jai Kishen Das, (1924) 11 A I R Lah 136=85 I C 24.

Abdul Rashid J.—On 22nd May 1933, the Model Town Society Ltd., Lahore, obtained a decree for Rs. 12,000 with interest at 9 per cent. per annum against Rai Sahib Jinda Ram. A house belonging to the judgment-debtor in the Model Town was attached and put to auction on 15th April 1935. The house was purchased by Mr. A. R. Davar for a sum of Rs. 8100. Immediately after the conclusion of the sale, the auction-purchaser paid a sum of Rs. 2025 to the auctioneer. On 17th April 1935 objections against the sale were preferred by the judgment-debtor under O. 21, R. 90, Civil P. C. A sum of Rs. 6075 was to be deposited in Court by the auction-purchaser within 15 days of the sale of the property as required by O. 21, R. 85, Civil P. C. This sum was however not deposited within the required time. On 27th May the auction-purchaser made an application to the Court asking for permission to deposit the sum of Rs. 6075. This application did not mention the date of the decree or the date of the sale, nor did it ask for extension of time. At the back of this application the following order appears in the handwriting of the Reader, and is initialled by the presiding officer of the Court: '*Hasab zabta rupiya dakhil khazana howe*'. On 18th October the objections that had been preferred by the judgment-debtor on 17th April against the sale, were dismissed in default. On 22nd May 1936 the case was taken up by the Court for the purposes of determining whether the sale should be confirmed. At that time objection was taken to the confirmation of the sale on the ground that 75 per cent. of the sale price had not been deposited in Court within the prescribed period, and that the Court was therefore bound to resell the house. The executing Court did not give effect to this objection and confirmed the sale. Against this decision an appeal was preferred to this Court which was heard by a learned single Judge. The learned Judge held that the provisions of O. 21, Rr. 85 and 86, Civil P. C., were mandatory and that as 75 per cent. of the sale price had not been deposited in Court within 15 days of the sale the Court was bound to resell the property. On this finding the appeal preferred by the judgment-debtor was accepted and a resale of the house in question was ordered. In the concluding portion of the judgment, it was remarked by the learned Judge that it had been brought to his notice by the auction-

purchaser that he had spent a considerable amount of money in effecting improvements after the purchase of the property, and that the amount he had spent on these improvements should be allowed to him if the house was ordered to be resold. The learned Judge held that if the executing Court finds that the auction-purchaser had spent any money on the improvements of the property bona fide, then it would be open to that Court to direct that out of the sale proceeds of the property on its resale the amount spent by the auction-purchaser shall be first paid to him and the balance if any shall be paid to the decree-holder. Against this decision two appeals have been preferred to this Court under Cl. 10 of the Letters Patent: one by the auction-purchaser A. R. Davar and the other by Rai Sahib Jinda Ram. Both of these appeals can be conveniently disposed of by one judgment.

It was contended on behalf of the auction-purchaser that failure to pay 75 per cent. of the sale price as required by R. 85 of O. 21 amounts to a mere irregularity within the purview of O. 21, R. 90 and that a sale cannot be set aside on account of this irregularity unless the judgment-debtor has sustained substantial injury by reason of such irregularity. The learned counsel for the auction-purchaser further contended that the Division Bench ruling of the Allahabad High Court, 57 All 658,¹ relied upon by the learned single Judge does not lay down the law correctly and that the provisions of O. 21, R. 85, Civil P. C., are not mandatory but are merely directory. It has been held in 57 All 658¹ that when default is made by the auction-purchaser in paying into Court the full amount of the purchase money within the time allowed by O. 21, R. 85 the Court has no jurisdiction to extend the time but must order a resale under R. 86. The only discretion given by R. 86 is in the matter of forfeiture of the deposit of 25 per cent. made by the auction-purchaser, and not in the matter of resale.

The contention raised on behalf of the auction-purchaser is that the failure to deposit 75 per cent. of the sale price within a fortnight, as required by O. 21, R. 85, amounts to a material irregularity in publishing or conducting a sale and such

1. *Nawal Kishore v. Buttu Mal*, A I R 1935 All 243=153 I O 910=57 All 658=1935 A L J 167.

irregularity is covered by O. 21, R. 90, Civil P. C. In my opinion this contention is devoid of all force. The "publishing" of the sale has reference to all proceedings that take place till the sale is actually held. The sale is held or conducted on a particular day or days appointed by the Court. As soon as the sale is concluded the highest bidder is declared, under O. 21, R. 84, to be the purchaser. He is to pay immediately after this declaration a deposit of 25 per cent. of the purchase price to the officer or other person conducting the sale. Any proceedings that take place after this deposit has been made, cannot, in my opinion, be regarded as falling within the meaning of the words 'conducting the sale'. In this view of the matter the rulings dealing with the provisions of O. 21, R. 84 are not fully applicable to the facts of the present case. Most of the rulings referred to by the learned counsel for the auction-purchaser such as A I R 1937 Lah 113,² A I R 1924 Rang 81,³ 8 Luck 731⁴ and 28 All 238⁵ deal with the provisions of O. 21, R. 84. A few rulings were quoted in which reference has been made to the provisions of O. 21, R. 85, Civil P. C. In each of these rulings however, the auction-purchaser, the judgment-debtor and the decree-holder signified their consent to the extension of time for making a deposit of 75 per cent. of the purchase price by the auction-purchaser. It was therefore remarked in some of these rulings that the effect of consent was to waive the irregularity in the procedure and the proper view to take of the transaction was to hold that the old sale was equivalent to a resale: *vide* 59 Cal 117⁶ at p. 127. A similar observation was made in a Division Bench ruling of the Madras High Court reported as A I R 1923 Mad 48.⁷ I would therefore respectfully agree with the view propounded in 57 All 658.¹ In the result I would dis-

miss the appeal of the auction-purchaser (Letters Patent Appeal No. 16 of 1937).

There is no substance in the appeal preferred by the judgment-debtor (Letters Patent Appeal No. 17 of 1937). The learned single Judge has not held that the auction-purchaser will be entitled to the costs of the improvements if he proves that any bona fide improvements have been carried out. The learned Judge has left it to the executing Court to determine whether the auction-purchaser would be entitled to claim any sum on account of improvements and if so whether any bona fide improvements have in fact been made. It would be open to the auction-purchaser to make an application to the executing Court for compensation on account of improvements and it would be for that Court to determine whether it is permissible to allow any sum, and if so, what amount on account of improvements. I would therefore dismiss the appeal of the judgment-debtor also. I would direct the parties in both the appeals to bear their own costs of these appeals.

Tek Chand J.—I agree.

K.B./A.L.

Appeals dismissed.

A. I. R. 1938 Lahore 200

YOUNG C. J. AND MONROE J.

Mohammad Din Mehar Din and another — Appellants.

v.

Emperor.

Criminal Appeal No. 1381 of 1936, Decided on 16th February 1937, from order of Addl. Sess. Judge, Lahore, D/- 30th November 1936.

(a) Criminal P. C. (1898), Ss. 148, 533 — Confessions recorded under S. 164 — Actual questions and answers put by Magistrate to accused not recorded but Magistrate giving evidence under S. 533 and satisfying Court that usual precautions were taken — Confessions are admissible in evidence.

Where certain confessions are recorded under S. 164 and although the actual questions and answers put by the Magistrate to the confessing accused are not recorded, the Magistrate gives evidence under S. 533 and satisfies the Court that questions had been asked and the usual precautions had been taken by him, the confessions are admissible in evidence under Ss. 164 and 533 taken together. It is not possible to lay down the particular questions to be asked in each particular case but the Magistrate and the High Court have to be satisfied that the confession was in fact voluntary: *A I R 1936 P C 253, Disting.*

[P 201 C 1, 2]

(b) Penal Code (1860) S. 302 — Murder — Sentence—Extreme youth.

2. Mahomed Ali v. Ram Dass, A I R 1937 Lah 113.

3. Mg. Obit Hlaing v. N. A R. M. Chetty, A I R 1924 Rang 81=79 I O 747=2 Bur L J 166.

4. Jangli Bakhsh Singh v. Buddhanlal, A I R 1938 Oudh 345=144 I O 814=8 Luck 731=10 O W N 440.

5. Ahmad Bakhsh v. Lalta Prasad, (1905) 28 All 238=1905 A W N 263.

6. Kalipada Mukerji v. Basanta Kumar, A I R 1932 Cal 126=138 I O 177=59 Cal 117=35 O W N 877.

7. Subramanyam Nambudri v. V. Kamanathi, A I R 1923 Mad 48=69 I O 1001=48 M L J 477.

Extreme youth of the accused is a sufficiently strong reason for not passing a sentence of death on them. [P 202 O 2]

Durga Das Jain and M. Aslam —
for Appellant.

D. S. Sawhney, Public Prosecutor —
for the Crown.

Young C. J. — Mohammad Din and Wali Mohammad and two others were charged with the murder of one Bashir, a boy 11 years of age. The Additional Sessions Judge of Lahore found Mohammad Din and Wali Mohammad guilty and sentenced them to death: the other two he acquitted. The evidence in this case upon which these two boys have been convicted consists of the evidence of a confession by each of them made under S. 164, Criminal P. C., before a First Class Magistrate, the recovery from their bodies of clothes bearing human bloodstains, track evidence proving that they were at the spot where the body of the murdered boy was discovered and also evidence of a motive. If the confessions are believable and admissible, no other evidence is in law required. In this case however there is the corroboration by the recovery of the bloodstained garments and the track evidence.

It has been argued by counsel that the confessions are not admissible and he attempted to rely upon the latest decision of the Privy Council in 17 Lah 629.¹ That decision however has no bearing whatever on the facts of this case. The confessions were recorded under S. 164, Criminal P. C., and although the actual questions and answers put by the Magistrate to the confessing accused were not recorded, the Magistrate gave evidence as is permitted under S. 533, Criminal P. C. and he satisfied the Court that questions had been asked and that the usual precautions had been taken by him. The Privy Council ruling, 17 Lah 629,¹ did not consider the effect of S. 533, Criminal P. C., and their Lordships themselves said they expressed no opinion on the question of the operation or scope of S. 533, Criminal P. C., as it had no bearing on the case which was then under discussion before them. In our opinion Ss. 164 and 533 taken together make it clear that these confessions are admissible in evidence. The learned Honorary Magistrate in Court says:

1. Nazir Ahmad v. Emperor, (1936) 23 A I R P C 258=1936 Cr O 752=168 I O 881=68 I A 872=17 Lah 629 (P C).

I questioned him (Wali Mohammad) in order to satisfy myself if he was making his statement voluntarily. I explained to the accused that I was a Magistrate and that any statement which he might make could be used as evidence against him. I explained this by questions and answers.

And later on under cross-examination he says:

I asked the accused if he was making the statement under police influence and he replied that he was speaking voluntarily and for the sake of truth.

It is not possible to lay down the particular questions in each particular case which ought to be put, but the Magistrate and the High Court have to be satisfied that the confession was in fact voluntary. We cannot see any reason to doubt the voluntary nature of these confessions. These two boys had been in police custody for about a fortnight before the confessions were made, and we have no doubt that if the police had wished illegally to obtain confessions, boys of this age would have succumbed to police pressure at a very much earlier date. The confessions set out the motive namely, that the wife of Mohammad Din had been abducted by one Dullah, and therefore the accused came to the conclusion that as Dullah was a man it would be easier to murder his small son Bashir in order to obtain revenge: Bashir was caught in a field and these two assisted in the murder. A pagree, loin cloth and a shirt were taken from the body of Mohammad Din shortly after the murder and they were found stained with human blood. A shirt was taken from person of Wali Mohammad and it was also found to be stained with human blood. The track evidence which appears to us to be reliable shows that both these appellants were in the company of Bashir at the place where the murder took place. We are satisfied on this evidence that the conclusion of the learned Additional Sessions Judge cannot be attacked.

We disagree however with the learned Judge when he thought that he was bound to condemn both these boys to death. Their ages are given in the heading of the judgment as 12 years. The learned Judge however comes to the conclusion that they are 16 and 17. We have had the advantage of seeing them here ourselves and we would put their ages in the neighbourhood of 15½. Not only do we think that it would be wholly wrong to hang boys of this age, but in this case there is some evidence contained in the confessions which is of course

the real evidence against both of them, that there was provocation at the hands of Dullah, the father of Bashir, who was murdered. This provocation flowing from Dullah would not, it is true, have affected our minds if these appellants had been of mature age as Dullah was not murdered but his son. Taking into consideration the youth of the appellants which, in any event, we consider to be a sufficiently strong reason, we set aside the sentence of death in both cases and sentence them instead to transportation for life; the Government will probably consider the advisability of keeping these two youths in the Borstal Jail.

R.M./R.K.

*Order accordingly.***A. I. R. 1938 Lahore 202****TEK CHAND AND ABDUL RASHID JJ.***Jamala — Plaintiff — Appellant.*

v.

*Mohammada and others — Defendants
— Respondents.*

First Appeal No. 341 of 1936, Decided on 28th May 1937, from decree of Senior Sub-Judge, Ferozepore, D/- 29th April 1936.

Punjab Land Revenue Act (17 of 1887), S. 117 (1)—Suit for declaration of title by J—No application for partition to revenue authorities—No direction by revenue authorities to bring civil suit—Previous admission by J that land in suit was already partitioned—Even then suit was maintainable under S. 117 (1) and principle of estoppel did not apply.

J instituted a suit in which he alleged that the entire estate left by his ancestor was joint, that no private partition ever took place, that he was entitled to a declaration to the effect that the land in question belonged to him and the co-sharers jointly and that he was entitled to have it partitioned. The suit was contested by the co-sharers on the ground that J had no right to sue for the declaration prayed for on the ground that he never applied for partition to the revenue authorities, that he was not directed to bring a civil suit, that he was estopped from instituting the suit since he had previously admitted that the land had already been partitioned:

Held that suit being for a declaration of title was maintainable under S. 117 (1), Land Revenue Act: 150 P R 1890, Rel. on. [P 208 C 1, 2]

Held further that the principle of estoppel did not apply. [P 208 C 1]

**R. P. Khosla and Nazar Mohammad —
for Appellant.**

J. L. Kapur — for Respondents.

Abdul Rashid J.—The facts, relevant to the question of law involved in this

appeal, may be shortly stated. Hasham had four sons, namely Jamala (plaintiff), Mohammada (defendant 1), Jaimal (defendant 2) and Fateh Mohammad. Fateh Mohammad had one son, namely Nura (defendant 3). Hasham died on 16th March 1926. His estate consisted of 3005 kanals and 1 marla of land situate in village Ghulam Patra in the Ferozepore district. On 3rd September 1927 Jaimal (defendant 2) filed an application for the partition of the property left by his father before the Assistant Collector. On 23rd September 1927, Jamala, plaintiff, and Nura and Mohammada, defendants, filed a written statement. They pleaded inter alia that a private partition had already taken place between the parties after the death of Hasham and that the application did not lie. Mr. Gokal Chand, Assistant Collector, held that a part of the property left by Hasham had been partitioned amongst his heirs, and that a part of the property of Hasham was still joint. He returned the application to the applicant with the remark that either he should file an application in respect of unpartitioned land or if in reality there had been no private partition, as alleged by him, he should establish his right in a Civil Court. A similar application was again presented by Jaimal on 19th June 1928. The order on this application was similar to the one reproduced above. On 3rd August 1933, Jaimal presented a third application for partition. On this application it was held by Mr. Ladha Ram, Assistant Collector, that once a private partition had been established it was the function of the Civil Court to decide as to whether a private partition had converted joint property into separate property. He was of the opinion that either the Revenue Officer should proceed under S. 117, Land Revenue Act, or he should reject the application till the question has been determined by a Civil Court. At the end of his judgment however he remarked that under the circumstances no change having taken place after the previous order of the Revenue Assistant, the application is dismissed under S. 115, Land Revenue Act.

Having failed before the Revenue Officer, Jaimal did not institute any suit in the Civil Court. Jamala, plaintiff, however instituted the presentsuit on 30th November 1934. The principal allegation of the plaintiff is that the entire estate left by Hasham is joint, that no private partition has ever taken place, that he is entitled to

a declaration to the effect that the land in question belongs to him and the defendants jointly, and that he is entitled to have it partitioned. The suit was contested by Mohammada and Nura, defendants only, who pleaded, inter alia, that the plaintiff had no right to sue for the declaration prayed for on the ground that he never applied for partition to the revenue authorities, and he was not directed to bring a civil suit, that the land had already been partitioned, that the suit was barred by time and that the plaintiff was estopped from instituting the present suit on account of his conduct during the course of the proceedings that took place before the Revenue Officers. On these pleadings the following issues were framed :

1. Has the plaintiff no right to sue on the ground that he never applied for partition of the land and was not directed to institute a civil suit?
2. Did the plaintiff admit on 23rd September 1927 and 27th October 1928 in the applications for partition by Jaimal that the land had already been partitioned and is he therefore not competent to institute the present suit?
3. Is the order of the Revenue Assistant dated 17th September 1934 dismissing the application of Jaimal a bar to the present suit?
4. Is the plaintiff estopped from instituting the suit on account of his act and conduct?
5. Is the suit within time?
6. If Issue No. 2 is decided in favour of the defendants, has there been no partition of the land and has the plaintiff a right to claim its partition now?
- 6-A. If Issue No. 2 is decided against the defendants, has the land already been partitioned and has the plaintiff therefore no right to claim its partition?
7. Relief.

The trial Court did not decide Issues Nos. 6 and 6-A. On Issues Nos. 2 and 4 it held that the principle of estoppel did not apply to the present case and that the admission of Jamala, plaintiff, if any, may be availed of by the defendants under Issues Nos. 6 and 6-A. On Issue No. 3 it was decided that the order of the Revenue Assistant dated 17th September 1934 was not a bar to the present suit. On Issue No. 5 it was held that the suit was within time. After giving these findings on the various issues, the suit of the plaintiff was dismissed on the ground that it was not maintainable either under S. 45, Land Revenue Act, or S. 42, Specific Relief Act. Against this decision, the plaintiff has preferred an appeal to this Court. The judgments of the Revenue Officers alluded to above make it perfectly clear that they were of the opinion that a question of title was involved in the applications presented by Jaimal, and that it was open to him to get that question of title determined by a

Civil Court. This was the real reason why the various applications preferred by Jaimal for partition were returned to him by the Revenue Officers concerned. The procedure followed by the Revenue Officers is prescribed in sub-s. (1), S. 117, Punjab Land Revenue Act, which runs in the following terms :

When there is a question as to title in any of the property of which partition is sought, the Revenue Officer may decline to grant the application for partition until the question has been determined by a competent Court or he may himself proceed to determine the question as though he were such a Court.

It appears to us that a question of title is involved in the present case. The plaintiff claims to be a joint owner of the entire property in suit, the contesting defendants deny his title in the entire property, and state that he is merely the owner of the fields that are in his possession, and that these fields fell to his share at the time of a private partition that took place soon after the death of Hasham. The title of the plaintiff to the fields that are in the possession of the contesting defendants has therefore clearly been denied. Reference may be made in this connexion to a Division Bench ruling of the Punjab Chief Court reported as 150 P R 1890.¹ In that case a claim for partition was made and liability to partition on the ground of a private division was denied by the defendants. The plaintiff contended that the so-called division did not sever the joint title or convert the joint property, or any portion of it, into severalty. Under these circumstances it was held that the suit was cognizable by a Civil Court, and that a question of title had been raised within the meaning of S. 116, Punjab Land Revenue Act which could only be decided after a regular trial either by a Civil Court or a Revenue Court acting under S. 117 as a Court and not by a Revenue Officer as such. We accordingly reverse the decision of the trial Court on Issue No. 1, and hold that the present suit for a declaration was maintainable.

So far as the findings of the lower Court on Issues Nos. 2 and 4 are concerned, they have not been challenged before us by the learned counsel for the respondents. The decision on these issues is therefore affirmed. Issue No. 3 does not arise in view of our finding on Issue No. 1. Issue No. 5 can only be tried in the present case after a decision has been arrived at on the merits

1. Radhu v. Mt. Nando, (1890) 150 P R 1890.

on Issues Nos. 6 and 6.A, as it is a mixed question of fact and law.

For the reasons given above, we accept this appeal, set aside the judgment and the decree of the Court below and remand the case for decision on the merits, in the light of the observations made above. Court-fee on this appeal will be refunded, other costs will abide the result. The learned counsel for the parties have been asked to cause their clients to appear before the trial Court on 5th July 1937.

R.W./R.K.

Appeal accepted.

A. I. R. 1938 Lahore 204

COLDSTREAM AND DIN MOHAMMAD JJ.

*Mool Raj and others — Plaintiffs —
Appellants.*

v.

*Manohar Lal and others — Defendants
— Respondents.*

First Appeal No. 278 of 1936, Decided on 27th May 1937, from decree of Sub-Judge, First Class, Lahore, D/. 24th March 1936.

(a) **Hindu Law—Joint family—Presumption**—Initial presumption that Hindu family is joint in estate—Hindu family owning ancestral property, presumption is all property possessed by members is joint — In Punjab however fact that family owns undivided ancestral property is not inconsistent with its separation — Such families though joint in respect of such property are considered separate in other respects.

There is an initial presumption that a Hindu family is joint in estate and that where a joint Hindu family owns ancestral property which has not been partitioned, the presumption is that all the property possessed by the members is joint. In Punjab however the fact that the family owns undivided ancestral land is not inconsistent with its separation. In Punjab it is usual to find Hindu families in which disruption has taken place without any formal division, and members have separated without the execution of the formal deed. The sons go away by mutual understanding, one or two perhaps carry on their father's business, others start new trades of their own, and others enter service, yet there is no partition, no drawing up of deeds of any kind, a certain number of ancestral shops, houses or gardens remain and these are admittedly joint, while in all other respects the family is disrupted : 102 P R 1889, *Rel. on.* [P 204 C 2 ; P 206 C 2]

(b) **Hindu Law—Joint family—Self acquisition**—Co-parcener can acquire separate property for himself out of his separate income.

A member of a joint Hindu family can acquire property for himself out of his own separate income, and it is his own separate property unless it is proved that such member has blended his

income with that of the other members of the family. [P 204 C 2 ; P 205 C 1]

(c) **Legal Practitioner—Witness—Counsel is not incompetent to give evidence** — It is but undesirable for him to depose as to matter other than formal either for or against his client.

A counsel is not incompetent to give evidence, whether the facts to which he testifies occurred before or after his retainer. As a general practice it is undesirable that when a matter to which a counsel deposes is other than formal, he should testify either for or against the party whose case he is conducting : A I R 1914 Cal 396 and A I R 1930 Lah 361 *Rel. on.* [P 206 C 2]

Ram Saran for D. R. Bhasin —
for Appellants.

M. C. Mahajan, Harbans Singh for
Daulat Ram and Daulat Ram and
P. A. Behl for M. C. Mahajan —
for Respondents 1, 2 and 4.

Coldstream J.—The suit giving rise to this appeal was brought by Mul Raj and his two sons, the present appellants, against Ram Kishen, father of Mul Raj and Manohar Lal, Kishori Lal and Jia Lal, the sons of Mehr Chand, brother of Mul Raj, for a declaration that the parties constituted a joint Hindu family and that a house in Lahore Cantonments occupied by the parties was joint property of the family. The suit was contested by all defendants who denied that they and the plaintiffs were a joint family and asserted that the house concerned belonged exclusively to the sons of Mehr Chand by whom the site had been acquired and the house constructed. The Subordinate Judge who tried the suit found that Mehr Chand had separated from his father Ram Kishen ever since he entered Government service in 1903 or 1902, that the plaintiff Mul Raj had been separate from his father since before 1921, when his brother Mehr Chand died and that the site of the house was acquired for himself by Mehr Chand who had built the house with his own money. On these findings he dismissed the suit. It is contended for the appellants before us that the evidence is wholly insufficient to displace the onus which lay upon the defendants of proving that their family was not joint or that the house and site were not co-parcenary property of the family. There is no doubt an initial presumption that a Hindu family is joint in estate and that where a joint Hindu family owns ancestral property which has not been partitioned, the presumption is that all the property possessed by the members is joint. But a member of a joint Hindu family can

acquire property for himself out of his own separate income and the trial Court having found it proved that the house in suit was so acquired by Mehr Chand it is for the appellants to show us sufficient reason for holding the decision to be wrong.

The matter really in dispute here is the ownership of the house and I deal first with this question. The site of the house was purchased in 1908 for Rs. 120 ostensibly by Mehr Chand, the transaction being by deed executed on 29th June 1908 and registered three days later on 1st July. The property bought included two *kachha* houses. Mehr Chand who was in Government service was then stationed in Ambala came to Lahore when the deed was executed and according to Rai Sahib Dhian Chand (D. W. 9) before whom the deed was executed brought the money with him. At that time Ram Kishen who if the plaintiffs' case is true must have been karta of the joint family was in Lahore Cantonments. But Ram Kishen did not attest the deed nor did he appear before the Sub-Registrar when it was executed. The plaintiffs' evidence about the source of the sale money is that a sum of Rs. 100 was given by Mehr Chand's mother to the witness Suja (not Laja as printed) Ram, P. W. 7, who had been asked by Mehr Chand to get it for him from his mother and that Mehr Chand added only Rs. 20 of his own. Why Mehr Chand did not himself ask his mother for the money is not explained and the story is extremely improbable. Before issues were struck the plaintiff declared that he did not know who purchased the site but in the witness box on 18th December 1935 he stated that his mother gave a currency note to Mehr Chand and he had seen an entry to this effect in his father's daily account book in 1908 that his previous statement was untrue and that he himself, Suja Ram and his sisters were present when the money was given. I have no doubt that this story is a fabrication and that all the money was produced by Mehr Chand. The property was subsequently registered in the Cantonment records as belonging to Mehr Chand and remained so registered until Mehr Chand's death after which it was recorded as belonging to his son Manohar Lal.

The house in dispute was mainly built in 1918. Ram Kishen was then in Lahore but the application for permission to build it was made to the Cantonment Committee

not by him but by one Jan Mohammad described as Mehr Chand's manager (D/15). Mehr Chand was in that year earning pay as a Government servant and as a shareholder individually in the Peoples Bank then in liquidation; he drew considerable sums in dividends in 1915, 1917, 1918. His pay was admittedly his separate property. In July 1919 Mehr Chand applied for permission to lay out a garden and build an *ihata* in front of the house (D/27). As Mehr Chand was not in Lahore the application was submitted by Ram Kishen who described himself as Mehr Chand's *Mukhtar*. One coparcener could not be the *mukhtar* of another in dealing with joint property and if the site had been joint family property Ram Kishen as karta could not have acted in this manner. Another application for permission to add a *chaubara* to the house was made in November of the same year (D/16). This was submitted on Mehr Chand's behalf by a carpenter. In 1920 Mehr Chand had separate money dealings in Ferozepore and was drawing comparatively large sums from his account there (D. W. 1/1). He was also lending money separately as is proved by the mortgage deed (D/2) showing that he lent to two Jhiwars of Ghawind Rs. 1200 on 14th April 1920.

By the evidence it is clearly established that Mehr Chand was carrying on his own separate business before and after the house and *chaubara* were built and that he was treating this property as his own with the express approval of his father and the apparent acquiescence of his brother. In November 1931 Mul Raj petitioned to be adjudicated insolvent. In the duly verified schedule of property (D/9) attached to his petition Mul Raj declared that he had no property in British India. This is very strong evidence to prove that in 1931 Mul Raj claimed no interest in any of the properties of which he now says he is joint owner. In the insolvency proceedings Manohar Lal, Mul Raj's brother, the defendant, acted for Mul Raj and stood surety for him. Lastly we have the fact that Ram Kishen has flatly denied that he is joint with his sons. According to him Mul Raj and Mehr Chand separated from him in 1903.04 and Mul Raj separated in 1914 when he took service in the Great War and he testifies that the house and its site belonged to Mehr Chand. No reason is proved for supposing that Ram Kishen is giving false evidence to injure

Mul Raj. The suggestion by the plaintiff that there is enmity between them resulting from Ram Kishen's misconduct with Mehr Chand's widow is not credible. Ram Kishen must be well over 70 years old. For enmity towards Mul Raj on the part of Ram Kishen in 1920 when he admitted Mehr Chand's ownership of the site and house no explanation is suggested.

Against all this, besides the plaintiffs' oral evidence described at page 106 of the lower Court's judgment, are merely the facts that the family owns 17 bighas of undivided ancestral land and a haveli which is still joint, that Ram Kishen signed some attendance rolls of labourers employed to build the house and some receipts for bricks used in the building and that Mul Raj and his family have occupied a part of the building since Mul Raj returned from Africa where he spent the years 1925-31. The oral evidence that the family is joint is of little value. It includes that of the plaintiffs' own counsel, Pandit Ram Saran Das (P. W. 3), who is married to the sister of Mul Raj. Giving evidence on 21st May 1934 Pandit Ram Saran Das stated that the family was still joint although there had been a separate mess since 1922. At that time it appears Ram Saran Das was not acting as plaintiffs' counsel, but he appeared as their counsel on 12th June 1934 and on 15th May 1935 he was summoned as a witness by the defendants in order that he might be confronted with a statement made by him in 1927 when he was defending a suit on behalf of Ram Kishen. Ram Kishen had been sued along with Mul Raj for a sum of Rs. 150 alleged to be due to the plaintiff in that suit as the price of ornaments. Ram Kishen repudiated liability and Pandit Ram Saran Das went into the witness box and gave evidence that Mul Raj had separated seven years previously. He also then stated first that Ram Kishen built the house after partition and then that Mehr Chand had built it and it was known as his. It is obvious that to evidence of witnesses of this kind no weight whatever can be attached. The lower Court has disbelieved the oral evidence produced to show that Ram Kishen supervised the building of the house. Even if he did supervise it, signed attendance rolls and receipts for bricks this was perfectly consistent with the house being built really for Mehr Chand who was not stationed in Lahore all the time.

The defendants' explanation that Mul Raj and his family occupied the chaubara of the house with the permission of the defendants and not as a joint owner has been accepted by the lower Court and I think that the lower Court was right to accept it. The fact that the family owns undivided ancestral land is not inconsistent with the separation alleged by the defendants. The family is one of the kind described in 102 P R 1889¹ where it was pointed out that in the Punjab it is usual to find Hindu families in which disruption has taken place without any formal division, and members have separated without the execution of any formal deed.

The sons go away by mutual understanding, one or two perhaps carry on their father's business; others start new trades of their own, and others enter service, yet there is no partition, no drawing up of deeds of any kind; a certain number of ancestral shops, houses or gardens remain and these are admittedly joint, while in all other respects the family is disrupted.

In the present case the nucleus of ancestral property is comparatively insignificant. It remained with Ram Kishen and it is proved that the site of the house was purchased by Mehr Chand with his own money, that Mehr Chand kept his money separate, and it is not proved that Mehr Chand blended his income with that of the other members of the family. In residence and mess Mul Raj and his father and his brother have been separate admittedly since 1922. There was no common chest. My conclusion is that it has been rightly decreed that when the suit was instituted the parties did not constitute a joint family, that the house in dispute belonged to Mehr Chand alone and that the plaintiffs have no joint interest in it. I would accordingly dismiss this appeal with costs.

I must add that the appearance of Pandit Ram Saran Das as counsel in a case in which he was a witness for the plaintiff was not in accordance with the interests and the tradition of the Bar. A counsel is not incompetent to give evidence, whether the facts to which he testifies occurred before or after his retainer. As a general practice, it is undesirable that, when a matter to which counsel deposes is other than formal, he should testify either for or against the party whose case he is conducting, 40 Cal 898² at p. 938 and see

1. *Rup Chand v. Basanta Mal*, (1889) 102 P R 1889.

2. *D. Weston v. Peary Mohan Das*, A I R 1914 Cal 896=23 I C 25=40 Cal 898=18 C W N 185 (S B).

also A I R 1930 Lah 361.³ It is true that in this case Pandit Ram Saran Das, when he first gave evidence, was not the plaintiff's counsel but having given evidence and being fully conversant as a close relation of the parties with the whole facts in dispute he ought not subsequently to have taken the brief for his brother-in-law. I may also notice that the Court ought not to have allowed the defendants to cross examine Pandit Ram Saran Das on 17th May 1935. They had called him as their own witness on 15th May to confront him with his previous statement of 1927, knowing him to be on the other side, that is to say, hostile, and they had had full opportunity, of which they had taken advantage, to cross-examine him on 21st May 1934 when he had given evidence for the plaintiff.

Din Mohammad J.—I agree.

A.L./R.K.

Appeal dismissed.

3. Sita Ram v. Ram Lal, A I R 1930 Lah 361 = 1930 Cr O 966 = 117 I O 66.

A. I. R. 1938 Lahore 207

COLDSTREAM AND BHIDE JJ.

Chandar Bhan and others — Plaintiffs
— *Petitioners.*

v.

Fateh Sher and others — Defendants
— *Respondents.*

Civil Misc. No. 207 of 1937, in Civil Misc. Nos. 146 to 151, 153, 155 to 157 and 163 of 1936 and Second Appeals Nos. 657 to 662, 665, 667 to 669 and 726 of 1934, for consolidation of all appeals for appealing to Privy Council decided on 3rd June 1937.

(a) Civil P. C. (1908), O. 45, R. 4—Cases not directly falling under—Court has power to consolidate such appeals under R. 7 of Schedule to Rules of Indian Order in Council (9th February 1920).

Rule 7 of the Schedule to the Rules of the Indian Order in Council (9th February 1920) regarding appeals to the Privy Council invests the High Court with power to allow consolidation of appeals for the purpose of giving security in cases not falling directly within the scope of O. 45, R. 4, : O. M. 650 of 1936 and A I R 1936 All 882 Ref. [P 208 O 1]

(b) Civil P. C. (1908), O. 45, R. 7—No power to extend period prescribed by R. 7.

Court cannot extend time for giving security beyond the period prescribed by O. 45, R. 7, Civil P. C. : A I R 1936 Lah 788, Rel. on. [P 208 O 2]

M. L. Puri — *for Petitioners.*

J. N. Aggarwal and Hargopal —
for Opposite Parties.

Coldstream J. — By an order in the case, C. M. 146 of 1936, dated 15th January 1937, this Bench gave leave to appeal to His Majesty in Council against the judgment of this Court disposing of the following eleven cases :

Second Appeal No.	657	of	1934,
do	658	"	1934,
do	659	"	1934,
do	660	"	1934,
do	661	"	1934,
do	662	"	1934,
do	665	"	1934,
do	667	"	1934,
do	668	"	1934,
do	669	"	1934,
do	726	"	1934.

By our order in the case (Civil Miscellaneous No. 353 of 1936) dated 18th November 1936 this Bench also gave leave to appeal to His Majesty in Council against the judgment of this Court in the following cases :

Second Appeal No.	1325	of	1934,
do	1327	"	1934,
do	1376	"	1934,
do	1326	"	1934,
do	1328	"	1934,
do	2151	"	1934,
do	404	"	1934,
do	465	"	1935,
do	466	"	1935,
do	642	"	1935.

On 19th February 1937 Chandar Bhan, Fateh Chand and Jethu Ram, to whom leave had been granted to appeal against the decision in Second Appeal No. 657 of 1934, petitioned that all these appeals be consolidated as the question for decision in all of them was the same. The petition prayed that as the petitioners were poor, the sum of Rs. 4000 which had been deposited by some of the persons to whom leave to appeal had been granted in cases other than those mentioned above might be accepted as sufficient security given for the costs of the respondents in all the appeals. It was further prayed that if this prayer could not be granted, those appeals at any rate to which this Court's order of 15th January 1937 related might be consolidated and treated as one appeal and time for depositing the costs required be extended. Notice of this petition was given to the

opposite parties in the cases to which the order of 15th January 1937 related, those having been decided by one judgment (see O. 45, R. 4, Civil P. C.).

The petition is opposed by the respondent decree-holders on whose behalf it is contended that the rules regulating the procedure of this Court in admitting appeals to His Majesty in Council do not empower this Court to allow consolidation of appeals for the purpose of giving security for costs and that the application must fail inasmuch as the security which the applicants were bound to deposit under the rules was not deposited within the time allowed by R. 7 of O. 45, Civil P. C. Reliance is also placed on the order of this Bench in C. M. 650 of 1936 where it was held following the Allahabad Court's decision in A I R 1936 All 832¹ that the High Court had no inherent jurisdiction to allow consolidation except in so far as it was specially permitted by the rules (as under O. 45, R. 4, Civil P. C.) as the inherent powers of the High Court must be held to be confined to cases within its jurisdiction and cannot be extended to appeals which are to be heard by their Lordships of the Privy Council. I may here notice that Mr. Mukand Lal Puri for the petitioners confines his arguments to the cases dealt with by the order of 15th January 1937.

When the application in case C. M. No. 650 of 1936 was argued before us, the only question discussed was whether the Court had inherent jurisdiction to consolidate appeals to the Privy Council no reference being made to R. 7 of the Schedule to the Rules of the Indian Order in Council of 9th February 1920 regarding Privy Council appeals to which learned counsel for the applicants has now drawn our attention. That Rule does appear to invest the High Court with a power to consolidate appeals in cases not falling directly within the scope of R. 4 of O. 45, Civil P. C. But even if this Court has the power to consolidate for the purpose of giving security appeals to the Privy Council, this particular case is not one in which it ought to be exercised. R. 7 of O. 45, Civil P. C., does not empower the High Court to extend time for giving security beyond six weeks after the date of the grant of the certificate allowing an appeal. The question whether the Court had such power was

considered by a Division Bench of this Court in A I R 1935 Lah 733.² After referring in that judgment to the case law on the subject which has been cited before us, Addison and Abdul Rashid JJ. decided that the Court could not extend time for giving security beyond the period allowed by O. 45, R. 7 of the Code. We see no reason for differing from that decision. The present petitioners did not deposit security within the time allowed and the certificate for the admission of the appeal may therefore be cancelled. The persons given leave to appeal against the judgments in the cases to which our order of 15th January related other than the case No. 657 of 1934 have neither deposited security nor asked for their cases to be consolidated with the case of the present petitioners. We do not know if they are prepared to contribute their share of the deposit required if leave to consolidate is given. There is no material before us warranting an assumption that they are so prepared. The petitioners have not joined them as parties in the present proceedings. The parties in all the appeals are not the same. The amount required to be deposited as security is fixed by the rules of the Court of which counsel are very well aware and it was the duty of the petitioners in my opinion to pay in the amount fixed stating either that it was paid in on account of their appeal or, if the Court was prepared to allow this, as sufficient security for the costs of the respondents in all the appeals. There is however no petition by the other appellants in this group of appeals and they have not moved in the matter.

I would accordingly reject this petition and cancel the certificate granting leave to appeal in all the cases to which our order of 15th January 1937 relates.

Bhide J. — I agree.

V.B.B./R.K.

Petition rejected.

2. Munna Lal v. Gajraj Singh, A I R 1935 Lah 733=159 I O 282.

A. I. R. 1938 Lahore 208

BHIDE J.

Hans Raj and another — Plaintiffs
— Appellants.

v.

Jagat Singh and another — Defendants
— Respondents.

Second Appeal No. 421 of 1937, Decided on 6th October 1937, from decree of Dist. Judge, Ambala, D/- 10th February 1937.

1. Mukand Lal v. Hashmatunnissa, A I R 1936 All 832=166 I O 288=I L R 1937 All 105=1936 A L J 1025.

Tort—Trespass—Lane alleged by plaintiff to be joint — Construction of overhanging structure on it by defendant in assertion of exclusive right amounts to injury—Suit for demolition of structure is competent.

Construction of a 'ohatra' (overhanging) structure in assertion of an exclusive right to a lane which is alleged by the plaintiff to be joint amounts to an injury so far as the plaintiffs rights are concerned and a suit for demolition of the 'ohatra' is maintainable. [P 209 C 1]

Aohhru Ram, Balkishen (Pandit) and Inder Dev — *for Appellants.*

Puran Chand — *for Respondents.*

Judgment. — Plaintiffs sued in this case for demolition of a 'ohatra' (overhanging structure) built by the defendants over a lane, which plaintiffs alleged to be joint. Defendants claimed that the lane was their exclusive property. The suit was dismissed by the trial Court and the learned District Judge has upheld the decision on the ground that the plaintiffs had no cause of action, as no damage was proved. I am unable to accept this view. In the present instance the defendants had built the 'ohatra' in assertion of an exclusive right to the lane and this itself was obviously an 'injury' so far as plaintiffs' rights were concerned. The question whether the lane was or was not joint has not been decided.

I must therefore accept this appeal and remand the case to the learned District Judge for giving a finding on that point and redeciding the case according to law in the light of the above remarks. Costs to follow final decision. Parties to appear before the District Judge on 25th October 1937.

R.M./R.K. *Appeal allowed.*

A. I. R. 1938 Lahore 209

TEK CHAND AND ABDUL RASHID JJ.

Messrs. Paras Dass Munna Lal —
Petitioners.

v.

Commissioner of Income-tax, Punjab,
North West Frontier and Delhi Pro-
vinces — Respondent.

Civil Misc. Petn. No. 178 of 1937, De-
cided on 16th June 1937.

Income-tax Act (1922), S. 23 (2) and (3)—
Word 'evidence' in S. 23 (2) is not confined
to direct evidence but also includes circum-
stantial evidence. Held after considering
facts of case that there was material before
Income-tax Officer for rejecting account
books and fixing sales at Rs. 1,50,000 and
applying 15 per cent. profit rate on sale.

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The word 'evidence' as used in sub-s. (2) of
S. 23, Income-tax Act, is not confined to direct
evidence but it is comprehensive enough to cover
circumstantial evidence. [P 210 C 2]

The assessee who was a cap manufacturer,
carried a whole sale trade in that commodity.
The assessee had omitted to enter into his
account books certain purchase transactions
amounting to Rs. 1,39,000. The Income-tax
Officer disbelieving the account books of the
assessee, fixed the sales at Rs. 1,50,000 in the
accounting period and assessed the income apply-
ing a flat rate of 15 per cent. as the reasonable
rate of profit. The sum of Rs. 1,50,000 was
worked out by taking a rough average of sale for
the last 10 years. Though the sale for the
accounting period was shown as considerably
diminished, the expenditure account as shown in
the account books was the same. The assessee
had himself showed that he had made a profit of
15 per cent. on the sales in the subsequent year:

Held that the omission of the transactions
from the account books of the assessee did provide
some material for the Income-tax Officer justify-
ing the rejection of account books and the High
Court could not go into the question of sufficiency
of the material. [P 210 C 2]

Held also that there was material for fixing the
sale at Rs. 1,50,000 and applying a flat profit
rate of 15 per cent. on the sale: *A I R 1930 P C*
108 Foll. [P 210 C 2; P 211 C 1]

Kirpa Ram Bajaj — *for Petitioners.*

Jagan Nath Aggarwal and S. M. Sikri
— *for Respondent.*

Abdul Rashid J.—This is an applica-
tion under S. 66 (3), Income-tax Act,
praying that a mandamus be issued to the
Commissioner of Income-tax, Punjab,
North West Frontier and Delhi Provinces,
requiring him to state the case of Messrs.
Paras Dass Munna Lal, Cap Merchants,
Delhi, and refer it to this Court for the
determination of the question of law
arising therein. The question of law has
been formulated by the assessee in the
following terms:

Whether there is any material on the record
justifying the rejection of accounts and estimating
the sales at Rs. 1,50,000 and applying a flat rate
of 15 per cent. profits to the sales.

The assessee, who is a cap manufac-
turer, carries on wholesale trade in that
commodity in the City of Delhi. The
sales as shown by his account books for
the last 10 years are as follows:

1925-26	Rs. 2,70,336
1926-27	" 2,20,909
1927-28	" 2,12,840
1928-29	" 1,35,114
1929-30	" 2,24,784
1930-31	" 1,85,979
1931-32	" 1,54,785
1932-33	" 51,980
1933-34	" 49,880
1934-35	" 81,866

The books show a capital account of Rs. 1,20,000 which is increased or decreased by the profit or loss shown in each year. During the assessment for the year 1934-35, it came to the knowledge of the income-tax authorities that the assessee had purchased a house in Chandni Chowk seven years previously for a sum of Rs. 50,000, and that he had been realizing its rent amounting to Rs. 2320 per year. Neither the purchase of the house nor the realization of the rent was shown in any of the books of account produced by the assessee. The amount of rent was also not included in the return made by the assessee. It also came to light that the adopted son of the assessee had been implicated in a conspiracy case some time in the year 1931 or 1932 and the assessee had spent a sum of about Rs. 50,000 in defending him. Property worth Rs. 18,000 had been purchased by the assessee in October 1933 and another house was purchased by him for a sum of Rs. 21,000 in June 1934. None of the four transactions referred to above find any place in the account books of the assessee. The accounting period in this case is 5th July 1932 to 24th June 1933. The books of the assessee show that sales amounting to Rs. 81,866 had taken place during this period. In view of the omission from the books of the assessee of the transactions referred to above, the Income-tax Officer came to the conclusion that the books did not reveal the true extent of his business both as regards sales and as regards profits. In view of the large business that had been carried on by the assessee for the ten years from 1925-26 to 1934-35, the sales for the accounting period were fixed at the sum of Rs. 1,50,000. The Income-tax Officer calculated the profits at a flat rate of 15 per cent. for wholesale business. The assessee was taxed on an income of Rs. 20,841 to tax and super-tax aggregating Rupees 2578.1.0 as against the declared income of Rs. 3983.5.4 from property and Rupees 3638.3.8 from business. The Assistant Commissioner of Income-tax rejected the appeal of the assessee and the Commissioner declined to make a reference to this Court under S. 66 (2), Income-tax Act.

The case of the assessee was that the sums of Rs. 50,000 for the purpose of purchasing a house in Chandni Chowk, Delhi, Rs. 50,000 for the expenses of the conspiracy case, and Rs. 39,000 for the purchase of property in the years 1933 and 1934 were

not shown in his books, as these sums were taken from the reserves of money that he had at home. This explanation was found to be utterly unsatisfactory by the income-tax authorities, and they accordingly came to the conclusion that the accounts of the assessee did not reveal the true state of his business and that his income could not properly be deduced from those books. In the circumstances I am of the opinion that the omission of these transactions from the account books of the assessee did provide some material justifying the rejection of the accounts. It is not open to the High Court to go into the question of the sufficiency of this material.

The next question for consideration is whether the estimate of Rs. 1,50,000 is based on any material. The main ground given by the income-tax authorities for fixing the sales at Rs. 1,50,000 for the year under assessment is the fact that the assessee had been carrying on a very large business from 1925 to 1934. His sales in the year 1925-26 amounted to Rs. 2,70,336. The sales in the year 1931-32 amounted to Rs. 1,54,785. Thereafter there was a sudden drop. The sales in the next three years amounted to Rs. 51,380, Rs. 49,380 and Rs. 81,866 respectively. It appears that the figure of Rs. 1,50,000 was worked out by taking a rough average of the business of the assessee for the last ten years. Past assessments therefore provided the material for the fixing of the sales at Rupees 1,50,000. Though the sales in the last three years, according to the books of the assessee, decreased considerably, there was no consequent decrease in the staff employed by the assessee or in the overhead charge. The shop expenditure in 1925-26 when the sales amounted to Rs. 2,70,336 was Rs. 5365. In subsequent years the expenditure account throughout has been between Rs. 5000 and Rs. 6000.

The word "evidence" as used in sub-s. (2) of S. 23, Income-tax Act, obviously cannot be confined to direct evidence. This word is comprehensive enough to cover circumstantial evidence. The circumstances alluded to above, in my opinion, provide material for fixing the sales during the year under review at the sum of Rs. 1,50,000. In the year 1933-34 the assessee himself showed that he had made a profit of 15 per cent. on the sales. There was therefore material for the Income-tax Officer to come to the conclusion that a flat rate of 15 per cent. was a reasonable rate of profit in this

case. The rate of profit so far as retail trade in caps is concerned, according to the Income-tax Officer, is 25 per cent.

In a case reported in 12 Pat 318¹ an assessment was made under S. 23 (3), Income-tax Act. It was argued in the High Court in that case that the Income-tax Officer was not entitled to make a guess without any evidence. The Court agreed with that contention but held that the state of affairs in the previous years, coupled with the fact that the assessee had a large mortgage loan business and must have enforced mortgages by sale on many previous occasions afforded ample material for the assessment made. When the case went up to the Privy Council, their Lordships agreed with the observations made in the judgment of the High Court and added that if the assessee wished to displace the Taxing Officer's estimate, it was open to him to adduce evidence of all his purchase transactions during the year and of the financial results thereof which he apparently had made no attempt to do. Following 12 Pat 318,¹ I would hold that in the present case there was evidence justifying the rejection of the accounts, and justifying the fixing of the sales at Rs. 1,50,000 and applying a flat rate of Rs. 15 per cent. profits under S. 23 (3), Income-tax Act. I would therefore dismiss this application but leave the parties to bear their own costs.

Tek Chand J. — I agree.

K.B./R.K. *Application dismissed.*

1. Commr. of Income-tax B. & O. v. Kameshwar Singh, A I R 1930 P C 108=142 I C 437=60 I A 146=12 Pat 318 (P C).

A. I. R. 1938 Lahore 211

COLDSTREAM AND DIN MOHAMMAD JJ.

Malik Ghulam Mohammad Khan — Judgment-debtor — Appellant.

v.

Nawab Zada Malik Amir Mohammad Khan — Decree-holder — Respondent.

Letters Patent Appeal No. 41 of 1937, Decided on 4th June 1937, from order of Skemp J., D/- 28th January 1937.

Punjab Relief of Indebtedness Act (7 of 1934), S. 34—Burden of proof — Burden lies upon decree-holder to prove circumstances which would bring judgment-debtor under S. 34 — Onus then shifts to judgment-debtor to give valid reasons for not paying amount — Issue of warrant of arrest without allowing

opportunity to judgment-debtor to give his reasons for non-payment is illegal.

Under S. 34, a duty is in the first instance cast upon the decree-holder to bring circumstances on the record from which the Court may be in a position to draw its own inference as to the conditions laid down in the substantive part of the section. This burden may possibly be discharged otherwise as for example by the admission of the judgment-debtor that he owns some money or by other unimpeachable evidence that he owns it, but this will not be conclusive. It will merely shift the onus on to the judgment-debtor to prove his immunity from arrest. Once it is proved that the judgment-debtor had property available for discharging his debts after being called upon to pay them the onus falls back upon him to prove some just cause for not having discharged them, more especially when a Court has granted him time on a promise to use that property for paying his decree-holder, and if he offers no kind of explanation the Court can legally conclude that he has without just cause contumaciously refused to pay the amount of the decree in whole or in part. The mere fact that a judgment-debtor admits that he has certain crops to be harvested and that he will pay the decretal amount out of the money realized from such crop but fails to pay the amount is not enough to prove his capacity to pay, absence of just cause and contumacy. If therefore the Court issues a warrant of arrest without going into the question of contumacy or just cause and without allowing opportunity to the judgment-debtor to give his reasons for not paying the amount, the warrant of arrest so issued is illegal.

[P 212 C 2; P 213 C 2; P 214 C 1]

B. H. Ali, Badr-ud-Din for A. G. Maurice and A. G. Maurice — *for Appellant.*

Mahmud Ali for Dr. Mohammad Alam — *for Respondent.*

Coldstream J. — Malik Amir Mohammad Khan, the respondent to this appeal, holds a money decree against the appellant Malik Ghulam Mohammad Khan. On 28th May 1936 he sought to execute it by attachment of all the judgment-debtor's property and by his arrest. The Senior Subordinate Judge executing the decree ordered attachment of all the appellant's property, lands, houses and cattle and gave notice to him, presumably under O. 21, R. 37, Civil P. C. to show cause why he should not be arrested. On 4th June the appellant's lands and cattle were attached. On 3rd July the appellant put in a petition stating that he had not had sufficient time to make arrangements for paying the decretal amount, that he was not being contumacious and that he would pay the debt in instalments as best he could if given time after selling his wheat crop, which had not yet been completely harvested. The Subordinate Judge passed an order allowing the appellant until 7th August to pay the money and recording that

if he had not paid by 7th August it would be presumed that his failure had been contumacious. On 4th July the appellant submitted a petition objecting to this order and asking for an issue to be struck for trial whether his failure to pay had been contumacious. In another petition put in on 9th July he represented that his lands could not be attached as they were ancestral property and asked that in any case he should be allowed to retain land yielding Rs. 500 per annum to maintain himself, his two wives, two daughters and three sons and to defray his expenses which were heavy as he was a zaildar, a member of the District Board and of the Jirga, and had to spend money on hospitality. On 6th August the petitioner submitted another petition protesting that he was ready to pay the debt in instalments, and that he was not being contumacious but was ready to go to jail if it were found that he was in fact being contumacious.

On the date of hearing, 7th August, the appellant's Mukhtar being present, the Subordinate Judge refused to go further into the question of the appellant's contumacy finding sufficient evidence for it in the appellant's admission made in the petition of 3rd July that he was possessed of wheat by the sale of which he could and would pay off his debt and in the appellant's failure to pay anything after having been given time in consideration of this admission. He ordered a warrant to issue accordingly. Against this Malik Ghulam Mohammad Khan appealed to this Court. His appeal was dismissed by a single Judge and he has submitted a further appeal under the provisions of the Letters Patent of this Court. It is contended that the Subordinate Judge acted illegally (1) in issuing a warrant of arrest without giving the appellant an opportunity of showing cause against its issue, as required by S. 34, Punjab Relief of Indebtedness Act 7 of 1934, and (2) in refusing to strike an issue on the question whether there had been contumacy placing the onus on the decree-holder to prove that the appellant had contumaciously refused to pay the decretal amount in whole or in part without just cause. It is also contended that the Subordinate Judge ignored the provisions of the second proviso to that section, but this part of the argument I have not understood.

Under S. 34 of Act 7 of 1934 an executing Court has power to issue a warrant of

arrest on two conditions: (1) that it is satisfied that the judgment-debtor has without just cause contumaciously refused to pay the amount of the decree in whole or in part within his capacity to make payment, and (2) that the judgment-debtor has been given an opportunity to show cause against his arrest. In deciding as to the judgment-debtor's capacity to pay, regard is not to be had to the value of a temporary alienation of land which could be temporarily alienated in execution of a decree (second Proviso to S. 34) and only that property is to be taken into account which could be sold by a Civil Court in executing a decree (third Proviso to that section). We are not concerned here with the second and third provisos.

No doubt the onus is on the decree-holder to prove the contumacy which entitled him to arrest his debtor but I see nothing in the Act to warrant the proposition that this onus cannot be discharged by merely pointing to evidence already on the record, or that before a Court comes to the conclusion that it is satisfied as to the judgment-debtor's contumacy it must in every case strike an issue and formally call upon the decree-holder to prove what is patent on the record. I take it that if it is established that a judgment-debtor has or had property with which he can pay or could have paid his debt or part of it and has not used it for this purpose when called upon to do so, and can offer no explanation of his failure, he may justly be regarded as having acted with contumacy. Once it is proved that the judgment-debtor had property available for discharging his debts after being called upon to pay them, the onus surely falls back upon him to prove some just cause for not having discharged them, more especially when a Court has granted him time on a promise to use that property for paying his decree-holder, and if he offers no kind of explanation I have no doubt that the Court can legally conclude that he has without just cause contumaciously refused to pay the amount of the decree in whole or in part.

There is however force in the contention that in this case the judgment-debtor has not been given the opportunity of showing cause against his arrest as required by the law. The order passed on 3rd July which was, in effect, that if the appellant had not paid the decretal amount by 7th August he would be arrested, prejudged a decision

as to his liability to arrest. An objection to this effect was promptly taken by the appellant, who nevertheless was not called upon subsequently to explain his conduct. In the face of this order, it would have been futile for the appellant to appear on 7th August for the question of his ability to pay and his contumacy had already been practically decided and he naturally took it for granted that if he appeared he would forthwith be arrested. It was incumbent on the Court to postpone the issue of a warrant until it had been satisfied that as a fact the appellant had been possessed of the means to make payment before 7th August (this was for the decree-holder to prove in any manner he could) and that in spite of his ability to pay he had deliberately and without just cause (and it would be for the judgment-debtor who had special knowledge of his own reasons to show such cause) refused to pay.

My view being that the Court has issued the warrant illegally, I would accept this appeal with costs, set aside the order issuing the warrant and remit the case to the executing Court to make the enquiry required by law. The parties will appear before the executing Court on 5th July 1937.

Din Mohammad J.—I agree that the appeal be allowed and that the case be remitted to the executing Court for disposal in accordance with law. The order of 3rd July betrays on the part of the executing Court a complete disregard of the provisions of law as contained in S. 34, Punjab Relief of Indebtedness Act, 1934. This Act introduced a salutary change in the law for the time being in force in order to afford protection to debtors against vexatious arrests. The substantive part of S. 34 deals with the question of a judgment-debtor's liability to arrest and prohibits arrest for default in the payment of any money due under a decree unless and until the condition laid down therein is fulfilled. That condition is that the Court should be satisfied that (1) the amount of the decree in whole or in part is within the debtor's capacity to pay, and (2) the refusal to pay that amount is without just cause and contumacious.

In order to determine the capacity to pay, certain directions are laid down in the form of the second and third provisos. By the second Proviso it is enacted that the value of the temporary alienation of

the land of a judgment-debtor is not to be taken into account and by the third Proviso it is enjoined that only that property is to be taken into consideration which a Civil Court can under the law sell. Now, the value of the temporary alienation of the land is nothing else than the value of the produce of the land and this proviso consequently prohibits the value of the produce being calculated while determining a debtor's capacity to make payment. Similarly, the property that a Civil Court cannot dispose of in execution of its decree is the land of a statutory agriculturist besides some other properties that are mentioned in S. 60, Civil P. C. The combined effect of these two provisions is to exclude from calculation the value of the land and its produce besides those properties which are already exempt otherwise. It follows therefore that it is only when in the light of these two provisions the question of a judgment-debtor's capacity to make payment is determined and the Court is satisfied that the amount demanded from him is within his capacity to pay and it further holds that he is withholding this amount from the decree-holder without any just cause and contumaciously, which again connotes want of any sound reason coupled with wilful and stubborn disobedience, that the Court can legally come to the conclusion that the debtor is liable to arrest. But even then it is not empowered to arrest him straightway. There is a further safeguard provided in the form of the first Proviso and by that proviso the Court is bound before issuing a warrant of arrest to give an opportunity to him to show cause against its issue. In other words, he must be allowed time to prove that the Court has gone wrong while deducing its conclusion as to his capacity to make payment, or the absence of just cause or his contumacy. The mere fact that some money has fallen into his hands which he has not paid is not enough to establish any of these factors. He may have valid reasons not to pay that amount and unless he is allowed to prove them, how can an executing Court come to the conclusion that he is liable to arrest or an appellate Court determine that the order is just and legal?

The question of onus is simple. A duty is in the first instance cast upon the decree-holder to bring circumstances on the record from which the Court may be in a position to draw its own inference as to

the conditions laid down in the substantive part of the section. This burden may possibly be discharged, otherwise, as, for example, by the admission of the judgment-debtor that he owns some money or by other unimpeachable evidence that he owns it, but this, as remarked before, will not be conclusive. It will merely shift the onus on to the judgment-debtor to prove his immunity from arrest. It may further be observed that prior to the issue of the warrant in question, a further protection was afforded to debtors in the shape of the Punjab Debtors' Protection Act, which provides among other things that such portions of a judgment-debtor's land shall be exempted from temporary alienation as is necessary to provide for his maintenance and the maintenance of those who are dependent on him. Reading S. 34, Relief of Indebtedness Act, in the light of S. 5, Debtors' Protection Act, the inevitable conclusion is that if a debtor is able to prove that the produce of his land is hardly sufficient for the maintenance of himself and the other members of his family, his refusal to surrender that produce or the value thereof will not be without just cause or contumacious.

The executing Court in this case does not appear to have appreciated this position correctly and appears to have made up its mind at the very commencement of the case against the judgment-debtor. As stated above, his admission that he had realized some produce from his land or was in a position to realize it was not enough to prove his capacity to pay, absence of just cause and contumacy, simply because he failed to place the value of that produce at the disposal of the decree-holder. The attitude of the Court is all the more inexplicable as the judgment-debtor appears to have made repeated attempts to put it on the right track. The Courts are expected to administer the law as they find it, however repugnant to their notion of justice it might appear to be, and protective measures like these should be construed in a liberal spirit and not otherwise. The executing Court would now determine the issue before it in the light of these remarks and after paying due regard to all the mandatory provisions that the law lays down in the interest of judgment-debtors.

K.B./A.L.

Appeal allowed.

A. I. R. 1938 Lahore 214

TEK CHAND AND ABDUL RASHID JJ.

Anjuman Imdadi Bank—Plaintiff—
Appellant.

v.

*Ujagar Singh — Defendant —**Respondent.*

Letters Patent Appeal No. 30 of 1937,
Decided on 17th June 1937, from judgment
of Skemp J., D/- 6th January 1937.

Civil P. C. (1908), S. 47 — Execution —
Application for temporary alienation of
judgment-debtor's land — Mortgage created
and mortgagee given possession but mortgage
money not realized from mortgagee — Decree
recorded as fully satisfied by mortgage —
Subsequent suit by decree-holder against
mortgagee held not barred by S. 47.

In execution of his decree the decree-holder applied for a temporary alienation of the land of the judgment-debtor. The land was attached and reference made to the Collector. A mortgage was created and the mortgagee given possession; but neither the executing Court nor the Collector realized the mortgage money from the mortgagee. On application of the judgment-debtor, the decree was recorded as completely satisfied by the creation of a valid mortgage even though the mortgagee tried to back out from the transaction. Subsequently the decree-holder filed a regular suit against the mortgagee for the money. It was contended by the mortgagee that the suit was barred by S. 47 :

Held that the mortgage was in the nature of a judicial hypothec which had satisfied completely the decree. If either of the parties to this hypothec wanted to enforce its rights against the other, the remedy was obviously by a regular suit and not in execution of the decree to which the mortgagee was not a party and which was already judicially satisfied. The decree having been held to have been satisfied, the question between the decree-holder and the mortgagee could not possibly be said to be one "relating to the execution discharge or satisfaction of the decree". This being so, no question of bar by S. 47 could arise.

[P 215 C 2 ; P 216 C 1]

Din Dayal Khanna—*for Appellant.*

Charanjiva Lal Aggarwal —

for Respondent.

Tek Chand J. — The sole question for determination in this appeal is whether the suit of the appellant, Anjuman Imdadi Bank, zemindara of mauza Khapar Kheri, District Amritsar, against Ujagar Singh, defendant-respondent, for recovery of Rs. 1098 is barred by S. 47, Civil P. C. In order to appreciate the point it is necessary to state briefly the relevant facts. In 1928 the plaintiff Anjuman obtained a decree against one Bhagat Singh for Rs. 1098. In proceedings in execution of this decree, the Anjuman applied for a temporary alienation of the land of the judgment-

debtor. The land was attached and a reference made to the Collector for suggesting the mode and terms of the temporary alienation. The proceedings were transferred by the Collector to the Tahsildar, before whom no suitable offer for mustajri was made, but Ujagar Singh respondent offered to take the land on mortgage undertaking to pay the decretal amount in full to the decree-holder. The Tahsildar considered this offer to be in the interests of the judgment-debtor, and supported it in his report to the Collector. The Collector in turn made a recommendation to the executing Court to accept the mortgage. The executing Court accepted the recommendation and sanctioned the mortgage. Possession of the land was accordingly given to Ujagar Singh and mutation duly effected in his favour as mortgagee. Neither the executing Court nor the Collector however took any steps to realize the mortgage money from Ujagar Singh. Some months later, Ujagar Singh applied that he did not want to pay the decretal amount and that the mutation be cancelled. The decree-holder raised no objection and the executing Court ordered the cancellation of the mutation. The judgment-debtor however had not been informed of these proceedings, and the order of cancellation had been passed behind his back. On coming to know of the order, he applied to the executing Court, objecting to the cancellation, and asking the Court to certify, under O. 21, R. 2, Civil P. C. that the decree had been satisfied by a binding mortgage in favour of Ujagar Singh. Ujagar Singh contested the application, urging that the mortgage was not binding on him, he having originally agreed to take it under a mistake as to the extent of the area mortgaged. The executing Court after a lengthy inquiry into the contentions of the parties, held that a valid mortgage had been created in favour of Ujagar Singh, that he had entered into possession of the land as mortgagee and that he could not back out of the transaction at that stage. It was accordingly held that the decree had been satisfied fully; the application of the judgment-debtor under O. 21, R. 2, was granted and the execution proceedings consigned to the record room as "completely satisfied." Ujagar Singh's appeal to the District Judge and second appeal to this Court were both unsuccessful: see O. A. 8 of 1932, decided by Bhide J. on 26th May 1932.

In the meantime, Ujagar Singh had continued in possession of the land, and had appropriated the rents and profits without paying anything to the decree-holder Anjuman. In July 1935, the Anjuman brought a suit against him for recovery of Rs. 1750 alleged to be due on foot of the mortgage above mentioned. Ujagar Singh resisted the suit on numerous grounds pleading inter alia that it was not maintainable under S. 47, Civil P. C. The trial Judge upheld this preliminary plea and dismissed the suit. On appeal, the learned District Judge came to a contrary conclusion; he accepted the appeal and remanded the case under O. 41, R. 23, Civil P. C. for decision on the merits. From his decree the defendant preferred a second appeal to this Court, which has been accepted by Skemp J. sitting in Single Bench and the suit dismissed as barred by S. 47. From this judgment the present appeal has been lodged under Cl. 10 of the Letters Patent.

Before the learned Judge it was argued on behalf of the defendant-respondent that Ujagar Singh, being a mortgagee from the judgment-debtor, was his representative within the meaning of S. 47, Civil P. C., and therefore the claim of the decree-holder for recovery of the mortgage money from him was a matter which was exclusively determinable in execution proceedings. This contention appears to have been accepted by the learned Judge. Before us both counsel have cited rulings on the point as to whether a person to whom the property of the judgment-debtor has been mortgaged in the course of execution proceedings, is or is not a representative of the judgment-debtor. It is unnecessary to discuss these rulings or to decide this point, for, the first question that falls to be determined is whether the present claim of the appellant against the respondent is a matter relating to "the execution, discharge or satisfaction of the decree", within the meaning of S. 47. Now, as already stated, the decree obtained by the Anjuman against Bhagat Singh, had, after a lengthy inquiry under O. 21, R. 2, been held to have been duly satisfied by the creation of the mortgage in question. This order was upheld by the District Judge and the High Court as far back as 1932, in proceedings to which Ujagar Singh respondent, was a party. That finding is admittedly binding on him. The decree having been held to have been satisfied, the question now in issue between the appellant and Ujagar

Singh cannot possibly be said to be one "relating to the execution, discharge or satisfaction of the decree". That order was passed upon the finding that a valid mortgage had been created in the course of the execution proceedings in favour of the respondent. This mortgage was in the nature of a judicial hypothec and indeed it was the creation of this hypothec which had satisfied completely the decree of the Anjuman against Bhagat Singh. If either of the parties to this hypothec now wanted to enforce its rights against the other, the remedy is obviously by a regular suit and not in execution of the decree to which Ujagar Singh was not a party, and which has been held judicially to have been satisfied several years ago. This being so, no question of bar by S. 47 can arise.

For these reasons, I would accept this appeal, set aside the judgment of the learned Judge in Chambers and restore that of the District Judge remanding the case under O. 41, R. 23, Civil P. C., for decision on the merits. Court-fee on this appeal will be refunded; other costs shall be costs in the cause. Both counsel have been directed to cause their respective clients to appear before Mr. Ghulam Rabhani Akhtar, Subordinate Judge, First Class, Amritsar, on 2nd August 1937 when a date for further proceedings in that Court will be fixed.

Abdul Rashid J.—I agree.

R.W./R.K.

Appeal accepted.

A. I. R. 1938 Lahore 216

YOUNG C. J. AND MONROE J.

Pokhar Das Ganga Ram

Convict—Appellant.

v.

Emperor.

Criminal Appeal No. 800 of 1937, Decided on 21st October 1937, from order of Sess. Judge, Mianwali, D/- 3rd July 1937.

(a) Criminal P. C. (1898), S. 540-A—Absence of accused—Trial is nullity—Exemption under S. 540-A—Provisions must be strictly complied with.

Normally, a trial in the absence of the accused is a nullity and it is only by virtue of S. 540-A that this consequence of the absence of the accused can be avoided: if the requirements of the section are not fulfilled, the trial remains a nullity. [P 216 C 2]

(b) Criminal Trial—Joint trial—One accused absent—Exemption granted illegal—Trial is vitiated.

Where eight accused are jointly tried and one of the accused is absent throughout the trial being granted an illegal exemption, the trial of other accused with that of the absentee being one and indivisible, the whole trial is vitiated.

[P 217 C 1]

Dr. Mohammad Alam — *for Appellant.*

Diwan Ram Lal, Advocate General — *for Respondent.*

Young C. J.—The seven appellants and Laiqa Ram (who was acquitted) were tried together for offences under Ss. 302 and 307, I. P. C. the seven appellants were convicted. The trial took place in the absence of Khem Chand, appellant, who was ill at the commencement of it. A few days before the trial commenced, the learned Judge summoned Khem Chand at Mianwali and in the presence of the Public Prosecutor, Khem Chand and his counsel, but in the absence of the other accused, made an order dispensing with the attendance of Khem Chand at the trial. The trial afterwards proceeded in the presence of all the appellants except Khem Chand, who was represented by counsel. Mr. Puri has raised an objection to the validity of the trial, on the ground that the power to dispense with the presence of an accused person is defined by S. 540-A, Criminal P. C., and that the learned Judge has not complied with the provisions of the section; and he has argued that the trial is wholly bad and the convictions of all the appellants ought to be set aside. Mr. Puri bases his argument on the wording of the section, which, he suggests, requires the presence of the accused "before the Court" as a condition precedent to an order dispensing with his attendance during the further proceedings. Mr. Puri emphasizes the requirement of the section that the trial must have commenced. The learned Advocate General, though stating that it might be argued that even the trial of Khem Chand was good, "for the purpose of argument" conceded that the trial so far as Khem Chand was concerned was bad. We ourselves have not been able to discover any ground for holding the trial of Khem Chand good. Normally, a trial in the absence of the accused is a nullity and it is only by virtue of S. 540-A that this consequence of the absence of the accused can be avoided: if the requirements of the section are not fulfilled, the trial remains a nullity. The learned Advocate-General sought to ignore the fact that

Khem Chand had been tried with his co-accused: and argued that the trial should be treated as the trial of the other seven accused, the inclusion of Khem Chand being ignored: that the trial of each accused was a separate trial, and that eight trials were actually conducted at the same time. No authority for any such view of a joint trial was cited to us.

In the absence of such authority, we are constrained to hold that a joint trial is a single trial and cannot be considered as a separate trial of each person accused: it is one and indivisible. It follows, we think, that an illegality which vitiates the trial so far as one of the accused is concerned, prevents the trial from holding good in respect of the remaining accused. We have therefore no option but to hold the trial bad, and order the appellants to be retried by the Sessions Judge, Mianwali.

B.D./R.K.

Order accordingly.

*** A. I. R. 1938 Lahore 217**

ADDISON AND DIN MOHAMMAD JJ.

Haveli Shah and others — Decree-holders—Appellants.

v.

Mt. Hussaina Jan and another — Judgment-debtors — Respondents.

First Appeal No. 37 of 1937, Decided on 8th December 1937, from decree of Senior Sub-Judge, Rawalpindi, D./ 12th October 1936.

* Provincial Insolvency Act (1920), S. 44 (2)—Creditor holding mortgage decree against insolvent realising his security before order of discharge but not proving balance personally due after valuing security — Order of discharge releases insolvent from personal liability under mortgage.

Where a creditor holding a mortgage decree against the insolvent, realises his security before the order of discharge is passed, but does not value his security and prove the balance personally due from the insolvent, the order of discharge releases the insolvent from personal liability under the mortgage as it is a debt provable under the Act and the creditor cannot subsequently claim a personal decree for the balance against the insolvent. [P 218 C 2]

V. N. Sethi — *for Appellants.*

M. L. Sethi — *for Respondents.*

Judgment. — Haveli Shah, etc., obtained a decree against Hussaina Jan and Mt. Zohra Jan on a mortgage in favour of the decree-holders' father in respect of certain property, the mortgage deed being

dated 14th February 1921. The principal amount of the mortgage was Rs. 1,00,000 and it was to carry compound interest at the rate of 15 per cent per annum with quarterly rests. The mortgage was with possession and the rent realized was to be appropriated towards interest. The mortgagees instituted the suit on their mortgage on 26th January 1925 the claim being then for Rs. 1,69,474-6-3. A preliminary decree was passed on 16th May 1928. According to the decree Rs. 1,54,375 were due on 16th May 1928, and it was further stated that on the sum of Rs. 1,00,000 interest at 15 per cent per annum would run until realization. Costs were also allowed. The money was not paid by the due date, i. e., by 16th June 1928, and a final decree was passed for sale of the property on 24th July 1928. A receiver was appointed to collect rents etc., before the property was sold and these rents have been paid to the decree-holders. The property was sold in 1932, but the sale was not confirmed till June 1934, the sale-certificate being issued on 6th July 1934, with respect to the bulk of the property. The decree-holders, although Rs. 1,18,345-8-0 had been realized by them, applied on 16th August 1935, for a personal decree for Rs. 2,42,318-13-9 with future interest against the two ladies. Various defences were raised. The trial Court held that the evidence produced by the decree-holders was insufficient to show what was due to them and that for this reason alone no personal decree could be passed. It further held that Mt. Zohra Jan, who is now a discharged insolvent, was protected by the Insolvency Act and could not be held personally liable for any amount. As regards Mt. Hussaina Jan, however it held that she would be personally liable had anything been found due. In the result a personal decree was refused and the decree-holders have appealed.

It is correct that the evidence produced by the decree-holders is most defective and the account produced by the servant of the decree-holders was certainly insufficient to prove that the large sum claimed was due. This account is printed at page 12 of the paper-book. It was admitted that Rs. 1,18,345-8-0 had been realized towards execution of the decree, most of it before 1934 or in that year. That means that in the year 1934 the principal sum of Rupees 1,00,000 had been paid and it was only

this principal sum which bore interest. There could therefore be no interest after 1934. Upto the middle of 1934, counting interest and costs, the sum due comes to approximately Rs. 2,40,000 while certainly over Rs. 1,18,000 has been paid. This leaves a balance of about Rs. 1,22,000 due to the decree-holders, but in the absence of a proper account we think it will be safe to hold that only Rs. 1,00,000 remain due. This we do on account of the unsatisfactory nature of the evidence as to the exact sum due. This sum, of course, does not bear interest, as the principal which alone bore interest has been paid. For this sum Mt. Hussaina Jan is certainly liable and there must be a personal decree for this amount against her.

The only other question argued on behalf of the appellants was that Mt. Zohra Jan was also liable for this amount. She was declared insolvent during the execution proceedings, but was discharged by order, dated 2nd August 1934. By that time all the mortgaged property had been sold so that the decree-holders could have claimed in insolvency the amount which she was personally liable to pay. S. 34, Provincial Insolvency Act runs as follows:

34. (1) Debts which have been excluded from the schedule on the ground that their value is incapable of being fairly estimated and demands in the nature of unliquidated damages arising otherwise than by reason of a contract or a breach of trust shall not be provable under this Act. (2) Save as provided by sub.s. (1), all debts and liabilities, present or future, certain or contingent, to which the debtor is subject when he is adjudged an insolvent, or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication, shall be deemed to be debts provable under this Act.

Sub clause (2), it will be seen, is very wide and includes all debts and liabilities, present or future, certain or contingent, to which the debtor is subject when he is adjudged an insolvent or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication. S. 47, Provincial Insolvency Act, deals with secured creditors. Sub-clause (1) lays down that

where a secured creditor realizes his security, he may prove for the balance due to him, after deducting the net amount realized.

It will be seen in the present case that the decree-holders could have done this before the discharge order, dated 2nd

August 1934. Apart from that, sub-clause (2) lays down that:

Where a secured creditor relinquishes his security for the general benefit of the creditors, he may prove for his whole debt.

This does not arise in the present case. But sub-clause (3) enacts that:

Where a secured creditor does not either realize or relinquish his security he shall, before being entitled to have his debt entered in the schedule, state in his proof the particulars of his security, and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed.

Under S. 44 (2), Provincial Insolvency Act, save as otherwise provided by sub.s. (1) an order of discharge shall release the insolvent from all debts provable under that Act. In the circumstances described, this sub-section obviously applies to the present case, where not only had the security been realized before the date of discharge, but the decree-holders could have valued their security and proved for the balance personally due by the insolvent. Under these circumstances we hold that under S. 44 (2) the order of discharge released Mt. Zohra Jan from personal liability under the mortgage as that was a debt provable under the Act. The appeal must therefore fail as regards her. In the result we accept the appeal and direct that a personal decree be passed against Mt. Hussaina Jan to the extent of Rs. 1,00,000. Parties will bear their own costs.

R.M./R.K.

Order accordingly.

* A. I. R. 1938 Lahore 218

ADDISON AND DIN MOHAMMAD JJ.

*Ghulam Ahmad and another —
Plaintiffs — Appellants.*

v.

*Nand Lal and others —
Defendants — Respondents.*

Letters Patent Appeal No. 66 of 1937, Decided on 25th October 1937, from decree of Bhide J., D/. 9th February 1937, reported in A I R 1937 Lah 940.

(a) Second Appeal—Finding of fact — Concurrent finding cannot be disturbed.

A concurrent finding of fact by the trial Court and the lower Appellate Court cannot be disturbed in second appeal. [P 219 C 1]

* (b) Minor — Guardian — Defence saving valuable property not taken — Guardian held guilty of gross negligence.

A guardian of a minor, who neglects to put forward a defence which saves a valuable property of the minor from alienation, is guilty of gross negligence. [P 219 C 1]

J. N. Aggarwal and Udai Bhan —
for Appellants.

Mehr Chand Mahajan and V. N. Sethi
— for Respondents.

Judgment. — This is a Letters Patent appeal from the judgment of a single Judge. The documents Ex. P. 7, dated 26th May 1916, Ex. P. 6, dated 30th March 1925, Ex. P. 2, dated 13th June 1926 and Ex. D 1, dated 27th November 1928, leave no doubt that only plot No. 1 was mortgaged to Nand Lal and that plot No. 2 shown in the plan Ex. L. C/1 was not mortgaged to him. There was a concurrent finding of fact by the trial Court and the lower Appellate Court on this question which was correctly arrived at. The single Judge therefore had no power in second appeal to alter this finding.

Further, there can be no doubt that a guardian of a minor, who neglects to put forward a defence which saves a valuable property of the minor from alienation, is guilty of gross negligence. In this respect also we agree with the trial Court and the lower Appellate Court and not with the single Judge of this Court.

The counsel for the appellants states that he will be content with the decree passed by the trial Court and this is accepted by the counsel for Nand Lal. We therefore accept this Letters Patent Appeal, set aside the decrees of the single Judge of this Court and of the lower Appellate Court, and grant the plaintiffs a decree declaring that plot No. 2 belongs to them and also give them a decree for possession of plot No. 2. The parties will bear their own costs throughout.

B.D./R.K. *Appeal allowed.*

A. I. R. 1938 Lahore 219

ADDISON AND DIN MOHAMMAD JJ.

Simar Nath — Defendant —
Petitioner.

v.

Lala Anand Lal Kaul, (now Mr. Khanna) Official Receiver — Plaintiff
— Respondent.

Civil Revn. No. 533 of 1937, Decided on 7th December 1937, from decree of Judge, Small Cause Court, Amritsar, D/. 12th April 1937.

(a) Provincial Small Cause Courts Act (1887), Sch. 2, Art. 31 — Suit for mesne profits even though for sum ascertained is excepted.

A suit for recovery of mesne profits, even though for a sum ascertained comes within the purview of Art. 31 and is excepted from the cognizance of the Court of Small Causes: *A I R 1928 Rang 102 (F B)*; *8 I C 270*; *A I R 1933 Nag 87*; *A I R 1918 All 222*; *A I R 1933 Lah 509 and 25 Bom 85, Foll.*; *23 Cal 884 (F B)*; *35 P R 1902, (F B)*; *94 P R 100*; *32 Bom 560 and A I R 1927 Cal 375, Dissent.* [P 219 C 2; P 220 C 1]

(b) Provincial Small Cause Courts Act (1887), Sch. 2, Art. 31 — Sums received on basis of sale — Sale set aside — Sum is wrongfully received within Art. 31.

The effect of annulment of a sale under S. 53, Provincial Insolvency Act, is to hold that no transaction had taken place at all, and any sum that the vendee receives by virtue of that transaction is received by him wrongfully within the meaning of Art. 31, Provincial Small Cause Courts Act. [P 220 C 2]

Nand Lal Bhalla — for Petitioner.

Shamsher Bahadur — for Respondent.

Din Mohammad J. — This is a petition for revision of the order of the Judge Small Cause Court, Amritsar, partially decreeing a claim for recovery of mesne profits against the petitioner. It is contended on behalf of the petitioner that the judgment of the Judge, Small Cause Court is not according to law, inasmuch as (i) he had no jurisdiction to try the suit, (ii) the suit was barred by limitation and (iii) the petitioner was in any circumstances legally entitled to retain part of the profits realised by him prior to the time when the sale in his favour was set aside. In our view it is not necessary to decide the last two questions as the petition can be disposed of on the short ground that the Judge Small Cause Court had no jurisdiction to try the suit. Art. 31 of Sch. 2 to the Provincial Small Cause Courts Act (9 of 1887) reads as follows :

Any other suit for an account, including a suit by a mortgagor, after the mortgage has been satisfied, to recover surplus collections received by the mortgagee, and a suit for the profits on immovable property belonging to the plaintiff which have been wrongfully received by the defendant.

Counsel for the respondent contends that a suit for a sum ascertained does not come within the purview of Art. 31 and relies on *23 Cal 884*,¹ *35 P R 1902*,² *94 P R 1900*,³ *32 Bom 560*⁴ and *A I R 1927 Cal 375*.⁵

1. *Kunjo Behary Singh v. Madhub Chandra*, (1896) *23 Cal 884 (F B)*.

2. *Mt. Klehen Kaur v. Tulaa Singh*, (1902) *35 P R 1902=84 P L R 1902 (F B)*.

3. *Ishar Singh v. Wasawa Singh*, (1900) *94 P R 1900=89 P L R 1901*.

4. *Kesri Sang v. Naransang*, (1909) *82 Bom 560=10 Bom L R 788*.

5. *Srinath Roy v. Taraprasanna Roy*, (1927) *14 A I R Cal 375=102 C 128=45 C L J 230*.

These judgments no doubt support his contention, but there is a large array of authority on the other side too, as, for example, 6 Rang 60,⁶ 25 Mad 103,⁷ 8 I C 270,⁸ 141 I C 825,⁹ 40 All 142,¹⁰ A I R 1933 Lah 509¹¹ and 25 Bom 85.¹² The argument employed in the former set of cases is that the words "any other suit for an account" govern the latter part of the Article also and only those suits are excepted from the cognizance of the Small Cause Courts which contemplate a decree for account. The second set of authorities holds a contrary view mainly on the ground that claims to mesne profits directly involve title to immovable property and not incidentally and that the Legislature had properly excepted suits for mesne profits from the cognizance of the Courts of Small Causes.

With all respect, we do not agree with the construction put by 23 Cal 884¹ and other similar authorities on the wording of Art. 31 and are in respectful agreement with the opinion expressed in A I R 1933 Lah 509,¹¹ especially as the trend of authority in the High Courts of Bombay, Madras, Rangoon, Allahabad and Nagpur is also in the same direction. Some of the judgments cited above from these Courts have discussed the matter at length from every point of view and it would be a mere act of supererogation to recapitulate those arguments here. We hold therefore that the suit as instituted was excepted from the jurisdiction of the Small Cause Court.

It is next contended by counsel for the respondent that Art. 31 does not apply on another ground also viz. that the profits were not 'wrongfully' received by the defendant inasmuch as the sale not being void ab initio, the vendee had a perfect title up to the date when the sale was set aside. Here also we do not agree. A decision under S. 53, Provincial Insolvency Act, results in the annulment of the sale and if once the sale is annulled, it cannot

be argued that any sum received on the basis of that sale was rightfully received by the defendant. In our view, the effect of the annulment is to hold that no transaction had taken place at all, and this being so, any sum that the vendee receives by virtue of that transaction is received by him wrongfully. We need not further dilate on the subject as this aspect of the case has also been dealt with in some of the judgments cited above.

On the grounds mentioned above, we accept the petition, set aside the order of the Judge, Small Cause Court and direct him to return the plaint to the plaintiff for presentation in a proper Court. The question whether the plaint so presented would not be affected by the provisions of the Limitation Act will be determined by the Court entertaining the suit. In view of there being a sharp conflict of authority in this matter, the parties will bear their own costs upto date.

V.B./R.K.

Order set aside.

* A. I. R. 1938 Lahore 220

COLDSTREAM J.

Lal Chand — Judgment-debtor — Appellant.

v.

Sohan Lal and others — Auction-purchasers and Decree-holder — Respondents.

Exn. First Appeal No. 180 of 1937, Decided on 12th July 1937, from order of Senior Sub-Judge, Amritsar, D/- 8th May 1937.

* Civil P. C. (1908), O. 39, R. 1—Temporary injunction under and stay of execution—Distinction between—Sale in contravention of injunction under O. 39, R. 1 is not nullity as in case of stay order.

A temporary injunction under the provisions of Rule 1, O. 39, is not a stay order issued by a Court competent to stay execution proceedings under any provision of the Code authorizing such an order. The effect of non-compliance with an injunction issued under O. 39, R. 1 is to make the offender liable to the punishment prescribed in O. 39, R. 2 (3) and a completed sale in contravention of an injunction under O. 39, R. 1 is not a nullity as being without jurisdiction. A temporary injunction under O. 39, is not a mandatory direction to a Court, as is a stay order of the kind provided for by the Procedure Code, but is an order directed against a particular person which can be issued only in the circumstances described in R. 1 : A I R 1920 Nag 12 ; A I R 1930 Lah 858 and A I R 1925 Lah 644, Rel. on; A I R 1932 Lah 515 and A I R 1925 Oudh 424, Dissent. ; A I R 1935 Lah 694 and A I R 1933 Rang 416. Ref. [P 221 C 2]

6. U Min Din v. U Po Thaung, (1928) 15 A I R Rang 102=109 I C 689=6 Rang 60 (F B).

7. Savari Muthu v. Althurusu Rowthar, (1902) 25 Mad 103=11 M L J 428 (F B).

8. Nand Rani v. Swasha Neshwar, (1910) 8 I C 270.

9. Dukreya Mehra v. Muktee Mahrin, (1933) 20 A I R Nag 87=141 I C 825=29 N L R 61.

10. Drig Pal Singh v. Kunjal, (1918) 5 A I R All 222=44 I C 689=40 All 142=16 A L J 55.

11. Ubedul Rahman v. Darbari Lal, (1933) 20 A I R Lah 509=146 I C 845=84 P L R 262.

12. Antone v. Mahadev, (1901) 25 Bom 85=2 Bom L R 688.

Charanjiv Lal Aggarwal—*for Appellant.*
 Faqir Chand Mital and A. R. Kapur
 — *for Respondent 1.*
 Respondent 2 in person.
 Mehr Chand Mahajan —
for Respondent 3.

Judgment.—On 11th April 1930 the Punjab and Sindh Bank Ltd., Amritsar, obtained a mortgage decree for Rupees 41,709.15.9 against Lal Chand. Execution was attempted in the same year but was delayed by another suit until 1934 when execution proceedings were revived. Lal Chand was allowed time for a private settlement but effected none. Ultimately the mortgaged property, a house and a shop, were put to sale on 23rd and 25th October 1935 by which time the debt had increased to over Rs. 51,000. Meanwhile on 2nd October a declaratory suit had been instituted by a firm Nand Lal Radha Kishan against the Bank relating to the execution of a decree of Rs. 1000. They managed to secure ex parte a temporary injunction in the Court of the Subordinate Judge First Class staying the sale of the house and shop and on 25th just before the sale was being concluded, they presented a copy of the stay order to the Manager of the Bank. A rodkar asking the executing Court (that of the Senior Sub-Judge) to stay the sale was received by the executing Court at 3.55 P. M. The Court did not stay the sale but concluded it at 4.57 P. M. The house was sold for Rs. 8000 and the shop for Rs. 17,700. The purchasers paid up the price. They have not yet succeeded in obtaining possession of the property and their money had been lying useless for more than 18 months pending the disposal of objections submitted by Lal Chand, Nand Lal, Radha Kishan and another under O. 21, R. 91, Civil P. C. The objections were disallowed by the executing Court by an order passed on 8th May 1937. The present appeal is by Nand Lal alone against that order.

Several of the objections raised in the executing Court related to alleged irregularities in the publication of the notice of sale. The appellant's counsel has stated that he does not press these but confines his appeal to the grounds that the sale was void as it was concluded in defiance of the injunction issued by the Subordinate Judge First Class and that the conduct of the executing Court, in continuing the sale after it was known that the injunction

had been obtained, resulted in substantial injury to the appellant. Here I may notice that a petition for revision of the executing Court's order refusing to have regard to the injunction was presented to this Court but was dismissed by Skemp J. on 28th January 1937 (Civil Revision No. 871 of 1936) on the grounds that it had become infructuous because the Court issuing the injunction had withdrawn it, and the suit in which it had been issued had been dismissed. I am informed, I may add, by respondents' counsel that Lal Chand attempted unsuccessfully to have the bank manager punished under the provisions of O. 39, R. 2 (3), Civil P. C. In support of his contention that the sale was void, counsel has relied upon A I R 1925 Oudh 424,¹ A I R 1932 Lah 515,² A I R 1935 Lah 694³ and A I R 1933 Rang 416.⁴

A temporary injunction under the provisions of R. 1, O. 39, Civil P. C., is not a stay order issued by a Court competent to stay execution proceedings under any provision of the Code authorizing such an order. Such an order can be passed for example by the executing Court (O. 21, Rr. 29 and 83) or by an Appellate Court (O. 41, R. 5) or perhaps by a High Court in exercise of its inherent powers. The effect of non-compliance with an injunction issued under O. 39 is to make the offender liable to the punishment prescribed in sub-r. 3 of R. 2 of that Order and so far as I know, that is the only effect, and I can find no statutory authority for the proposition that a completed sale in contravention of an injunction under O. 39, R. 1 is a nullity. A temporary injunction under O. 39 is not a mandatory direction to a Court, as is a stay order of the kind provided for by the Procedure Code, but is an order directed against a particular person which can be issued only in the circumstances described in R. 1. Had it been the intention of the Legislature that a Court sale effected while an injunction under O. 39 was in force should be a nullity the statute would surely have been made this clear, as it has made it clear in S. 64 of the Code that a private alienation

1. Sitapat Ram v. Mahabir Prasad, A I R 1925 Oudh 424=88 I C 582=2 O W N 315.
2. Sri Mandar Das v. Atmaram, A I R 1932 Lah 515=189 I C 842=88 P L R 667.
3. Nihal Chand v. Shah Dev Singh, A I R 1935 Lah 694=160 I C 838.
4. Ma Ti v. Ma Tait, A I R 1933 Rang 416=147 I C 700=11 Rang 410.

of property under attachment is void. It is to be noted in passing that S. 64 does not make such a private alienation void but merely provides that it shall be void as against all claims enforceable under the attachment. In the present case the injunction was not for the benefit of Lal Chand but for the supposed protection of a third party (although of course the circumstances point to collusion between that party and Lal Chand in order to defeat the decree-holder bank).

It is true that a different view was apparently taken by Broadway A. C. J. in A I R 1932 Lah 515² where it was held that an executing Court acted without jurisdiction in disregarding an injunction staying a sale. With great respect, I am not convinced that a sale in contravention of an injunction is a nullity as being without jurisdiction, even if it be conceded that the Court would have acted properly in postponing the auction. A I R 1935 Lah 694³ deals with a case where a postponement order had been regularly issued by the executing Court and has no applicability here. A I R 1933 Rang 416⁴ also relates to a case of a stay order issued by the executing Court. The judgment of the Oudh Court in A I R 1925 Oudh 424¹ is certainly in favour of counsel's contention but if it lays down correctly that a sale by an executing Court was a nullity under the existing Code when effected in face of an injunction, it is difficult to see why it was necessary to amend Rule 1 of O. 39 as the Oudh Court has done so as to provide specifically for an injunction being issued by a Court trying a suit restraining a Court from executing a decree by sale of the suit property. (The Amended Rule will be found printed at pp. 252-3 of Chitaley's Code of Civil Procedure, Edn. 2).

My own view is that the sale was not without jurisdiction and a nullity; in taking this view I am fortified I think by the remarks of the Nagpur Judicial Commissioner in 54 I C 928⁵ and by Tek Chand J. in 128 I C 304.⁶ See also 6 Lah 380.⁷ Assuming that the executing Court ought not to have proceeded with the auction after 3.30 P. M. on the second day of

the sale and that its action in doing so made the sale materially irregular it has to be seen whether the lower Court has wrongly found it not proved that in consequence of the continuance of the sale and the manner in which it was conducted the appellant sustained substantial damage.

I have been taken through the evidence by the appellant's counsel, and after considering it, I am in complete agreement with the conclusion of the learned Senior Subordinate Judge that it does not establish that the property was sold for less than its value or that had the sale not been carried to completion, a larger price would have been obtained for the property. The learned Subordinate Judge described and discussed the evidence in detail. That of the witnesses who say they were prepared to pay more than the property fetched has properly been rejected as worthless for the reasons given in the judgment. The mere prolongation of the auction manifestly could not injure the judgment-debtor. The sale on 25th was begun in the Court compound and continued in the presence of the Judge himself in his Court. From this fact no prejudice to the judgment-debtor can be assumed. The record of the bids produced by the Court auctioneer is regular, nothing suspicious in it is suggested and there is no reason to reject the evidence of the decree-holder's witnesses that the sale was regularly conducted to the finish. As regards the price it is notorious that at Court auctions, bidders are shy to risk their money in view of the astonishing facilities afforded by the practice of the Courts for delaying satisfaction of decrees by sale of property. In this case however there is no good reason for believing that the property was sold for less than its real value. In 1934 when execution proceedings were revived and the judgment-debtor appeared in Court resisting execution and asked for time to effect a private settlement, he stated that he had succeeded in finding prospective buyers who were prepared to pay Rupees 15,000 for the shop and Rs. 7500 for the house and that if they were put to auction they would fetch much less. It is true that the decree-holder's notice valued the property at a considerably higher price but in view of the judgment-debtor's own estimate it is clearly impossible to hold it proved that the judgment-debtor sustained substantial injury by the sale of the properties at what they ultimately fetched.

5. Dharamchand v. Mitsui Bussan Kaisha & Co., A I R 1920 Lah 12=54 I C 928.

6. Darbari Ram v. Ghulam Farid-Fazal Karim, A I R 1930 Lah 858=128 I C 804.

7. Bell Ram & Bros. v. Ram Lal, A I R 1925 Lah 644=90 I C 987=6 Lah 380.

The decree-holder's counsel Mr. Mehr Chand has stated deliberately in Court that the judgment-debtor has no other property of any kind out of which the decree can be satisfied. The statement he is prepared to support by an affidavit of his client and the appellant's counsel cannot deny its truth. It is clear therefore that Lal Chand cannot himself profit by resale, for admittedly his debt now far exceeds the value of the property. Mr. Mehr Chand has made an offer in Court to the judgment-debtor that he is ready to give Lal Chand credit for Rs. 30,000 or even Rs. 32,000 (at which amount Lal Chand now values his property) if Lal Chand will hand over the property to a receiver for resale. This offer Lal Chand's counsel has rejected and it is obvious that Lal Chand's only object in prolonging the execution proceedings is to retain possession of his property. Lal Chand's objections were not in good faith nor is there any honest purpose in this appeal. I dismiss the appeal with costs.

K.B./R.K.

*Appeal dismissed.***A. I. R. 1938 Lahore 223**

JAI LAL J.

Messrs. Kidar Nath Ram Chandra —
Defendant — Petitioner.

v.

Secretary of State — Plaintiff —
Respondent.

Civil Revn. Petn. No. 777 of 1936,
Decided on 23rd February 1937, from
order of Addl. Dist. Judge, Lahore, D/-
24th June 1936.

(a) Arbitration—Validity—Agreement between Military Department and contractor providing that disputes between parties are to be referred to arbitration of sanctioning authority—No mention made, as to by whom reference is to be made—Reference by any officer of department and to the officer holding appointment of sanctioning authority is perfectly valid

Where an agreement between a Military Department and a contractor provides that in case of a dispute between the parties as to the subject matter of the contract, the same is to be referred to the arbitration of the sanctioning authority but does not say by whom the reference is to be made, in absence of any indication in the contract that the reference should be made by a particular officer a reference by any officer of the department is competent. So also where the reference has to be made not to the person sanctioning the contract but to the officer who might be holding the appointment of sanctioning authority at the time of the dispute

a reference to the officer who happens to hold such appointment at the time of the dispute is perfectly valid. [P 224 C 2]

(b) Arbitration — Validity — Judicial misconduct—Party is entitled to know details of claim preferred against him—Aggrieved party not ignorant of nature of claim against him—Details of claim supplied to him on date of hearing — Failure by arbitrator to allow him further opportunity to meet the case does not amount to judicial misconduct.

Although ordinarily a litigant appearing as a party before an arbitrator is entitled to know the details of the claim which has been preferred against him, yet where it appears that the aggrieved party was not ignorant of the nature of the claim against him when he appeared before him and was supplied with the details of the claim on the date of the hearing, mere failure by the arbitrator to allow the party further opportunity to meet the case set up against him does not amount to judicial misconduct on the part of the arbitrator and the conclusion of the lower Appellate Court on the point cannot be attacked in revision.

[P 224 C 2 ; P 225 C 1]

Jagan Nath Aggarwal and Faqir Chand
Mital — *for Petitioner.*

Anant Ram Khosla — *for Respondent.*

Order. — On 12th May 1933, the petitioner took a contract for the supply of fodder to Camel Units in the Lahore Military District. The agreement was signed on the same day and was sanctioned by Major Penrose Welsted, Deputy Director of Grass Farms, and signed by him in token of his sanction. On the ground that the petitioner had failed to keep to his agreement, the contract was subsequently cancelled, and on the petitioner making a demand for his alleged dues on account of supplies made by him a counter-claim was preferred against him by the Military Department for the sum of Rs. 3219-9-0. This claim was for the first time communicated to him on 30th March 1935, by means of a letter sent to him by Major Penrose Welsted, who was then officiating as Director of Farms. In that letter he intimated to the petitioner that he had been asked to decide a claim preferred against the petitioner by the Assistant Director of Grass Farms, No. 2 Circle, Lahore Cantonment, and that he had fixed 23rd April 1935, at 11 A. M. at Lahore Cantonment for deciding the case. He also intimated to the petitioner that if he failed to appear at the time appointed, he would proceed with the case in his absence. This letter was written in pursuance of an appointment of Major Penrose Welsted, as arbitrator. It appears from this letter that the matter was referred to him for arbitration by the Assistant Director of Grass

Farms who at the time happened to be Lieutenant Colonel Crawford. Clause 20 of the agreement reads as follows :

Any dispute or difference arising out of this contract, settlement of which is not herein provided for, shall be referred to the arbitration of the officer sanctioning the contract, whose decision shall be final and binding.

On receipt of the letter of 30th March 1935, the petitioner made an application to the arbitrator to summon some documents and witnesses which he intended to produce before the arbitrator. On 17th April 1935, a reply was sent to him by the Assistant Director of Grass Farms that an attempt would be made to produce the witnesses who were employed in the department at the date of the hearing but that the arbitrator had no power to summon any other witnesses who should be produced by the petitioner if he required their evidence. On 23rd April 1935, when the case came up for hearing before the arbitrator, the petitioner raised a question that he had not been supplied with the details of the claim by the Military Department. It appears that on that day some details of the claim were supplied to him and on the same day, in spite of his prayer for an adjournment of the case, the arbitrator proceeded to arbitration and gave an award against the petitioner.

An application was then made on behalf of the Secretary of State for India in Council to the Subordinate Judge to file this award but the learned Judge declined to file it holding that the arbitrator had been guilty of judicial misconduct. On appeal to the Additional District Judge of Lahore, this order of the learned Subordinate Judge was set aside and it was held that there was no judicial misconduct on the part of the arbitrator who had conducted himself in a proper and businesslike manner. The consequence was that the award was ordered to be filed and a decree passed in accordance therewith. This is a petition for revision of the order of the learned Additional District Judge. I have heard counsel on both sides. Only three questions are raised before me. First that the reference by Colonel Crawford was illegal; secondly that the reference being made to Major Penrose Welsted who at the time of the arbitration proceedings was acting as Director of Farms, was illegal, and thirdly that the decision of the Court below that there was no judicial misconduct was erroneous and that in fact the

arbitrator was guilty of judicial misconduct, his proceedings being opposed to natural justice.

The agreement does not provide by whom a reference has to be made. It only says that if there is a dispute between the parties as to the subject matter of the contract, the same shall be referred to arbitration of the sanctioning authority. The reference in this case was made by the Assistant Director of Grass Farms. There is no contention that this officer had nothing to do with the contract in question, therefore, in the absence of any indication in the contract that the reference should be made by a particular officer a reference by any officer of the department, in my opinion, was competent in this case. Reference has been made to the rules framed by the Government regarding the conduct of Government litigation. Those rules, in my opinion, have no bearing on the question of reference to arbitration. They only refer to conduct of litigation by or on behalf of the Government or the Government Departments in Courts.

With regard to the second contention, it appears that when the contract was cancelled, there had been a re-organization of the department and the post of the Deputy Director of Farms was abolished and the work up to then done by the Deputy Director was assigned partially to the Assistant Director and partially to the Director of Farms. It is expressly provided in the scheme of re-organization that the sanctioning of the contracts has to be done by the Director of Farms. Therefore the Director of Farms became the successor of the Deputy Director of Farms as the sanctioning authority and it is conceded by counsel on both sides that the reference has to be made not to the person who sanctioned the contract but to the officer who might be holding the appointment of the sanctioning authority at the time of the dispute. A reference therefore in this case to the Director of Farms, who happened to be at the time Major Penrose Welsted was perfectly valid.

On the third question, though I am not prepared to agree with the conclusion of the Additional District Judge that the proceedings of the arbitrator were absolutely businesslike, I am unable to hold at the same time that judicial misconduct has been proved in this case. It is true that ordinarily a litigant appearing as a party

before an arbitrator is entitled to know the details of the claim which has been preferred against him, but the correspondence in this case indicates that the petitioner was not ignorant of the nature of the claim when he appeared before the arbitrator, and this is obvious from his letter of 13th April 1935 in which he specified the documents and the witnesses whom he wanted to be summoned in support of his case. The information that he required from these witnesses and the documents mentioned indicate a knowledge of the nature of claim of the Government against the petitioner. The arbitrator however has not proceeded on this ground as on 23rd April 1935 he supplied the petitioner with details of the claim of the Government and then proceeded to give his award on the same day. In my opinion he should have given the petitioner further opportunity to meet the case set up against him, but I am unable to hold that his failure to do so amounted to judicial misconduct in the present case. The conclusion of the learned Additional District Judge on this point cannot be attacked on revision. I therefore dismiss this petition but in the circumstances I leave the parties to bear their own costs of these proceedings throughout.

R.M./R.K.

Petition dismissed.

A. I. R. 1938 Lahore 225

JAI LAL AND DALIP SINGH JJ.

Risaldar Ali Shan Khan and another
—Plaintiffs—Appellants.

v.

Ahmad Nawaz Khan — Defendant—
Respondent.

Second Appeal No. 1372 of 1936, Decided on 7th October 1937, from decree of Dist. Judge, Jhelum, D/- 19th May 1936. Limitation Act (1908), S. 13 — Secunderabad cantonment is under British administration—Party residing in cantonment area —Period of limitation is not saved.

Although Secunderabad cantonment is not within British India, yet it is under the administration of Government of India. Hence a party's residence at Balram in Secunderabad cantonment will not help him in saving limitation under S. 13 : 21 Cal 177 and A I R 1938 P C 134, Rel. on. (P 225 C 2)

L. M. Datta and Anant Ram Khosla —
for Appellants.

M. Khurshid Zaman — for Respondent.

Dalip Singh J.—In this case the plaintiffs brought the usual declaratory suit alleging that the gift by one Faqir Khan, 1938 L/29 & 30

their fathers' brother, to one other brother's son was ineffectual and void as against them. Various issues were raised which need not now concern us, but the suit was dismissed inter alia on the ground that it was barred by limitation. The plaintiffs had admittedly brought this suit more than six years after the date of the alienation in question, but they pleaded extension of time under S. 13, Limitation Act, on the ground that the defendant had been absent from British India during a period of the six years.

The facts proved, however, are that the defendant was stationed with his regiment in Balram. Balram forms a part of the area of Secunderabad Cantonment and the evidence of the Officer Commanding is that Secunderabad Cantonment is under the administration of the Government of India. Now S. 13, Limitation Act, lays down not only that the defendant will be absent from British India but also from the territories beyond British India under the administration of the Government. In 21 Cal 177,¹ which was approved by their Lordships of the Privy Council in 142 I O 552,² it was pointed out that the administration of Secunderabad Cantonment was in British hands but the territory on which the Cantonment is located had never been ceded by the Nizam of Hyderabad or acquired by conquest by the British Government, the sovereignty of the territory still vested in the Nizam of Hyderabad, and therefore Secunderabad Cantonment was not within British India. This, however, is a totally different question from whether Secunderabad Cantonment is a territory beyond the British India which is under the administration of the Government of India. It is clear from the answers given to the interrogatories by the Officer Commanding at Secunderabad and the notification mentioned in 21 Cal 177¹ that Secunderabad Cantonment is under the administration of the Government of India.

The plaintiffs therefore cannot claim any extension of time under S. 13, Limitation Act, and their suit being barred by limitation was rightly dismissed and the appeal must be dismissed with costs.

B.D./R.K.

Appeal dismissed.

1. Hossain Ali Mirza v. Abid Ali Mirza, (1894) 21 Cal 177.

2. Anantapadmanabhaswami v. Official Receiver of Secunderabad, (1933) 20 A I R P C 134 = 142 I O 552 = 60 I A 167 = 56 Mad 405 (P O).

* A. I. R. 1938 Lahore 226

ADDISON AND DIN MOHAMMAD JJ.

Gopi Chand — Plaintiff — Appellant.

v.

*Khazan Chand and others —**Defendants — Respondents.*

Second Appeal No. 1640 of 1936, Decided on 25th November 1937, from decree of Dist. Judge, Sialkot, D/- 20th July 1936.

* Arbitration Act (1899), S. 2 — Award relating to mortgaged property situated at Sialkot—Amritsar Court has no jurisdiction to make order filing award.

Though S. 2, Arbitration Act, does not expressly refer to the provision of the law contained in S. 16, Civil P. O. the implication is obvious when it states where the suit could be instituted.

[P 227 C 1]

Where mortgaged property which was involved in the award is situated at Sialkot, the Court of the District Judge at Amritsar has no jurisdiction to make an order filing the award, inasmuch as if the subject matter submitted to arbitration were the subject of a suit, the suit could not be instituted at Amritsar.

[P 227 C 1]

Lala Achhru Ram — for Appellant.

J. N. Aggarwal and Mehr Chand Mahajan — for Respondents.

Din Mohammad J. — This appeal has arisen in the following circumstances: The firm Hira Singh Gopal Singh was a firm of commission agents working at Amritsar. Hereinafter this firm will be called defendant 3. The firm Bhagat Ram Mangal Sain, hereinafter called defendant 4, was working at Sialkot and entered into some sort of grain transactions with defendant 3. On 2nd November 1932, Bhagat Ram, proprietor of defendant 4, executed a deed, Ex. P.3, in favour of defendant 3, in which he admitted his liability to pay Rs. 5000 to defendant 3 and further stated that he had deposited three title deeds relating to his immovable property with defendant 3 by way of equitable mortgage. One of the conditions of business between defendant 3 and defendant 4 was that in case any disputes arose between the parties, they would be settled under the Arbitration Act 9 of 1899. Disputes did arise and they were consequently referred to arbitration under the provisions of the Arbitration Act, into the details of which it is not necessary to enter. Suffice it to say that an award was made on 12th June 1933 and a notice of it was also personally served on defendant 4 on 12th July 1933. On 18th July 1933, the award was filed in the Court of the District Judge, Amritsar. Defendant 3 applied for trans-

fer of the award to Sialkot with a view to execute it there. The application was allowed and the execution proceedings started at Sialkot. Notice under O. 21, R. 66, Civil P. C., was issued and served personally on defendant 4 on 12th November 1933. A regular sale of the property followed on 7th March 1934 and the sale which covered the house in dispute was confirmed on 14th April 1934 in favour of one Gopi Chand who was the plaintiff in the Court below and is the appellant before us.

In the meantime, on 11th June 1933, defendant 4 had mortgaged the equity of redemption of the house in dispute to the firm Raja Ram Jai Parkash, hereinafter called defendant 2, for Rs. 1925. The document evidencing the mortgage was registered on 8th July 1933. On 4th February 1934, defendant 2 and defendant 4 agreed to refer to arbitration the disputes that arose between them in relation to this mortgage. On 21st February 1934, an award was made stating that defendant 3 had no priority in respect of his mortgage. On 27th February 1934, this award was made a rule of the Court and, on 2nd May 1934 the house in dispute was once more sold to Khazan Chand who was defendant 1 in the Court below. On 11th June 1934, the sale in his favour was confirmed. On 11th June 1935, the suit out of which this appeal has arisen, was instituted by Gopi Chand against defendants 1 to 4, and was for possession of the house in dispute. It may be remarked that on 22nd June 1935 defendant 1 resold the house to defendant 2.

Various pleas were raised by the contesting defendants on which as many as 15 issues were framed covering all questions of law and fact that could possibly arise in the case. The Subordinate Judge decreed the suit against defendants 1, 2 and 4, and further burdened them with the plaintiff's costs. Dissatisfied with that decision, defendant 2 appealed to the District Judge who accepted the appeal and reversing the decision of the Subordinate Judge, dismissed the plaintiff's suit. He however ordered that the parties should bear their own costs throughout. Thereupon the plaintiff appealed to this Court and the appeal has been referred to us for disposal. Various questions of law have been raised before us but in our view this appeal can be disposed of on the short-ground that the Court of the District Judge,

Amritsar, had no jurisdiction whatsoever to make an order filing the award. By S. 2 of Act 9 of 1899, the Act applied only in those cases,

where, if the subject matter submitted to arbitration were the subject of a suit, the suit could, whether with leave or otherwise, be instituted in a Presidency town.

By the Proviso annexed to this Section, the Local Government is empowered to declare the Act applicable in any other local area as if it were a Presidency town. It is common ground that the Act has been declared to be applicable to the town of Amritsar. By S. 16, Civil P. C., any suit for foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property can only be instituted in the Court within the local limits of whose jurisdiction the property is situate, and though S. 2, Arbitration Act, does not expressly refer to this provision of the law, the implication is obvious when it states where the suit could be instituted. The immovable property which was involved in the award was admittedly situated at Sialkot and any suit enforcing any encumbrance against it could only be instituted in Sialkot and not anywhere else. Consequently by S. 2, Arbitration Act, the Court of the District Judge at Amritsar had no jurisdiction to make an order filing the award, inasmuch as if the subject matter submitted to arbitration were the subject of a suit, the suit could not be instituted at Amritsar. There was thus a lack of inherent jurisdiction in the Court ordering the filing of the award as the award was incompetent under the Arbitration Act and was altogether void. This being so, all subsequent proceedings taken in connexion therewith were without jurisdiction and have no effect in law. The plaintiff having acquired his rights on the basis of this award, cannot be said to have acquired any such title as can be protected or enforced in law. There is abundant authority in support of the proposition that the defendants were entitled in this suit to raise pleas on this ground and this is practically conceded by the plaintiff.

We accordingly dismiss the appeal and uphold the decree of the lower Appellate Court dismissing the plaintiff's suit though on a different ground. In the peculiar circumstances of the case however, we leave the parties to bear their own costs before us.

D.S./R.K.

Appeal dismissed.

* A. I. R. 1938 Lahore 227

BHIDE J.

on difference between

DALIP SINGH AND SKEMP JJ.

Rura and another — Plaintiffs—

Appellants.

v.

Banta and others — Defendants—

Respondents.

Second Appeal No. 1604 of 1936, Decided on 4th October 1937.

* (a) Limitation — Starting point — Fresh invasion of right amounting to repetition of old invasion—No distinction between new invasion and repetition of old one. (Per Skemp J.)

Every invasion of right although it might be a repetition of the old one gives a new cause of action with a new starting point of limitation. The distinction between a fresh invasion and a repetition of a previous invasion is a distinction without a difference. [P 228 C 2; P 229 C 1]

(b) Res judicata—Co-defendants — Suit by K for his share against J and X—J *ex parte*—Suit decided in K's favour with reliance on particular pedigree table — J in possession of property—Application by X for shares, relying on another pedigree table—Suit by J against X for declaration that X was entitled to shares only under table relied on in K's suit—As J was absent in K's suit, and as point was not necessary between J and X, K's suit did not operate as res judicata.

(Per Bhide and Dalip Singh JJ., Skemp J. Contra)—To establish res judicata between co-defendants it should be established that there should be conflict of interests between co-defendants; that it should have been necessary to decide that conflict in order to give plaintiff the relief which he claimed; that the question between the co-defendants must have been finally decided : A I R 1931 P C 114, *Rel. on.*

[P 231 C 2]

In a suit by K for partition against J and X, J who was in possession of the entire property did not put in any appearance and it was decided that K was entitled to a certain share in accordance with a particular pedigree table. Thereafter X put in applications for their shares under a different pedigree table, whereupon J brought a suit for a declaration that X would be entitled to those shares only which were in accordance with the pedigree table relied on in K's suit, which fact being disputed by X, J claimed that that point was res judicata as between J and X both being co-defendants in K's suit :

Held that the question of preference between the two pedigree tables was neither raised nor decided as between the co-defendants in K's suit, nor was it necessary to decide that in that suit, hence decision in K's suit was not res judicata in favour of J in his suit against X : A I R 1931 P C 114, *Disting.*

[P 231 C 2]

Aohhru Ram and Indar Dev —

for Appellants.

D. N. Aggarwal and Ram Lal Anand I

— for Respondents.

Skemp J.—The land in suit measuring 167 kanals 17 marlas originally belonged to one Ruldu who died sometime between the Settlements of 1850 and 1885. Ruldu was childless and it devolved by inheritance on various of his collaterals one after another and finally on Mt. Tabo, widow of Bhupa, the last collateral. Mt. Tabo was in possession at the Settlement of 1885 and did not die till 1918. Since her death, there have been no less than five suits about this land, mostly because the pedigree tables of 1850 and 1885 are at variance with each other. On the death of Mt. Tabo, the land passed by mutation to the various collaterals of Bhupa who shared in accordance with the pedigree table of 1850. The mutation was sanctioned on 12th January 1921. On 23rd August 1921, one Jhandu whose name will become familiar, brought a suit for a declaration that the entire land had been gifted to him by Mt. Tabo. The suit was dismissed and so was the appeal. The Subordinate Judge's judgment is not on the record but it was dismissed by the District Judge on the ground that the gift was not proved. The District Judge made some remarks that the pedigree table of 1850 was to be preferred to the latter one, but these are clearly obiter. On 26th June 1924, Jhandu brought a second suit for a declaration that he was entitled to 1/108th share in the property in accordance with the pedigree table of 1885. The suit was dismissed by Sheikh Laiq Ali, Subordinate Judge, on the ground—in my opinion erroneous—that the decision about the comparative value of the pedigree table was *res judicata*. Jhandu appealed to the District Judge and Colonel Roe, District Judge, on 18th October 1925, dismissed the appeal. His main finding was that the suit was barred by the provisions of O. 2, R. 2, Civil P. C. but in the last sentence of his judgment he referred to *res judicata*.

Apparently Jhandu had been up to this time in possession of the entire area of 167 Kanals 17 Marlas, but after Colonel Roe's decision the other share-holders applied for partition in accordance with the mutation of 1921. The plaintiff objected and was referred to a Civil Court. He instituted a third suit in the Court of Sheikh Hamid Asghar, Subordinate Judge, where he sought that the shares should be determined by the pedigree table of 1885 and based his cause of action on the

defendants' application for partition. This suit was dismissed by Sheikh Hamid Asghar on the ground that the plaintiff already had more than he would be entitled to under the pedigree table of 1885. No appeal was lodged. The fourth suit was lodged by one Kala Singh, who is one of the parties to the present case relying on the pedigree table of 1885. The Subordinate Judge relied on the pedigree table of the earlier Settlement and dismissed the suit on the merits. Kala Singh appealed to the Court of the learned District Judge and Khan Zaka-ud-Din accepted the appeal and relying on the pedigree table of 1885 granted Kala Singh a decree for 1/12th share.

After the decision of this suit, the other parties made a second claim for partition on the basis of the mutation of 1921 and on the 10th April 1934, Jhandu brought the present suit for a declaration that the defendants could not claim in partition proceedings any shares greater than those they were entitled to according to the pedigree table of 1885. On the issues, the trial Judge found that the plaintiff had a *locus standi* to sue, that the pedigree table of 1885 was to be preferred, that the plaintiff's conduct did not operate as an estoppel but that the suit was barred by the rule of *res judicata* owing to the judgment of Colonel Roe. The plaintiff appealed and the learned District Judge allowed new points to be raised. He framed an additional issue: Did the decision in Kala Singh's case operate as *res judicata* in favour of the plaintiff-appellants and also allowed arguments on the points whether the suit before Sheikh Hamid Asghar operated as *res judicata*, and on limitation. He found that the suit was barred by limitation, that the plaintiff had no cause of action on account of the decision of Sheikh Hamid Asghar. He further held that Colonel Roe's judgment operated as *res judicata* and that Khan Zaka-ud-Din's judgment in Kala Singh's case would also operate as *res judicata* in favour of the present plaintiff. But in view of his findings as to cause of action and limitation he dismissed the appeal. The plaintiffs have come here in second appeal.

In my view the decision of the learned District Judge with regard to limitation is erroneous. He admitted that if Jhandu was in possession the second invasion of his rights would give him a further right of action but he took the view that the

second application for partition in accordance with the mutation of 1921 was not a fresh invasion of Jhandu's rights but a repetition of the first invasion. The distinction between a fresh invasion and a repetition of a previous invasion is, in my opinion, a distinction without a difference. The inhabitants of North-West India would not be much concerned whether Nadir Shah's subsequent invasions were repetitions of his previous invasion or fresh invasions. The application which led to Jhandu's last suit was not made in the same partition proceedings as those which led to the previous suit but was a subsequent application for partition and therefore there was, in my opinion, a fresh invasion of Jhandu's title which he had a right to repel, and the suit is within time.

As to the ground that the result in the suit in Sheikh Hamid Asghar's Court would operate as *res judicata* I do not agree. In the suit tried by Sheikh Hamid Asghar, it was merely decided on a preliminary issue that that suit could not proceed. The question now is whether the present suit can proceed. The reasoning of the learned District Judge on this point is :

Comparing the plaint in the suit of 1927 with that in the present case, I find that both the allegations relating to the cause of action and the relief claimed are almost identical. The only difference is that in 1927 the order of the revenue authorities was said to have been passed on 25th March 1927 while that in the present case is dated 6th January 1934. But in both cases the order arose out of partition proceedings and directed the plaintiff to establish his claim . . . by a civil suit. . . . In face of the decision in 1927 case it cannot be held that the plaintiff has any cause of action to bring the present case.

In my opinion this reasoning would be correct but for Kala Singh's intervening suit, which is specially mentioned in the present plaint. Para. 3 says :

That the pedigree table of 1850 has no value when compared with the pedigree table of 1885, has been held in the case, *Kala Singh v. Harnam Singh* by the District Judge, Jullundur, on 14th July 1932. The parties in the present suit were parties in the previous suit ; hence they are bound by the decision.

Part at least of the present cause of action is that suit and the fact that it operated as *res judicata*. Therefore in my opinion the decision of Sheikh Hamid Asghar is not *res judicata*. The learned District Judge also held that the suit was covered as *res judicata* by reason of Colonel Roe's judgment. I do not agree. Colonel Roe found that the suit was barred

under O. 2, R. 2, Civil P. C. The last sentence of his judgment runs :

There seems to be no doubt that O. 2, R. 2, is a bar to the present suit apart from the fact that there is an express decision by a competent Court that the plaintiff is not entitled to the land . . . though that land was then included in a larger area.

This portion of one sentence is his sole reference to *res judicata*, and it seems to me that this was obiter. But I agree with the learned District Judge that Khan Zaka-ud-Din's decision in Kala Singh's case which incidentally is a decision on the merits, is *res judicata*. Both the present plaintiff and the present defendants were parties to that suit, both being defendants. The present plaintiff at any rate did not appear but he now wishes to rely on the decision in favour of Kala Singh. Both he and the defendants had the opportunity of appearing. The case was tried out on the merits and in my opinion they are bound. For these reasons, I would accept this appeal, set aside the judgment and decree of the District Judge and grant the plaintiff the decree he sought viz. that the defendants are only entitled to shares in partition according to the pedigree table of 1885. In the circumstances I would direct the parties to bear their own costs throughout.

Dalip Singh J. — The facts of this appeal are sufficiently given in the judgment of my learned brother and need not be recapitulated here. I agree with him in the finding that the learned District Judge was wrong in holding that the suit was barred by limitation. It seems clear to me that there was a fresh invasion of Jhandu's rights by the second application for partition, for Jhandu had been throughout in possession of the land in dispute. This application for partition was not a revival of the old application for partition but was a fresh application. I also agree with my learned brother in holding that the judgment of Sheikh Hamid Asghar would not operate as *res judicata*. The plaint in that case was badly drafted. The plaintiff sought to get a declaratory decree that the defendants were not entitled to get the land partitioned at all. It did not state that the plaintiff's possession would be disturbed by giving the defendants a greater share than was allowed to them by the pedigree table of 1885, and the mutation which was based on the pedigree table of 1850 was wrong. The judgment proceed.

ed on the basis that the possession of the plaintiff was not mentioned in the plaint and as the plaintiff had admittedly got more than his share by the mutation according to the pedigree table of 1850 than he would get by partition under the pedigree table of 1885, therefore the plaintiff had no cause of action. In the present suit it is alleged that the defendants are not entitled to partition according to the pedigree table of 1885 and they are not entitled to take more land from plaintiff's possession than what they would be entitled to under the pedigree table of 1885. Thus the disturbance of plaintiff's possession is the main cause of action according to the present plaint. Whatever might be therefore the merits of the decision by Sheikh Hamid Asghar in the previous suit, it does not operate as *res judicata* to hold that the present plaint also discloses no cause of action. I also agree with my learned brother in holding that the judgment of Colonel Roe does not operate as *res judicata*. That judgment proceeded on the basis of O. 2, R. 2, Civil P. C. and though there was a passing reference to the rule of *res judicata* the decision in my opinion was really based on a misinterpretation of O. 2, R. 2. In any event I do not think that it operates as *res judicata*.

With great respect however to the decision of my learned brother, I am unable to agree with him that the judgment pronounced by Khan Zaka-ud-Din Khan operates as *res judicata*. The present plaintiff and the present defendants except Kala Singh were defendants in that case, and in order to make the decision *res judicata*, it would be necessary to find that the point at issue between the present defendants was in issue in the previous case and was heard and decided. Now it appears to me clear that all the grounds which would be open to the present defendants to urge against the present plaintiff were not open to be urged by the present defendants in the suit of Kala Singh. Therefore as the question of *res judicata* the main defence of the defendants in this case against the suit of the present plaintiff could not be urged by the defendants in the suit brought by Kala Singh I do not consider that that judgment is the final decision between the parties.

Reliance was placed on 53 All 103¹ for holding that the decision in Kala Singh's case was *res judicata*. But in that case what was in dispute between the parties was the title of the two co-defendants and all the defences that could be urged by one party or the other were open to the defendants and the plaintiff in that case. Here as already pointed out technical defences against the present plaintiff were not open to the present defendants and hence the ruling is no authority for the proposition that the present suit is barred by the rule of *res judicata*. I would therefore accept the appeal but remand the case back to the trial Court for redecision under O. 41, R. 23. Stamp on the appeal would be refunded. In view of the circumstances of the case I would leave the parties to bear their own costs up-to-date.

[On account of the above difference, the case was heard by Bhide J.]

Bhide J. — This appeal was first heard by a Division Bench consisting of Dalip Singh and Skemp JJ. but, on account of a difference of opinion between them on a point of law, has been placed before me for decision according to Cl. 21 of the Letters Patent. The point* of law on which the learned Judges differed will appear from the following. The present suit was instituted by one Jhandu for a declaration that he and the other co-sharers in certain land of which the last holder was Mt. Tabo widow of Bhupa, were entitled to a partition thereof according to their shares as shown by the pedigree table of 1885. On the death of Mt. Tabo, this land had been mutated in favour of the collaterals of Bhupa, according to their shares as shown by the pedigree table of 1850. The pedigree table of 1850 differed from the pedigree table prepared in the year 1885 and this difference led to a great deal of litigation. Jhandu at first brought a suit for the whole of the land left by Mt. Tabo on the allegation that the land had been gifted to him, but the gift was held to be not proved and the suit was dismissed. He then instituted two other suits for his share in that land, founding his claim on the pedigree table of 1885. One of these suits was dismissed by the District Judge on the main ground that it was barred by O. 2, R. 2, Civil P. C. The other one was dismissed on the ground that the plaintiff was already in possession of more land than what he was entitled to.

1. *Munni Bibi v. Tirloki* (1931) 18 AIR P C 114 = 182 I C 598 = 58 I A 158 = 53 All 103 (PC).

The fourth suit was instituted by one Kala Singh another co-sharer in the land. He also based his claim on the pedigree table of 1885. In this suit, Jhandu as well as the present defendants were impleaded as defendants. It was held in this suit that the pedigree table of 1885 was to be preferred to that of 1850 and Kala Singh's claim was decreed on this basis. After the above decision, some of the co-sharers applied for partition according to the pedigree table of 1850. Thereupon Jhandu instituted the present suit for a declaration that defendants could not claim in the partition proceedings any share in excess of what they were entitled to according to the pedigree table of 1885. This suit was dismissed on various grounds and the plaintiff has preferred a second appeal. The learned Judges of the Division Bench were agreed that the final decision in the first three suits instituted by Jhandu did not operate as *res judicata* for the purposes of the present suit. The only point on which the learned Judges differed was whether the decision in Kala Singh's suit as regards the preference to be given to the pedigree table of 1885 operated as *res judicata* as between plaintiff Jhandu and the defendants in the present suit. Jhandu and these defendants were joined as defendants in Kala Singh's suit as stated already. The contention of the plaintiff was that the decision in Kala Singh's suit on the above point operated as *res judicata* in his favour. Skemp J. accepted this contention as correct. Defendants on the other hand contended that the previous decision could not operate as *res judicata* between them and Jhandu as they were merely co-defendants in the previous suit and the necessary conditions for the previous decision operating as *res judicata* between co-defendants were not satisfied. Dalip Singh J. was in favour of this view.

There is no doubt that the main point for decision in the present case is the same as the one decided in the suit of Kala Singh, viz. whether the pedigree table of 1885 was to be accepted as correct in preference to that of the year 1850. The present plaintiff as well as the present defendants were admittedly parties to the suit of Kala Singh, but they were then co-defendants and the only question which now needs consideration is whether the conditions for the previous decision operating as *res judicata* as between co-defendants are satisfied. These conditions have

been clearly laid down in several decisions of their Lordships of the Privy Council. In 53 All 103¹ they were stated as follows: (1) That there should be a conflict of interests between co-defendants; (2) that it should have been necessary to decide that conflict in order to give plaintiff the relief which he claimed; (3) that the question between the co-defendants must have been finally decided.

It appears from the record of Kala Singh's case that Jhandu did not put in appearance or raise any plea in that case. So no question was either raised or actually decided as between Jhandu and the present defendants. So far as Kala Singh was concerned, it can be said that as Jhandu did not care to contest the suit, the matter must be held to be decided as between him and Kala Singh. But can it be said that it was so decided between Jhandu and the defendants in the present suit? I think not. In the first place, Jhandu not having raised any pleas, there was actually no conflict between Jhandu and the other defendants before the Court in Kala Singh's suit. But assuming that there should be deemed to have been a conflict of interests by implication in view of the position taken up by Jhandu and the defendants in the present suit, I do not see that it was necessary to decide that conflict in order to give relief to Kala Singh the relief he claimed. It cannot be said that Kala Singh could not succeed, unless Jhandu was also held to be entitled to the share he now claims, according to the pedigree table of 1885. For, Jhandu may be debarred from claiming it owing to various other reasons, e. g. owing to a compromise with other sharers, or such pleas as *res judicata*, estoppel, etc. arising from the previous suits instituted by Jhandu. But the decision of the latter pleas would obviously have been irrelevant and unnecessary for the purpose of deciding Kala Singh's claim. It seems to me therefore that it was neither necessary for the Court to decide, nor could or did the Court decide finally the issue now arising between Jhandu and the defendants. Consequently conditions 2 and 3 for a decision operating as *res judicata* as between co-defendants do not at any rate seem to be satisfied in the present case.

The facts in 53 All 103¹ which was strongly relied on by the learned counsel for the plaintiff were different. In that case it was found that the creditor of one

Amar Nath had sued to establish his right to sell certain property which as alleged belonged to Amar Nath. He joined as defendants (1) Mt. Munni, daughter of Amar Nath and (2) Mt. Kunno and Mt. Kashi, who were rival claimants to the property. The former claimed it as the heir of Amar Nath, while the latter claimed it on the basis of a gift alleged to have been made by Amar Nath in favour of his wife, Mt. Mukandi. The suit was decreed, on the finding that the property belonged to Amar Nath and there was no valid gift. Subsequently Gokal Nath, a son of Mt. Kashi paid off the creditor's decree and retained possession of the property. Mt. Munni then sued for possession on the basis of her title as heir of Amar Nath. It was held by their Lordships, that the decision in the previous suit operated as *res judicata* in favour of Mt. Munni Bibi, as the creditor's suit could not have succeeded unless it was decided as between the rival claimants that the property belonged to Amar Nath and that there had been no valid gift in favour of Mt. Mukandi. It is therefore clear that it was necessary in that case to decide the question of title as between the co-defendants in order to give relief to the plaintiff. That is not the position in the present case.

For reasons given above, I agree with the view taken by Dalip Singh J. and accepting the appeal, remand the case to the trial Court under O. 41, R. 23 Civil P. C., for decision as proposed by him. I leave the parties to bear their costs up to this stage in view of all the circumstances. Parties to appear before the learned trial Judge on 21st October 1937.

B.D./R.K.

Case remanded.

* A. I. R. 1938 Lahore 232

ADDISON AND DIN MOHAMMAD JJ.

Jaspat Rai — Appellant.

v.

Kahan Chand and others—Respondents.

Letters Patent Appeal No. 106 of 1937 and Second Appeal No. 942 of 1937 Decided on 6th December 1937, from order of Dalip Singh J., D/- 8th June 1937.

(a) Execution Sale — Mortgage decree directing sale of mortgaged property free from mortgage—Sale proceeds to be deposited in Court for payment to previous mortgagee and entitling decree-holder only to surplus — Decree-holder himself purchasing

property in execution and obtaining sale certificate, without impleading previous mortgagee or depositing sale proceeds in Court — Sale held invalid and should be set aside.

Where though mortgage decree directed that the property in question should be sold free from mortgage, but the sale proceeds should be deposited in Court for payment to the previous mortgagee and entitled the decree-holder to the surplus alone, the decree-holder purchased the property in question in execution neither impleading the previous mortgagee, nor depositing the money in Court and obtained the sale certificate behind the back of the previous mortgagee :

Held that the sale was not valid and not binding on the previous mortgagee, because the decree-holder did not conduct himself in an honest manner, as his intention appeared to be to keep the previous mortgagee in the dark and not to let him know how the affairs were being arranged to his detriment. Further the property could not be sold without protecting the rights of the previous mortgagee and the decree-holder could not purchase it in utter disregard of the burden under which it rested : 32 Bom 572 and A I R 1932 Lah 344, Ref.

[P 294 C 1]

* (b) Civil P. C. (1908), S. 11—Order is not final until time of appeal has elapsed—Application by previous mortgagee for setting aside execution sale on ground of illegality dismissed—Appeal against order pending—Suit for possession against previous mortgagee as purchaser of equity of redemption decreed after repelling same contentions of previous mortgagee, as raised in application for setting aside sale — Appeal against latter decree not barred — Decision in suit for possession held not *res judicata* in pending appeal in execution.

An order is not final until the time of appeal has elapsed or the appeal has been finally decided.

[P 224 C 1]

In execution proceedings an application for setting aside sale by the previous mortgagee on the ground of illegality was dismissed. An appeal against the order was pending. In the meanwhile the decree-holder auction-purchaser filed a suit for possession against the previous mortgagee who had purchased the equity of redemption, in which the same question of illegality of sale that was raised in execution was raised once more. The suit was decreed, repelling all the contentions of the previous mortgagee. The appeal in execution was dismissed on the ground that the judgment on the same question was pronounced against previous mortgagee in the suit by the decree-holder for possession, though the appeal against the order in the suit for possession was not barred :

Held that in appeal in execution the matter was not *res judicata* and that the case should have been disposed of on merits : A I R 1916 Lah 177 (F B) ; A I R 1927 Lah 289 (F B) ; 34 Cal 616 (P C) and A I R 1917 P C 201 Ref.

[P 294 C 2]

Sodhi Charan Singh — for Appellant.

Charan Singh — for Respondents.

Din Mohammad J. — This judgment will dispose of Letters Patent Appeal No. 106 of 1937 and Second Appeal No. 942 of 1937. The facts bearing upon

the questions of law involved in these appeals may be shortly stated. On 23rd October 1922, one Lok Nath mortgaged certain property to one Jaspat Rai and, on 15th April 1925, he mortgaged the same property along with some other property to Khushi Ram. Khushi Ram instituted a suit on the foot of his mortgage, impleading Jaspat Rai among the defendants. Jaspat Rai put in his pleas stating that Khushi Ram was not entitled to the relief prayed for unless and until he (Jaspat Rai) was fully paid off or the property mortgaged was sold subject to his (Jaspat Rai's) rights. In a very unhappily worded judgment, the Subordinate Judge held that the property should be sold free from mortgage but the sale proceeds should be deposited in Court for payment to Jaspat Rai, the previous mortgagee, and to the surplus alone, if any, would Khushi Ram be entitled. A preliminary decree was drawn up in accordance with this judgment, and was made final on 14th August 1931. In execution of this decree, Khushi Ram himself purchased the property in question, but he neither impleaded Jaspat Rai in the course of execution proceedings nor did he deposit the money in Court. The sale in favour of Khushi Ram was confirmed behind the back of Jaspat Rai and the sale certificate, too, was issued to Khushi Ram. In the meantime, Khushi Ram died and one Kahan Chand was brought on the record as his legal representative. Charan Das and Jagiri Mal, sons of Lok Nath, who had taken the place of the mortgagor, Lok Nath, were adjudged insolvents and their estate vested in the Official Receiver.

On 20th June 1935, Jaspat Rai made an application under S. 47 read with S. 151, Civil P. C., alleging that Khushi Ram had committed fraud on the executing Court in not disclosing the terms of the decree and in not depositing the sale proceeds in Court as directed by it. He further averred that no notice was sent to him in the course of the execution proceedings and that his rights had thus been adversely affected. This application was resisted by Kahan Chand and was dismissed by the executing Court on 22nd May 1936. Against this decision, Jaspat Rai appealed to the Court of the District Judge, Mr. Dhawan. In the meantime, the Official Receiver of the insolvent's estate put the property in question to auction and Jaspat Rai purchased the equity of redemption.

Thereupon, on 12th February 1936, Kahan Chand instituted a suit against Jaspat Rai and others for possession of a part of a house along with certain other property. The same questions that were raised in the course of execution proceedings were once more raised in the regular suit. On 12th January 1937, the Subordinate Judge decreed the suit with costs repelling all contentions raised by Jaspat Rai. On 20th January 1937, the appeal of Jaspat Rai, which had arisen out of the execution proceedings, came on for hearing before Mr. Dhawan and was dismissed on the ground that the question of the legality of the sale to Khushi Ram was *res judicata*, inasmuch as a judgment on that point had been pronounced against Jaspat Rai by the Subordinate Judge on 12th January 1937, and no appeal had been presented against that order till then. From that decision Jaspat Rai preferred an appeal to this Court which was heard by Dalip Singh J. on 8th June 1937. He endorsed the opinion of the District Judge on the question of *res judicata* and dismissed the appeal. It may be mentioned here that by that time the order of the Subordinate Judge, on the basis of which the plea of *res judicata* had prevailed, had been set aside by Sardar Sewa Singh, Additional District Judge, on 14th May 1937. Letters Patent Appeal No. 106 of 1937 has been preferred from the decision of Dalip Singh J. while appeal No. 942 of 1937 has been presented by Kahan Chand against the order of the Additional District Judge dismissing his suit.

The first question that arises for decision in this case is whether the sale in favour of Khushi Ram was valid and hence binding upon Jaspat Rai. We have no hesitation in saying that Khushi Ram did not conduct himself in an honest manner in so far as he did not implead Jaspat Rai in the course of execution proceedings and did not deposit in Court any amount for him. It appears that his intention was to keep Jaspat Rai in the dark and not to let him know how the affairs were being arranged to his detriment. In 32 Bom 572,¹ a sale that was held without notice to the person affected thereby was set aside. Similarly in A I R 1931 Lah 344,² a Division Bench of this

1. Parashram v. Balmukand, (1908) 32 Bom 572 = 10 Bom L R 752.

2. Mul Rai v. Bura Mal, (1931) 18 A I R Lah 344 = 134 I O 292 = 12 Lah 602 = 32 P L R 863.

Court maintained the order of the Subordinate Judge who had set aside a sale suo moto on the ground that the property which was to be sold free from any encumbrance had been sold subject to a mortgage in favour of the decree-holder. The learned Judges remarked :

There can be little doubt that when the Court is empowered to make an order, it has inherent jurisdiction to see that that order is carried into effect. The sale admittedly contravened the express direction of the Court and S. 151, Civil P. O., confers ample power upon the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

Here the mortgaged property could not be sold without protecting the rights of Jaspat Rai nor could Khushi Ram purchase it in utter disregard of the burden under which it rested. There still remains the question whether Jaspat Rai not having appealed against the order of the Subordinate Judge in Kahan Chand's suit, before the hearing of his appeal by Mr. Dhawan, could maintain the plea of the illegality of the sale in the Court of Mr. Dhawan. On behalf of Jaspat Rai, reliance has been placed on 48 P R 1916³ which says that an order is not final until the time of appeal has lapsed or till the appeal has been finally decided. We are in respectful agreement with the principle enunciated therein. Further the position appears to us to be this: if the word "suit" conveys only the idea of proceedings in an original Court, as held in 8 Lah 384,⁴ the plea of res judicata could not be taken for the first time in appeal and if "suit" covers appeals and it is open to the parties to raise a plea of res judicata even in the Appellate Courts then the plea could not prevail before Dalip Singh J. as long before he heard the appeal, the order of Subordinate Judge repelling the contention raised by Jaspat Rai, had been reversed by the Additional District Judge. There is abundant authority in support of the proposition that the appeal destroys the finality of the decision of the original Court and the judgment of the original Court is superseded by that of the Court of Appeal. See 24 Cal 616⁵ and 45 Cal

442.⁶ We hold therefore that the matter was not res judicata in the Court of Mr. Dhawan and that the case should have been disposed of on the merits. On the same ground Dalip Singh J.'s order cannot stand.

We however do not consider it necessary to remand the appeal arising out of execution proceedings to the District Judge as we have given ample opportunity to the parties to argue their appeal on the merits and it will serve no useful purpose to remit the case and to waste further time of the Courts in this matter. We are satisfied that the objections raised by Jaspat Rai were valid and that they should have been allowed. For these reasons we accept the appeal, reverse the order of Dalip Singh J. as well as the order of the District Judge and that of the executing Court and allowing the objections of Jaspat Rai, set aside the sale in favour of Khushi Ram. In view of the decision arrived at above, it is not necessary to deal at length with Second Appeal No. 942 of 1937. The decision of the Additional District Judge accords with the view taken by us and we therefore dismiss the appeal. Jaspat Rai will get his costs from Kahan Chand in all the Courts in both Letters Patent Appeal No. 106 of 1937 and Second Appeal No. 942 of 1937.

V.B.B./R.K.

Letters Patent appeal allowed.

6. Abdullah Ashgar Ali Khan v. Ganesh Dass, (1917) 4 A I R P O 201=42 I O 959=44 I A 213=45 Cal 442 (P O).

* A. I. R. 1938 Lahore 234

FULL BENCH

COLDSTREAM, DALIP SINGH
AND DIN MOHAMMAD JJ.

*Shanti Parkash and another —
Plaintiffs — Appellants.*

v.

*Harnam Das and others —
Defendants — Respondents.*

Letters Patent Appeal No. 164 of 1936, Decided on 22nd November 1937, from decree of Skemp J., D/- 8th October 1936, reported in A I R 1937 Lah 642.

(a) Limitation Act (1908), S. 4 — Words of S. 4 do not extend period of limitation.

All that S. 4 provides is that the suit might be brought on the day when the Court reopened if the Court happened to be closed when the period

3. Dalipa v. Suraj Kaur, (1916) 3 A I R Lah 177 =34 I O 581=48 P R 1916.

4. Mt. Laohmi v. Mt. Bhulli, (1927) 14 A I R Lah 289=104 I O 849=8 Lah 384=28 P L R 174 (F B).

5. Sheosagar Singh v. Sitaram Singh, (1897) 24 Cal 616=24 I A 50=1 O W N 297=7 Sar 124 (P O).

prescribed expired. The words of S. 4 do not extend limitation: *A I R 1935 P C 85 (P C), Foll.* [P 236 C 2]

* (b) Contract Act (1872), S. 25 (3) — Balance struck and interest fixed — This amounts to promise to pay: *A I R 1937 Lah 642, Reversed.*

Wherever there is a balance struck and interest has been fixed or agreed to be paid, the words have always been construed to mean a promise to pay within the meaning of S. 25 (3): *Case law followed; A I R 1937 Lah 642, Reversed.*

[P 237 C 1]

(c) Limitation—Acknowledgment implying promise to pay—Suit can be based on it considered as agreement provided consideration is proved—Plea of lack of consideration if not raised by defendant, consideration must be taken to have been proved — This point can be allowed to be newly raised even if question before trial Judge was whether S. 4, Lim. Act extends limitation — (Per *Dalip Singh and Din Mohammad JJ., Coldstream J. dissenting*).

Where acknowledgment implies a promise to pay, a suit can be brought on the basis of such acknowledgment considered as an agreement provided consideration is proved. Where a suit is brought on such basis, the plaintiff must be taken to allege a valid agreement and if the defendant does not plead lack of consideration, then consideration must be taken to have been proved. As it is an agreement for consideration, whether it is before expiry of limitation or even after it, a suit on its basis cannot be held to be time-barred.

[P 238 C 2; P 239 C 1]

Even if such point is newly taken before the Full Bench the question before the trial Judge and Single Bench being whether an acknowledgment of a debt made after the period of limitation has expired but during the time in which owing to the provisions of S. 4, Lim. Act, the suit might have been instituted, will start a fresh period of limitation, it is open to the Full Bench to allow the point to be raised as the question to be decided in both the points is the same viz., whether the suit is barred by limitation.

[P 239 C 2]

J. N. Aggarwal — for Appellants.

Achhru Ram and Inder Dev —
for Respondents.

Order of Reference

Coldstream and Din Mohammad JJ. — The main point arising for decision in this appeal is whether an acknowledgment of a debt made after the period of limitation for a suit prescribed by Sch. 1, Lim. Act has expired but during the time in which owing to the provisions of Ss. 4 to 25 of the Act, the suit might have been instituted, will start a fresh period of limitation under the provisions of S. 19. There has been some conflict on this question in the various rulings mentioned by Skemp J. who delivered the judgment under appeal. In Civil Revision No. 178

of 1936¹ Tek Chand J. took a view different from that of Skemp J. agreeing with Jai Lal J. in Civil Appeal No. 515 of 1930.² But there is support for Skemp J.'s decision in the judgments of the Calcutta and Bombay Courts. We think that the question involved is of considerable importance and that in view of the difference of opinion upon it, this case should be decided by a Full Bench. We order that the case be laid before the Hon'ble the Chief Justice for constituting a Bench accordingly.

Judgment of Full Bench

Dalip Singh J. — The plaintiffs in this case sued the defendants for recovery of Rs. 923. The plaint in its heading stated that it was based on an entry dated 1st July 1928. In the body of the plaint the plaintiff proceeded to state that there had been a bahi account on which an entry was made on 11th July 1922, by two persons in lieu of an advance made in cash. On 30th June 1925, another balance was struck by the same two persons acting on behalf of the joint Hindu family. On 1st July 1928, one of the aforesaid persons namely Lachman Das, acting on behalf of the same family struck a new balance of Rs. 725.8.0. Lastly, on 14th July 1929, Lachman Das made a payment of Rs. 50 and entered it against the last mentioned balance in his own hand. The plaintiffs therefore sued claiming that this payment of Rs. 50 in the hand of the judgment-debtor extended limitation. The suit was instituted on 14th July 1932. The defendants admitted the original entry and the first balance but pleaded that Lachman Das alone was responsible for the same. So far as the second balance was concerned, they pleaded that Lachman Das and Harnam Das signed it on behalf of themselves but not on behalf of the family. Defendant 1 did not deny the existence of the joint family, the other defendants denied that also. The main plea of all the defendants, however was limitation. They denied the genuineness of the payment entry of 14th July 1929, alleging that it was a forgery. Eight issues were framed by the trial Court. The issues on the merits were found in favour of the plaintiffs and it was also held that the balance which was struck on 1st July 1928, was not struck at a time

1. *Kishan Singh v. Sardar Ali, reported in (1937) 24 A I R Lah 162=164 I O 650=38 P L R 934.*

2. *Buta Singh v. Bhan Singh, reported in (1930) 17 A I R Lah 978=129 I O 125.*

when the original debt was barred by limitation. It will be remembered that the previous balance had been struck on 30th June 1925. 30th June 1928, was a holiday and hence the point arose as to whether the balance struck on 1st July 1928, was within time or not. The trial Court, therefore gave a decree for Rs. 923 against the estate of the joint family of the defendants together with costs. None of the defendants was held liable personally.

The defendants appealed and the learned Senior Subordinate Judge on appeal upheld the findings of the trial Court on the merits but held that the suit was barred by limitation as the entry made on 1st July 1928, was made after limitation had expired and S. 4, Limitation Act did not extend the period of limitation. It appears to have been contended before him as had been contended before the trial Court that the words of the balance struck were a promise to pay within the meaning of S. 25 (3), Contract Act and that therefore apart from any other question the suit would lie on the basis of this entry alone. The trial Court had given no decision on this point. The learned Senior Subordinate Judge, however held that the words did not come within the purview of S. 25 (3) and as the debt was time-barred on that date it could not form the basis of a suit. He therefore held that the suit was barred by time and accepted the appeal and dismissed the suit of the plaintiffs leaving the parties to bear their own costs. An appeal from this decision was heard by a Single Bench of this Court and before the Single Bench it appears to have been contended again that S. 4, Limitation Act extended limitation and that the debt was not time-barred on the date of the entry in question. On the second point it was contended again that under S. 25 (3) the words of this entry were a promise to pay within the meaning of that section and therefore the suit was not barred by limitation. The learned Judge repelled both these contentions, holding that S. 4, Limitation Act did not extend limitation, that the original debt was therefore time-barred at the date of this entry and that the words in the balance did not come within the purview of S. 25 (3), Contract Act and therefore the appeal failed on both points urged. He dismissed the appeal, leaving the parties to bear their own costs. In the Letters Patent appeal it was pointed out that there was a conflict of deci-

sions on the question whether an acknowledgment of a debt made after the period of limitation for a suit prescribed by Sch. 1 to the Limitation Act had expired but during the time in which owing to the provisions of Ss. 4 to 25 of the Act the suit might have been instituted would start a fresh period of limitation under the provisions of S. 19. The case was therefore referred for decision to a Full Bench. Before the Full Bench, the learned counsel for the appellants has contended, firstly, that the suit is not barred by limitation because of the provisions in S. 4, Limitation Act; secondly, that the words of the acknowledgment in question fall within the purview of S. 25 (3) and, thirdly, in any circumstances the debt not being time-barred on the date when the acknowledgment was made, S. 25 (3) did not apply and, as the acknowledgment had been made in such terms as implied a promise to pay and was with consideration, it could in itself form the basis of a suit and consequently the suit having been brought within three years of the acknowledgment was well within time.

So far as the first point is concerned, it is unnecessary to enter into any lengthy analysis of the admittedly conflicting rulings on the point, for, the matter appears to me to be concluded by the decision of their Lordships of the Privy Council in 57 All 242.³ In that case their Lordships of the Privy Council pointed out that there was a distinction in form between S. 4 and S. 14. The language employed in S. 4 indicated that it had nothing to do with computing the prescribed period. According to their Lordships, all that the Section provided was that the suit might be brought on the day when the Court reopened if the Court happened to be closed when the period prescribed expired. There was therefore according to their Lordships nothing in the Section which altered the length of the prescribed period. The matter was otherwise under S. 14 and other sections of a similar nature where the words used were "in computing the period of limitation prescribed for any application certain periods should be excluded." It appears to me clear that their Lordships of the Privy Council have therefore laid down that the words of S. 4, Lim. Act do not extend limitation, and therefore the

3. *Maqbul Ahmad v. Onkar Pratab Narain Singh*, (1935) 22 A I R P O 85=155 I O 205 =62 I A 80=57 All 242 (P O).

argument based on S. 4, Lim. Act is of no force. Indeed the learned counsel for the appellants on being referred to the Privy Council ruling did not press the matter further. There remain the question whether the words actually used in the entry fall within the purview of S. 25 (3), Contract Act and the other question already referred to above. Now, so far as the question of S. 25 (3), Contract Act is concerned, the words in the entry are as follows :

Hisab yad dashit Lachhman Das wald Dhani Nath va Harnam Das wald Lachhman Das jat Khatri Khosla sakin Nurmahal, ba sud bahisab fi sadi 12 anna senkra mahwar muqarir kiya giya our bahaq Shanti Parkash baligh va Lachhmi Chand Ram Parkash nabalghan bawalayat Shanti Parkash tahrir kar diya. 1 July 1928.

Below this are the words :

Mubligh 725-8-0 bakaya hissab mundarja bala tahrir kiya gaya hai. Ticket 4 anna ka lagaya gaya.

Lachhman Das bakalam khud.

The question before the Bench is therefore whether these words amount to, or contain, a promise to pay within the meaning of S. 25 (3), Contract Act. I may say at once that if the matter were *res integra*, I should have found considerable difficulty in coming to the conclusion that the words were within the purview of S. 25 (3), Contract Act, but the matter is not entirely *res integra*. In a long course of decisions in this Court beginning with 72 P R 1879⁴ where a Division Bench of this Court held in a case in which somewhat similar words were used that the fact that a balance was struck and the interest was fixed and there was no set off against any other account were equivalent to a promise to pay within the meaning of S. 25 (3), Contract Act, down to the present day a number of rulings have held that whenever a balance is struck and over and above that interest is fixed or there is a promise to pay interest then there is a promise to pay within the meaning of S. 25 (3), Contract Act. In this connexion, I may refer to 8 I C 575⁵, a Single Bench ruling, 8 I C 811⁶, a Division Bench ruling, 35 P R 1903⁷, a Full Bench ruling on a somewhat

different point, A I R 1929 Lah 511,⁸ A I R 1929 Lah 695⁹ and Civil Appeal No. 2183 of 1930, a Division Bench ruling decided on 25th January 1933, in which I was one of the Judges deciding the appeal. In this last mentioned ruling, the same point arose and was referred to a Division Bench. It was pointed out that so far as this Court was concerned, wherever there was a balance struck and interest had been fixed or agreed to be paid the words had always been construed to mean a promise to pay within the meaning of S. 25 (3), Contract Act and there was no ruling to which the attention of the Division Bench had been drawn to the contrary. In the present case too, the learned counsel for the respondents very frankly conceded that he had not been able to find any ruling to the contrary either in this Court or in any other Court in India. He has however contended that these rulings are wrong and that the mere promise to pay interest or the statement that interest has been agreed upon or determined or fixed do not make an express promise to pay within the meaning of S. 25 (3), Contract Act. He contends that the preponderant weight of authority is that a mere acknowledgment, though it implies a promise to pay under the ruling of their Lordships of the Privy Council in 33 Cal 1047¹⁰ at p. 1059, has always been held not to amount to a promise to pay within the meaning of S. 25 (3), Contract Act. He therefore contends that the mere mention of interest as fixed or a promise to pay interest cannot be said to be a promise to pay the principal and though it may imply a promise to pay the principal, it does not fall within the purview of S. 25 (3), Contract Act.

Again, I may say that if the matter were *res integra*, the contention would weigh considerably with me and I would be inclined to give effect to it; but the matter is not *res integra*. A long course of rulings has held, not only on the question of interest but where the words used amount to the words "is payable" or "to be paid" or "to be taken" or "to be given" "baqi

4. *Ladhu Shah v. Fazl Dad*, (1879) 72 P R 1879.

5. *Bholaram v. Nanak Chand*, (1910) 185 P R 1910=8 I C 575.

6. *Tirka v. Rizak Ram*, (1910) 8 I C 811=188 P W R 1910=8 P L R 1911.

7. *Daula v. Ganda*, (1903) 85 P R 1903=101 P L R 1908 (F B).

8. *Om Prakash Mitter v. Haji Abdul Rahim & Sons*, (1929) 16 A I R Lah 511=117 I C 377.

9. *Gopi v. Singh Ram*, (1929) 16 A I R Lah 695=122 I C 238.

10. *Mani Ram v. Seth Rup Chand*, (1906) 33 Cal 1047=39 I A 165=4 C L J 94=10 O W N 874=2 N L R 180 (P O).

dena" "baqi lena" etc., almost invariably that such words amount to a promise to pay within the meaning of S. 25 (3), Contract Act. So far as interest is concerned, there is no ruling in this Court to the contrary, no ruling of any other High Court to my knowledge to the contrary. In these circumstances, it seems to me that it is too late in the day now to urge that these words should not be held to fall within the purview of S. 25 (3), Contract Act. After all, people have entered into contracts and have forborne to sue on the strength of these rulings as reported in various reports and it would upset matters greatly if now it were held that these acknowledgments were useless or that no suit would lie on the basis of these acknowledgments because they did not fall within the purview of S. 25 (3) Contract Act. With some reluctance therefore, I come to the conclusion that the words in this case must be held to contain a promise to pay within the meaning of S. 25 (3), Contract Act and I would hold accordingly.

There now remains the other point raised by the learned counsel for the appellants, namely that the acknowledgment could form the basis of a suit and that this acknowledgment was actually the basis of the present suit and that as the suit was brought on the basis of this acknowledgment, that is to say, it was alleged that there was a valid agreement between the parties on this date and as the defendants had not pleaded lack of consideration for this acknowledgment treated as a contract and as this acknowledgment was made at a time when the suit could have been brought on the basis of the original debt, therefore S. 25 (3), Contract Act, did not apply at all and the suit was not barred by limitation. This argument depends first of all upon a construction of the plaint and pleadings in this suit. After considering the plaint and the pleadings, oral and written, of the parties and the action of the Court on the question, it appears to me that the suit was brought on the basis of this entry and not on the basis of a bahi account as shown in the judgment of the learned Judge sitting in Single Bench. The first point to notice in this connexion is the heading of the plaint which refers only to this entry. The second point to notice is that the plaintiff did not claim that limitation was extended by reason of this entry and the sub-

sequent payment of Rs. 50 but only contended that limitation was extended by reason of the payment of Rs. 50 following this entry. In the oral pleadings as recorded the plaintiff again relied on this entry only and made no reference to other entries in his bahi. This entry was described as manat dawa by one of the defendants in his oral evidence. It seems to me that all these facts taken together show that the plaintiff was suing on the basis of this entry. The trial Court itself appears originally to have regarded the suit as so framed, because before any evidence was led it took up suo motu the question whether this entry amounted to an agreement and finally decided that it did and called upon the plaintiff to pay Rs. 8-4-0 by way of penalty treating this entry as an agreement. From all these facts it seems to me that the correct conclusion is that the suit as framed originally was on the basis of this entry.

The next point that appears to me to follow is that if the suit was so framed then it must be taken that the plaintiff had alleged a valid agreement constituted by this entry and it was for the defendants then to plead that this agreement was not valid because there was no consideration for this agreement. The defendants did not plead any such thing. All that they alleged was that they denied the execution of the agreement and also pleaded ignorance as regards one of the executants. Also that they were not bound by the document even if it were executed. They never pleaded lack of consideration. It must therefore be taken that if the agreement was otherwise good, consideration must be taken to have been proved. If so, then, the only question left is whether a suit could be brought on the basis of this entry considered as an agreement. The learned counsel for the respondents conceded that on the rulings of this Court this agreement could form the basis of a suit. He contended however, rightly in my opinion, that while this Court had held that such acknowledgments implying a promise to pay under the Privy Council ruling were agreements and therefore could form the basis of a suit nevertheless if a suit were actually brought on the basis of such acknowledgments treated as agreements, it would be for the plaintiffs to prove that the agreement was for consideration and the mere existence of old debts could not be consideration for

the agreement. I have no doubt that this argument is correct so far as it goes. I do not think that this Court has ever held that merely because an acknowledgment implies a promise to pay it can form the basis of a suit apart from proof of consideration. All that the words used in some of the rulings, namely that this acknowledgment can be the basis of a suit mean is that in previous rulings before the ruling of their Lordships of the Privy Council a suit based on such an acknowledgment was thrown out in the preliminary stage on the ground that the document relied upon as showing the agreement did not contain any promise to pay and therefore could not be the basis of a suit.

After the ruling of their Lordships of the Privy Council, it was merely pointed out that the suit could not be so thrown out but it has never been held so far as I am aware that the suit can proceed without proof of consideration. It is a different question depending upon the circumstances of each case as to the onus of proof of consideration. In my opinion, on the pleadings and in the circumstances of the present case, where a suit is brought on the basis of such a document, the plaintiff must be taken to allege a valid agreement and if the defendant denies that the agreement is valid he must allege lack of consideration if that is the ground on which he contends that the agreement is invalid. In the present case it seems to me that the defendant did not deny consideration. Therefore it must be taken that the implied allegation of the plaintiff that there was consideration was not denied and that therefore the suit could succeed on this document. Looked at from this point of view, none of the questions raised before the learned Judge sitting in Single Bench really arise, for, it is obvious that if this was an agreement for consideration before the expiry of limitation or even after it, a suit on its basis would succeed and could not be held to be barred by limitation. The learned counsel for the respondents contended strongly that this case was never urged before the lower Appellate Court or before the learned Judge of this Court in Single Bench. I do not think this case was urged as put before us now but it seems to me that the question before the lower Appellate Court and before the learned Judge in Single Bench was whether the suit was barred by limitation or not. The actual point therefore is the

same and it cannot therefore be held that the Letters Patent Bench is barred from going into this question on the ground that the case was not so argued before the lower Appellate Court or before the learned Judge in Single Bench. The matter is not entirely free from difficulty for it might be argued that even before the trial Court finally the case appears to have been dealt with as if the suit was on a *bahi* account and that this entry merely served to extend limitation. But this was not the actual pleading of the plaintiffs as already pointed out. The learned trial Court did not enter into other matters because it was clear that S. 4 governed the case and extended limitation. The point was not argued before the lower Appellate Court or before the Single Bench. It therefore might well have been held that the point was no longer open to the learned counsel for the appellants. On the whole however, after considering the matter, it seems to me that the essential point being whether the suit was barred by limitation or not and this form of argument being that of a point of law going to the root of the case and patent on the record it is open to the Full Bench to hold that the suit is not barred by limitation on this ground also.

I would therefore allow the appellants to raise this point and hold as stated above that the suit is not barred by limitation. I would therefore accept the appeal and restore the decision of the trial Court. In the circumstances I would leave the parties to bear their own costs throughout.

Din Mohammad J.—I agree ; but, in order to make my position clear, I wish to add that so far as I am concerned, I entertain no doubt that the entry in question does fall under S. 25 (3). In a country like India, where people do not yet fully appreciate the technicalities of law and are still in the habit of using archaic expressions which before the introduction of British-made laws completely served their purpose, too much stress cannot be laid on the mere wording of the agreements entered into by them. To me, it appears that it was mainly on this consideration that in the decisions cited before us any words that indicated even remotely an intention on the part of the debtor to pay his debt were considered sufficient for the purposes of S. 25 (3). When an unconditional acknowledgment implies a promise

to pay as laid down by their Lordships of the Privy Council in 33 Cal 1047,¹⁰ I fail to see why mention of interest should not make that implication express. In the case before us, the words used are "Memorandum of account (of) Lachman Das . . . with interest (which has been) fixed at the rate of twelve annas per cent. per mensem, written in favour of Shanti Parkash. . . ." The fixing of future interest on the sum acknowledged to be due obviously indicates that the writer of the entry at the time of its making made some sort of a promise to pay the amount and then in order to give his promise the garb of language used such terms as in his parlance were sufficient to convey his intentions and were considered enough by his creditors. I am supported in my conclusion by the fact that stamps of the value of four annas were affixed, although a mere acknowledgment could be made on a stamp of the value of one anna only. Relying therefore on the authorities cited at the Bar which I consider to be quite in consonance with law and against which not a single decided case has been quoted on behalf of the respondents, I have no hesitation in saying that the entry in suit fully satisfies the requirements of S. 25 (3).

I am further of opinion that the so called new point too, could be raised before us, being one of law pure and simple and being determinable on the record as it stands without the necessity of ascertaining any additional facts. To my mind it is not a new point at all, but only another way of dealing with the same old point of limitation an alternative argument put forward to protect the suit against the attack founded on the plea of limitation. No doubt the attention of the parties or the Courts below was never directed to this aspect of the case, but this will not debar the plaintiffs from bringing it to our notice. The question however is of mere academic interest, as the appeal before us succeeds even if this point is left undecided.

Coldstream J.—I agree entirely with my learned brother Dalip Singh as regards the effect of S. 4, Lim. Act. As regards the interpretation of the acknowledgment of 1st July 1930, I must say that I am unable to find in its actual words any express promise to pay. It is, I think, settled law in this province that a bare acknowledgment of a stated debt is not a promise to pay within the meaning of

S. 25 (3), Contract Act. It is not easy to understand why the mere addition of a statement of the rate of interest payable should turn an acknowledgment which is not "a promise to pay" into "a promise to pay". But in view of the weight of the authorities against me, I am not prepared to dissent from my learned brother's decision on this point.

As regards the argument that the entry in question records a contract, which, in the circumstances, must be presumed to have been for consideration, I think it would be wholly wrong to allow such a case to be put forward now. It was not the case tried in the first Court, nor does such a case appear to have been noticed in the Court of first Appeal; and it is certain that it was not set up before the learned Judge whose judgment is under appeal. Only two points were taken before that Judge: (1) that S. 4, Lim. Act, extended the period of limitation; and (2) that the words of the entry recorded a promise to pay within the purview of S. 25 (3), Contract Act. We do not know what answer the respondent would have made to such an argument had it been advanced at the trial or in the Appellate Courts. No doubt, the argument does relate to the question of limitation which has been the main point for decision throughout; but the question whether there was consideration for the making of the acknowledgment is not one of law alone but also of fact, and I do not see any justification in this case for presuming that the appellant alleged that there had been consideration for the entry. As regards this argument therefore with great respect I regret that I am unable to concur with my learned brother Dalip Singh.

By the Court.

The order is that the appeal is accepted, the judgments of the lower Appellate Court and of the Single Bench of this Court are set aside and the decree of the trial Court is restored. Parties to bear their own costs throughout.

D.S./R.K.

Appeal allowed.

A. I. R. 1938 Lahore 241

BHIDE J.

*Karim Bakhsh and others —**Defendants — Appellants.*

v.

*Shadi, Plaintiff and others,**Defendants — Respondents.*

Second Appeal No. 606 of 1937, Decided on 24th November 1937, from decree of Senior Sub-Judge, Jullundur, D/- 8th February 1937.

Limitation Act (1908), Art. 142—Parties to suit co-sharers Plaintiff alleging that he was in possession of certain property and was dispossessed by defendants—Case is governed by Art. 142 Plaintiff must prove possession within 12 years—Mere fact that defendants are co-sharers makes no difference when plaintiff himself alleges that he is in possession of separate property Plaintiff cannot be held to be in constructive possession of property.

Where the parties to a suit are co-sharers and the plaintiff comes to the Court with an allegation that he was in possession of certain property and was dispossessed by the defendants, the case is governed by Art. 142 and it is necessary for the plaintiff to prove his possession within 12 years. The mere fact that the defendants have been held to be co-sharers cannot help the plaintiff when he himself alleges that he is in separate possession of property. In such case although partition pleaded by the defendants is not proved, the defendants cannot be held to be holding possession of the property in dispute on behalf of the plaintiff and the plaintiff cannot be held to have been even in constructive possession of the same. He must prove actual dispossession within 12 years: *A I R 1934 All 993, Rel. on.* [P 241 O 2; P 242 O 1]

Nanak Chand and Prem Chand —

for Appellants.

P. A. Behl for Malik Barkat Ali —

for Respondent (Plaintiff).

Judgment.—The plaintiff sued in this case for possession of one third share in a house on the ground that he was in lawful possession thereof and had been ousted by the defendants some nine months before the suit. The defendants pleaded that there had been a partition of the property and that they had been in possession of the house in question for some 30 years. The trial Court dismissed the suit but on appeal the learned Senior Subordinate Judge granted the plaintiff a declaration to the effect that he was entitled to one-third share of the property in dispute. From this decision the present appeal has been preferred.

The only point argued by the learned counsel for the appellants was that of limitation. It was urged that on the facts

recited in the plaint, it was clear that the suit was based on an allegation that the plaintiff being in possession had been dispossessed by the defendants, and therefore it clearly fell within the scope of Art. 142, Lim. Act. It was therefore contended that it was incumbent on the plaintiff to prove his possession of the house in dispute within 12 years before the institution of the suit. It was next urged that according to the findings of the Courts below the defendants had been in possession of the house for over 12 years before the institution of the suit and consequently the suit ought to have been dismissed. The learned counsel for the respondent, on the other hand, contended that the learned Senior Subordinate Judge has found that the parties were co-sharers and therefore the possession of the defendants must be presumed to have been on behalf of the plaintiff also. It was further urged by him that the plea of adverse possession was given up on behalf of the defendants. As regards the latter point, it appears from the record that all that was stated on behalf of the defendants was that no issue need be framed on the question of adverse possession. This statement was probably made in view of the fact that the burden of proving possession within 12 years lay upon the plaintiff in accordance with the provisions of Art. 142, Lim. Act. The issues as to limitation were correctly framed with reference to that Article: vide Issues 3 and 4. The learned counsel for the appellants has strongly relied on a Full Bench ruling of the Allahabad High Court reported in *A I R 1934 All 993*.¹ That was also a case in which the parties were co-sharers and yet it was held that when a plaintiff comes to Court with an allegation that he was in possession of certain property and was dispossessed, the case is governed by Art. 142, Lim. Act, and it is necessary for the plaintiff to prove his possession within 12 years. The mere fact that the defendants have been held to be co-sharers in the property cannot, in view of this authority help the plaintiff in the circumstances of this case. According to the plaintiff's own allegation, his father had built separate houses for himself and his brothers and had put them in separate possession. The defendants pleaded that there had been a partition.

1. *Bhindyachal Chand v. Ram Gharib*, (1934) 21 *A I R All* 998=152 *I O* 1=1934 *A L J* 973 (F B).

This partition was not proved, but when separate possession was alleged by the plaintiff himself it cannot be held that the defendants were holding possession of the property in dispute on behalf of the plaintiff. The following passage in the Allahabad ruling referred to above supports the appellants' contention that in view of the allegations of the parties plaintiff cannot be held to have been even in constructive possession within 12 years before the institution of the suit :

But it cannot be denied that one co-owner can dispossess another co-owner and can exercise adverse possession over a joint property. If therefore the plaintiff, a co-owner, admits that he has been dispossessed and that, at any rate, for a short period prior to the suit, the possession of his co-owner was adverse to him, then he cannot fall back on a mere presumption of joint possession in his favour and succeed without showing any other circumstances whatsoever. But if the co-owner, who has been dispossessed, were to satisfy the Court that he was actually dispossessed on some date within 12 years, he discharges his burden ; or even if he proves that prior to that period the parties were on good terms with each other without any denial of title and without any quarrel, the Court may record a finding that the possession of the plaintiff prior to the period of actual possession was constructive. In such an event, the finding would be that the plaintiff has succeeded in establishing that he was in constructive possession of the property within 12 years of the suit.

But there is no such evidence in this case. I therefore uphold the contention of the learned counsel for the appellants and accepting this appeal set aside the decree of the learned Senior Subordinate Judge and dismiss the suit ; but in view of all the circumstances leave the parties to bear their costs throughout.

R.M./R.K.

Appeal allowed.

A. I. R. 1938 Lahore 242

DIN MOHAMMAD J.

Pandit Harbhagwan Das — Defendant Appellant.

v.

Sardar Partap Singh, Plaintiff and others, Defendants — Respondents.

Second Appeal No. 251 of 1937, Decided on 6th July 1937, from decree of Dist. Judge, Lyallpur, D/- 27th November 1936.

(a) Pre-emption — Prior to suit original vendee transferring property to person having right equal to that of pre-emptor—Pre-emptor cannot oust him — Principle applies even where sale by original vendee has not taken place in exercise of pre-emptive right of subsequent vendee.

If before the institution of the suit for pre-emption, the original vendee transfers the property to a person claiming a right equal or superior to that of the pre-emptor, the pre-emptor cannot legally oust him. This principle is not confined to those cases only where the re-sale takes place in exercise of the pre-emptive right of the subsequent vendee. There is no distinction between cases where the re-sale takes place in exercise of a pre-emptive right and those where the re-sale takes place without an assertion of his right by the subsequent vendee because the effect in both cases is the same, that is, the purchase of the land in suit by a person possessing a right equal or superior to that of the pre-emptor and, in these circumstances, the fact that the purchase takes place in assertion of the right or otherwise is immaterial.

[P 243 C 1, 2 P 244 C 1]

(b) Pre-emption — Suit for — In order to succeed, pre-emptor must have superior right even at stage of suit and decree.

A pre-emptor in order to succeed in his claim must not only possess a superior right at the time of the sale but must retain the superiority on the basis of which he claims to pre-empt also at the stage of the suit and the stage of the decree : *A I R 1933 Lah 481 and A I R 1935 Lah 529; Rel. on.*

[P 244 C 1]

S. L. Puri for M. L. Puri — for Appellant.

Harbhajan Das and Hazara Singh Uppal — for Respondent (Plaintiff).

Judgment.—This appeal has arisen in the following circumstances : On 2nd June 1934, one Labh Singh sold about 2½ marlas of land situated in the old abadi of Qilla Sheikhpura to one Mt. Yashodhan for Rs. 343.12.0. On 18th January 1935, Mt. Yashodhan sold it to one Mathra Das for Rs. 450. On 27th May 1935, Mathra Das sold the same land to his father, Har Bhagwan, for the same amount for which he had purchased it. On 30th May 1935, one Partap Singh instituted the suit out of which the present appeal has arisen for pre-emption of the land in question both on the ground of his relationship to the original vendor Labh Singh which however was immaterial and on the ground of his owning a contiguous plot of land. This suit was instituted against the vendor and the vendees, Mt. Yashodhan and Mathra Das only. On 3rd July 1935, Har Bhagwan was on his own application impleaded as a defendant in the case. He resisted the suit on various grounds. His main plea however was that as he also owned property contiguous to the land in suit, he had a right equal to that of the pre-emptor and as he had purchased the land in question prior to the institution of the suit, the pre-emptor could not defeat his title. This plea found favour with the trial Court and the suit was dismissed. On appeal how-

ever, the District Judge reversed the decision of the trial Court mainly on the ground that the sale in favour of Har Bhagwan had not taken place in the exercise of any pre-emptive right and consequently the title of the pre-emptor was indefeasible. Har Bhagwan has appealed. After hearing counsel on both sides, I have come to the conclusion that this appeal must succeed. There is abundant authority in support of the proposition that if before the institution of the suit the original vendee transfers the property to a person claiming a right equal or superior to that of the pre-emptor, the pre-emptor cannot legally oust him.

In 69 P R 1898,¹ the land in suit was in the first instance sold to three persons, of whom two were co-sharers in the joint holding but the third was not. Subsequently the plaintiff, who was also a co-sharer in the said holding, sued for pre-emption in respect of the sale, but shortly before the institution of his suit, the stranger vendee sold his share to another co-sharer in the same holding. Accordingly at the time when the suit was instituted, the land was in the hands of three vendees against none of whom the plaintiff could assert a superior right. It was however contended on behalf of the plaintiff that regard must be had to the original transaction. It was held by a Division Bench of the Punjab Chief Court, overruling the said contention, that the mere fact that at one stage a stranger had a share in the bargain could not be held to vitiate the right of the three persons who were the vendees at the date of suit and resisted plaintiff's claim with rights that were not inferior to his own. In 20 All 100,² it was held that if the land, which was subject to pre-emption, having been sold to a stranger, was subsequently re-sold by the stranger vendee before suit to a co-sharer having equal rights with those seeking pre-emption, the right of pre-emption did not survive. In 21 All 374³ at p. 379 this decision was referred to with approval. In 23 All 247,⁴ it was again held that a stranger vendee could defeat the claim of a co-sharer having a right of pre-emption by sale to a co-sharer having a similar right,

stress being laid on the fact that the re-sale to have such effect must be completed before any suit for pre-emption is brought by a co-sharer entitled to pre-empt. In 37 P L R 1921,⁵ Martineau J. observed that the claim of a pre-emptor could be defeated if before the suit was instituted, the vendees whose rights were inferior, sold their share to a person who had an equal or superior right to that of the plaintiff. In 87 I C 652,⁶ a similar decision was arrived at by the same learned Judge. In 26 A L J 1378,⁷ a Division Bench of the Allahabad High Court remarked
if on the date the suit for pre-emption is brought the property has been transferred to a person as against whom the plaintiff has no preference, the claim cannot be decreed.

To the same effect is the case reported in 41 I C 9.⁸ Counsel for the respondent refers to a passage in 138 P R 1884⁹ where it has been remarked that the land was re-sold to the subsequent vendee in compliance with his pre-emptive right. He further relies on similar remarks made in 11 Lah 258¹⁰ and 164 P W R 1913.¹ These decisions however are of no avail in the present case. In the first instance, the remarks relied upon do not confine the applicability of the principles deducible from the judgments alluded to above to those cases only where the re-sale takes place in exercise of the pre-emptive right of the subsequent vendee and secondly the judgments where the re-sale had taken place pendente lite are not relevant to the present case. I am unable to distinguish between cases where the re-sale takes place in exercise of a pre-emptive right and those where the re-sale takes place without an assertion of his right by the subsequent vendee, because in my view the effect in both cases is the same, that is the purchase of the land in suit by a person possessing a right equal or superior to that of the pre-emptor and, in these

5. Hira v. Sardara, (1921) 59 I O 712=37 P L R 1921.

6. Abdul Aziz v. Abdulla, (1925) 12 A I R Lah 418=87 I C 652=26 P L R 215.

7. Badri Pandey v. Parsotam Singh, (1928) 15 A I R All 697=110 I O 869=26 A L J 1378.

8. Lalta Prasad v. Raghubar Singh, (1917) 4 A I R Oudh 314=41 I O 9=20 O O 160=4 O L J 459.

9. Amirullah Shah v. Tabe Husseln (1884) 188 P R 1884.

10. Moolchand v. Ganga Jal, (1930) 17 A I R Lah 356=132 I O 369=11 Lah 258=31 P L R 342 (F B).

11. Fazl Din v. Lal Singh, (1918) 20 I O 843=164 P W R 1913.

1. Mughal v. Jalal, (1898) 69 P R 1898.

2. Serh Mal v. Hukam Singh, (1898) 20 All 100.

3. Janki Prasad v. Ishar Das, (1899) 21 All 374=1899 A W N 126.

4. Narain Singh v. Parbat Singh, (1901) 23 All 247=1901 A W N 66.

circumstances, the fact that the purchase takes place in assertion of the right or otherwise is immaterial.

Besides, there is overwhelming authority in support of the proposition that a pre emptor in order to succeed in his claim must not only possess a superior right at the time of the sale but must retain the superiority on the basis of which he claims to pre-empt also at the stage of the suit and the stage of the decree: see 14 Lah 421¹² and 16 Lah 921.¹³ Now, can a pre-emptor whose right is not superior to that of a vendee at the time of the suit or at the time of the decree be allowed to pre-empt the land merely because the vendee did not expressly assert his right of pre-emption before obtaining the sale of the said land. To me, it appears that the only proper answer that can be given to this question is in the negative. On these grounds, I accept the appeal, set aside the judgment of the District Judge and dismiss the suit with costs throughout.

D.S./R.K.

Appeal allowed.

12. *Het Ram v Dalchand*, (1933) 20 A I R Lah 481=141 I O 535=14 Lah 421=34 P L R 101.
 13. *Hayat Bakhsh v. Mansabdar Khan*, (1935) 22 A I R Lah 529=160 I O 826=16 Lah 921=37 P L R 873.

A. I. R. 1938 Lahore 244

DALIP SINGH AND SKEMP JJ.

Chaudhri Hakam Ali — Plaintiff —
Appellant.

v.

Hashu — Defendant — Respondent.

Letters Patent Appeal No. 76 of 1936, Decided on 1st July 1937, from decree of Bbide J., Lahore, D/. 3rd March 1936, reported in A I R 1937 Lah 146.

(a) Punjab Colonization of Government Lands Act (5 of 1912), Ss. 3 and 19—'Collector of District' held did not include Settlement Officer having powers of Collector.

Where the Commissioner by letter empowered 'the Collector of the Lyallpur District' to sanction sales under S. 19:

Held that the words 'the Collector of the Lyallpur District' did not include the Settlement Officer having powers of Collector. [P 245 O 2]

(b) Civil P. C. (1908), O. 6, R. 17—Suit on contract of sale of land—Contract found to be void owing to invalid sanction—Purchaser though not claiming alternative relief for refund of purchase money held should be allowed to amend his plaint to recover purchase money: 39 P L R 287=A I R 1937 Lah 146=162 I O 557, *Reversed*.

A suit was brought on a contract of sale of land which was subject to the conditions of the Punjab Colonization of Government Lands Act. The sale was discovered to be void owing to invalid sanction. The purchaser had not claimed an alternative relief in the plaint for the recovery of the purchase money which he had paid under the contract:

Held that the purchaser should be permitted to amend his plaint in order to obtain the refund of the purchase money and should not be referred to a separate suit: 39 P L R 287=A I R 1937 Lah 146=162 I O 557, *Reversed*. [P 245 O 2]

Abdul Majid — *for Appellant.*

Abdul Karim — *for Respondent.*

Skemp J.—This Letters Patent Appeal has arisen in the following circumstances: The land in suit is situate within the limits of the Lower Chenab Canal Colony and is subject to the conditions of the Colonization of Government Lands (Punjab) Act, 1912. On 2nd November 1922, the defendant sold the land to the appellant by registered deed being only a tenant at the time. According to the registered deed Rs. 200 had been paid in advance; the balance of Rs. 2300 was paid in cash before the Sub-Registrar. On 11th January 1923, the respondent applied to the Collector of the Lyallpur district for sanction. This application was actually put up before Mr. J. D. Penny, Settlement Officer, Lyallpur, who had the powers of a Collector. He called for a report from the Assistant Colonization Officer, which was to the effect that proprietary rights could not be given until the malikana on the whole khata had been paid. Mr. Penny then gave formal sanction to the sale and on 9th June 1923, the sale formed the subject of a mutation in the revenue records.

On 7th February 1934, the plaintiff sued for possession of the land which had been sold to him, saying that possession had not been given. The defendant took all possible defences. He pleaded that the consideration had not been paid and also that the sanction of the Commissioner to the sale, as required by law, had not been obtained and that the sale was therefore void. The trial Judge dismissed the suit on the merits, but the learned District Judge accepted the appeal. He found that the deed of sale had been executed and consideration had been paid in full. As to the question of the Commissioner's sanction, he allowed the plaintiff to bring on the record two documents Exs. P. A and P. B. which had been obtained from the office of the Commissioner of Multan with

very great difficulty. He held that the Commissioner under S. 19, Colonization of Government Lands (Punjab) Act, had empowered Mr. Penny to sanction sales as Collector and that the sale was good. He granted the plaintiff the decree he sought.

The defendant appealed to the High Court and Bhide J. held that the sanction Ex. P.A actually granted by the Commissioner applied in terms only to the Collector of the district and not to Mr. Penny, Settlement Officer, as Collector. He therefore accepted the appeal and dismissed the suit. A suggestion was made before him that the plaintiff might at least be granted refund of the money he had paid under the contract but the learned Judge thought that a separate suit should be lodged. The plaintiff has lodged a Letters Patent appeal, a certificate being given by the learned Judge in Chambers, and three points have been argued before us: (1) What is the effect of Ex. P.A? (2) Whether the plaintiff had actually acquired proprietary rights? and (3) Whether the plaintiff, if unsuccessful otherwise, should not be allowed a refund of the money which he has paid?

On the first point it is necessary to consider the law. S. 3, Colonization of Government Lands Act (1912) lays down:

"Collector" means the Collector of the district as described in the Punjab Land Revenue Act, 1887, and includes any officer appointed by the Local Government to perform all or any of the functions and exercise all or any of the powers of the Collector under this Act.

Mr. Penny, Settlement Officer, was gazetted with all the powers of a Collector subject to the control of the Deputy Commissioner, Lyallpur, under the authority of this S. 3 by Gazette Notification dated 2nd December 1920.

S. 19 of the Act lays down:

None of the rights or interests vested in a tenant under this Act shall without the consent in writing of the Commissioner or of such officer as he may by written order empower in this behalf be transferred or charged by any sale, exchange, etc.

The Act came into force on 6th June 1912 and on 26th July 1912, in Ex. P.A, the Commissioner wrote to the Deputy Commissioner of Lyallpur, saying:

I hereby empower the Collector of the Lyallpur District to sanction transfer of rights under S. 19 of Act 5 of 1912.

Ex. P.B is a letter, dated 10th June 1935, from the Commissioner to the Deputy Commissioner, Lyallpur, saying

the words "the Collector of the Lyallpur District" in the letter of 26th July 1912, should be interpreted as applicable to the Settlement Officer, Lyallpur, as well as the Deputy Commissioner, Lyallpur. This letter was written after the trial of the present action in the original Court was completed and the learned District Judge quite rightly held that it could not possibly affect the present action. The question for determination then is whether the words "the Collector of the Lyallpur district" include the Settlement Officer of Lyallpur. He had been endowed with all the powers of a Collector subject to the control of the Deputy Commissioner of Lyallpur.

In our opinion, the words in the letter do not include the Settlement Officer as Collector. S. 3 of the Act itself, as already quoted, makes a distinction between the Collector of the District and any officer appointed to perform functions or exercise powers as Collector. The appeal fails, therefore on the main point. As to the second point, *prima facie* the finding of the learned District Judge on this point is a question of fact and after hearing Mr. Abdul Majid we see no reason to differ from this finding. On the third point, however we do not see why the plaintiff should not be permitted to amend his plaint in order to obtain the recovery of Rs 2500 under the contract. The necessary findings of fact have already been arrived at by the learned District Judge in consequence of untrue pleadings made by the defendant and we do not see any reason why the plaintiff should be referred to a separate suit which might now possibly be barred by time.

The learned counsel for the respondent has also contended that there could be no pleading in the alternative for a refund of the money in case the contract was held to be void, and secondly, that he should be given an opportunity to prove that the plaintiff knew all along that Mr. Penny's sanction was not a good sanction. Neither of these arguments has any force. We therefore accept the Letters Patent appeal to this extent that we allow the plaintiff time until 13th July to pay into this Court the Court fee on Rs 2500. If he does so, he will be granted a decree for recovery of this amount from the defendant. In view of the circumstances, the parties are to bear their own costs throughout.

D.S./R.K.

Appeal partly allowed.

A. I. R. 1938 Lahore 246

COLDSTREAM AND DIN MOHAMMAD JJ.

Imam Bakhsh Munawar Din and others — Defendants — Appellants.

v.

Mandar Narsingh Puri Parhalad Puri — Plaintiff — Respondent.

Second Appeal No. 1391 of 1936, Decided on 5th July 1937, from decree of Addl. Dist. Judge, Multan, D/- 23rd July 1936.

(a) Mahomedan Law—Wakf—Plots of land described in revenue records as graveyard and from very early time, in existence as *kabaristan* — Land is presumed to be wakf—Fact that no objection had been taken to original owner's taking reeds from graveyard will not alter nature of wakf.

The fact that certain plots of land were described in the revenue records as graveyard and had been in existence and used from a very early time as *kabaristan* by the Mahomedan community, is by itself presumptive evidence that the land had been set apart for use as a burial ground and that by user, if not by dedication the land is wakf. The nature of wakf will not be altered by the fact that Mahomedan community had taken no objection to the original owner's taking reeds from the graveyard: *A I R 1936 P C 83 and 27 P R 1913, Rel. on.* [P 247 O 1, 2]

(b) Mahomedan Law—Wakf—Definite area of land dedicated for use as graveyard—Presumption.

Once it is found that a certain definite area of land has been dedicated for use as a graveyard, it must be presumed, in the absence of any proof that the dedication was limited, that the whole of the land was set apart to be used solely for the purpose of burying the dead: *27 P R 1913 and A I R 1934 All 335, Rel. on.* [P 247 O 2 ; P 248 O 1]

Barkat Ali and Shabir Ahmad —

for Appellants.

Aohhru Ram and Vishnu Datta —

for Respondent.

Coldstream J.—The dispute giving rise to this second appeal is over a piece of land outside Multan City. This land, through, or into, which a broad pathway runs, measures 33 kanals and 17 marlas and has been used as a Mahomedan graveyard for generations but in the revenue records is described as the property of an ancient Hindu temple in Multan City, the Mandar Narsinghpuri Parhalad Puri. In 1932, according to the plaintiff, but some 40 years ago according to the defendants, some Mahomedans built a mud wall round the land and erected a building upon it alleged to be for the convenience of people using the graveyard.

On 4th November 1932, the managing body of the temple, through its President

instituted a suit against a number of Mahomedans, as representing the Mahomedan community, for a declaration that the temple was owner of the land, and the defendants had no right to interfere with its rights, in particular the right of passing along the path, and for an order that the defendants should demolish the wall and building, remove the graves and obstructions on the pathway and cease from cutting reeds growing on the land. A sum of Rs. 140 was also claimed as damages done to the land by digging, taking water, cutting reeds and pruning a tree.

The trial Court found that the land had been a graveyard established a long time before the first land revenue records of 1868 described it as such, that the pathway was part of the graveyard to which place alone it gave access, that the land must be presumed to have been dedicated for use as a graveyard and therefore it was wakf. It further held that the plaintiff temple had no right whatever in the land and had not proved that the temple had suffered any damage. On these findings it dismissed the suit.

The temple manager appealed and the learned District Judge found that there was evidence showing that the management of the temple had from time to time cut trees and reeds in the graveyard and that the pathway did not end in the graveyard but had to be used for the exercise of the temple's rights in the land. His conclusion was that the temple was owner of the land subject to the right of the defendant community to use the land as a graveyard. He accordingly accepted the appeal and gave the plaintiff a declaration of ownership and an injunction restraining the defendants from interfering with the plaintiff's right to cut trees and reeds, and ordered the defendants to demolish the building and wall, give up possession of an area of 7 marlas of the old path in which graves had been made (the graves were not however to be demolished) and pay Rs. 5 compensation to the plaintiff for unauthorized use of water and earth.

From this judgment the defendants have appealed. It is contended that the evidence proves that the whole area described in the revenue records and the pathway are a consecrated burial ground and that the suit had therefore been rightly dismissed in the trial Court and wrongly decreed by the learned District Judge. The land is

measured for land revenue purposes in three plots numbered in the records of 1923.24 as Nos. 3094, 3095 and 3096. The last two are described as a graveyard in possession of the Mahomedan community. No. 3094 is shown as a road (rasta) running between these plots from end to end, covering an area of 2 kanals 7 marlas of which a portion measuring 7 kanals is occupied by graves (goristan).

At the first regular settlement in 1868 the plots now numbered 3095 and 3096 were described as "a graveyard" (zer kabaristan) and the description in the subsequent records is the same until 1895.96 when they were shown as a graveyard in possession of the Mahomedan community. The pathway was described simply as a road until 1923.24 when the area of 7 marlas occupied by graves was shown as in possession of the Mahomedan community as was the rest of the graveyard. From the history of the land given in the settlement records, it appears that during the time of the Sikhs a Bairagi applied to be given the land, which was uncultivated and unclaimed and appropriated it. Of the land irrigated by five of the wells situated on it, that pertaining to three wells was given to the Bairagi as a muafi by Maharaja Ranjit Singh (1804.39). From the fact that the whole area now mapped as Nos. 3095 and 3096 was described as a graveyard in 1868, it is certain that the graveyard had been in existence a long time and the admitted fact that since then it has been a kabaristan is by itself presumptive evidence that the land had been set apart for use as a burial ground and that by user, if not by dedication, the land is wakf : 38 P L R 182.¹ It is still used as a Mahomedan graveyard and the right of Mahomedans so to use it is admitted.

The argument of the respondents' counsel before us is that the evidence of user raises a presumption merely that the Mahomedans have a right to bury their dead in the land and no presumption that the plaintiff temple has lost its rights as owner, and in support of this argument reliance is placed on the finding by the lower Appellate Court that the plaintiff temple has been removing reeds from the graveyard from time to time. This finding, which is one of fact and final,

is justified by the evidence, but it proves no more than that up to that time no objection was taken to the plaintiff's taking the reeds from this area as well as from other areas of waste land recorded as his. At least one Mahomedan bought reeds from the temple. The Mahomedans may have been apathetic or probably enough, were content at that time to live in amity with an important Hindu landlord and such conduct will not alter the nature of the wakf if there was a wakf: see the Chief Court's judgment in 27 P R 1913² at page 97. What the nature of the wakf is seems clear from the records, a dedication of the whole area for use as a burial ground. The area has been distinctly defined since 1868 and there is no evidence justifying the conjecture that the original owner merely allowed Mahomedans to use his land for burying their dead while reserving to himself a right to cut reeds and trees. It was for the plaintiff to prove such a special form of dedication. But the plaintiff's case is that there has never been any dedication. The presumption raised by the documentary evidence is that dedication was effective long before the Bairagi was granted his muafi by Maharaja Ranjit Singh. Most of the judgments to which respondents counsel has referred us in this part of his argument deal with cases wholly different in circumstances from that before us.

23 Bom 666,³ was a case in which a customary right of burial in privately owned land was claimed. There existed no ancient Mahomedan graveyard.

33 I O 91⁴, a judgment by a single Judge of the Allahabad Court certainly supports the contention that trees on a Mahomedan graveyard may be the private property of the successors of the person by whom the graveyard was dedicated. But the defendants appropriated the trees for a purpose unconnected with the wakf, a fact which greatly influenced the Court in decreeing the plaintiff's suit.

In my view, once it is found that a certain definite area of land has been dedicated for use as a graveyard it must be presumed, in the absence of any proof that

2. *Court of Wards v. Ilahi Bakhsh*, (1913) 27 P R 1913=17 I O 744=40 I A 18=40 Cal 297 (P O).

3. *Mohidin v. Sivlingappa*, (1899) 23 Bom 666=1 Bom L R 170.

4. *Fakhruddin v. Mohammad Rafiq*, AIR 1916 All 117=88 I O 91.

1. *Ballabh Das v. Nur Mohammad*, A I R 1936 P O 88=160 I O 579=88 PLR 182 (P O).

the dedication was limited, that the whole of the land was set apart to be used solely for the purpose of burying the dead : see the Chief Court judgments in 27 P R 19, 3² and 149 I C 966.⁵ My conclusion is that the only possible decision as to the legal effect of the facts proved is that the land recorded as Nos. 3095 and 3096 is wakf property in which no private rights exist. That the revenue records show the plaintiff to be owner no doubt shifted the onus in this case on to the defendants but this onus they have, in my opinion, discharged by the production of the entries in those same records showing that from 1868 the land has been a 'kabaristan'.

The learned District Judge has referred in his judgment to evidence that there are in the graveyard Hindu tombs of Purbias who were buried instead of burnt. He has mentioned two witnesses Kanmu Ram and Girdhari Ram. When the trial Judge inspected the graveyard some graves alleged to be of Hindus were shown to him. The learned District Judge has found that there are distinctive Hindu graves at a distance from the Mahomedan graves. But it was never the plaintiff's case that the land had been dedicated for use as a burial ground by others than Mahomedans. The trial Court's judgment makes no mention of any such suggestion. The plaintiff's case was that although the plots 3095 and 3096 are as a fact a Mahomedan graveyard but he himself is entitled to certain rights in them quite unconnected with any Hindu grave.

As regards the road, the trial Court found that it goes nowhere except to the graveyard. The learned District Judge who also inspected the place says that after leaving the graveyard the path joins another leading to a neighbouring well and this finding cannot be questioned. The plaintiff's own plan shows however that now at any rate the path is closed at its exit by the defendants' wall and the "village map" (presumably the map on the revenue records) does not show that the path goes further than the graveyard. (D. W. 1 Nabi Bakhsh) Graves were made on the pathway as already indicated between 1919 and 1923. The plaintiff apparently raised no objection to this. There is no evidence that the pathway has ever been used by others than those visiting the graveyard,

or that its use is necessary to reach any place other than the graveyard. The learned District Judge has decided that the plaintiff must use it for exercising his rights but as in my view he does not possess the rights he claims this ground for the Lower Court's decision regarding the paths disappears.

Respondents' counsel has not attempted to support the lower Appellate Court's award of nominal damages. I know of no authority for the view that a tenant has no right to allow a third party to take water from his well for his own purpose if the tenant does not require it for himself and the evidence is that the water used by the defendants was given to them by a tenant of Tarkhanwala well. It is not found that the earth taken had any market-value or that the taking of it did any appreciable damage. For the reasons indicated, I would accept this appeal and dismiss the suit with costs throughout.

Din Mohammad J.—I agree.

D.S./R.K.

Appeal allowed.

A. I. R. 1938 Lahore 248

COLDSTREAM AND MONROE JJ.

In the matter of B, a Pleader, Simla.

Civil Misc. No. 345 of 1937, Decided on 15th July 1937.

Legal Practitioners Act (1879), S. 13 — *A* engaging *B* a pleader to defend one and to conduct another suit — Fees settled were to be paid within one year—Both suits then referred to arbitration—*A* paying *B* certain amount, half to be paid as arbitrator's fees and rest towards *B*'s fees — *B* appropriating whole amount towards his fees—Year of payment of fees had not elapsed—*B* held to have wrongfully retained amount and his conduct was grossly improper. Even if *B* committed no criminal offence his conduct called for disciplinary action.

A appointed *B*, a pleader, to defend a suit instituted against her and also to conduct another suit filed by her. Both these suits were subsequently referred to arbitration. Certain fees were settled for these suits and they were to be paid within one year. *A* paid Rs. 100 to *B* and told him that Rs. 50 were to be paid as her contribution to the arbitrator's fees and Rs. 50 should be credited by *B* towards his fees. *B* did not pay Rs. 50 to the arbitrator but appropriated the whole of Rs. 100 towards his fees. One year during which fees were to be paid had not yet elapsed :

Held that *B* wrongfully retained for himself Rs. 50 which had been handed over to him for payment to the arbitrator and that his conduct in doing so was grossly improper in the discharge of

5. *Jhao Lal v. Ahmudullah*, A I R 1984 All 885 =149 I C 966=1936 A L J 248.

his professional duty. Even if no criminal offence was committed by *B* in appropriating the amount towards his fees which were due to him, his conduct was gravely improper on the part of the counsel and called for disciplinary action.

[P 250 C 2]

Diwan Ram Lal (Advocate-General) —
for the Crown.

Shamair Chand — for Respondent.

Order.—In September 1936, Dr. Jessie George, a retired member of Women's Medical Service, submitted a representation supported by her affidavit, accusing *B*, a lawyer practising in Simla of unprofessional conduct in the course of his duties as her counsel. The matter was referred to the District Judge of Simla for enquiry and report. Dr. Jessie George's case was as follows :

In September 1934 a Mr. King of Simla who was acting as agent for Dr. George instituted with his daughter a suit against Dr. George to recover a loan on the basis of an alleged equitable mortgage in the plaintiff's favour and to recover agency charges. Dr. George filed a cross suit against Mr. King. In July 1935 the parties referred both disputes to arbitration, the arbitrator being Lala Shankar Nath, an advocate of Simla.

In both suits Dr. George engaged *B*, the fee agreed on according to her, being Rs. 300 and Rs. 30 for munshi's fees for both suits. Rs. 100 was paid when *B* was briefed in December 1934. The Court accepted a preliminary objection as to the competency of Mr. King's suit as framed and allowed Dr. George Rs. 50 costs. This sum of Rs. 50 was recovered and paid to *B* in June 1935. Dr. George's story is that in October 1935 she handed Rs. 100 to *B* telling him that Rs. 50 were to go towards his fee and Rs. 50 were to be paid as her contribution to the arbitrator's fee. *B* appropriated the whole of Rs. 100 towards his fee.

The arbitrator made his award on 21st December 1935. It was it seems generally favourable to Mr. King and Dr. George instructed *B* to file objections to it. The Simla Courts were closed for their winter vacation. When they reopened *B* filed an application on 1st February, the last day within limitation, stating that objections were raised which would be detailed subsequently and on 10th February detailed objections drawn up with the help of another pleader were presented. These were dismissed as barred by time. The learned District Judge drew up three

charges against *B* : (1) that he had been grossly negligent in delaying the filing of the objections until they were barred by limitation ; (2) that *B* had wrongfully retained documents belonging to his client (*B* claimed a lien on the documents until his fee was paid); and (3) that *B* had wrongfully retained Rs. 50 given him for payment to the arbitrator.

The learned District Judge found it not established that the conduct of *B* fell within any of the clauses in S. 13, Legal Practitioners Act in respect of any of the three charges. At the same time he remarked that the conduct of *B* "did not redound to his credit" and that he had not given true answers on certain points. He also recommended that Dr. George should be allowed her expenses as she had discharged a public duty.

On 21st May 1937 the Advocate-General submitted a petition praying this Court to call upon *B* to show cause why he should not be dismissed or suspended from practice under S. 13, Legal Practitioners Act, and a notice was issued accordingly by the Registrar under the orders of the Court. The respondent has appeared before us and we have heard the learned Government Advocate in support of the petition and Mr. Shamair Chand who has opposed it on behalf of the respondent.

As regards the first two charges which have not been seriously pressed before us by the learned Advocate General, after considering counsel's arguments and examining the evidence we do not think that it is necessary to take action against the respondent. As to the charge of wrongful retention of Rs. 50, the respondent's case is that the whole of the Rs. 100 was given him in October 1935 by Dr. George towards payment of his fee of Rs. 300 plus Rs. 30 munshiana which was to be paid within six months from the time of his engagement in December 1934, that the arbitrator had not demanded payment, as Dr. George alleges he had done, and that when the Rs. 100 were handed to him he was still owed the greater part of his fee for the mortgage suit and the whole of his fee for the cross suit which had been fixed at Rs. 200 plus Rs. 20 munshiana. According to George, she had attended the respondent's wife during her confinement, and there was due a fee of Rs. 130 for her professional services. Nothing therefore was due from her to the respondent, the amount being settled thus :

Rs. 100 paid when respondent was briefed.

Rs. 50 (costs awarded in Mr. King's suit and paid to respondent).

Rs. 50 paid in October 1935 and

Rs. 130 set off on account of the fee for medical attendance.

From the evidence of Dr. George (cross examined) it appears that she engaged respondent before she filed her cross suit, but no further agreement about fees was made and she understood that another fee was not required. The respondent's statement is that he asked Dr. George for his fees in both the suits so that he could put in a certificate and claim the amount as costs and Dr. George "then adjusted the fees of the mortgage suit and promised to pay the fees of the account suit later on," this was in April 1936 (p. 7 of the printed record).

On a consideration of the evidence we are satisfied that in respect of the purpose for which the Rs. 100 were handed to the respondent in October 1935 Dr. George's version is correct. It is corroborated by the evidence of the witness Mr. Mondieta (P. W. 2) who is a retired Registrar of the office of the Survey of India (he says the transaction was in November, but there is a slip of memory). The witness is quite certain of his facts. He says the respondent asked Dr. George for the arbitrator's fee and thereupon Dr. George took Rs. 100 from her bag in notes explaining that Rs. 50 were to be paid to the arbitrator and Rs. 50 only retained towards counsel's fee. This was after a discussion at Dr. George's house, where the parties and witness met and drank tea, on the result of the arbitration. There is also the evidence of the arbitrator Lala Shankar Nath P. W. 3. From this it appears that his fee was raised from Rs. 100 to Rs. 200 after October 1935. Lala Shankar Nath says he did not demand payment until his fee had been raised, which testimony corroborates the respondent. But he has testified that Dr. George wrote and told him (the documents show that this was in 1936) that Rs. 50 had been given by her to the respondent for payment of the arbitrator's fee. From the writing (p. 45) given by the respondent to Dr. George on 10th December 1934, acknowledging receipt of Rs. 100 out of Rs. 330 as fee and munshiana for defending her in Mr. King's suit, it appears that the balance was to be payable within one year from that date. So that in October 1935 Dr. George had still time to pay the

balance under her agreement with her counsel.

Our conclusion is that the respondent wrongfully retained for himself Rs. 50 which had been handed to him for payment to Lala Shankar Nath and that his conduct in doing so was grossly improper in the discharge of his professional duty. It is contended before us by counsel for the respondent that even if he retained Rs. 50 knowing that it was intended to be paid to the arbitrator he committed no criminal offence as he merely appropriated money due to him and this did not cause Dr. George any wrongful loss. But there is no criminal charge before us for decision and even if no criminal offence was committed, the respondent's conduct was in our opinion gravely improper on the part of a counsel and calls for disciplinary action. From our finding as to the facts, it follows that the respondent did not speak the truth when examined by the learned District Judge in denying that he was given the money for the arbitrator and not for himself—a fact which we must take into consideration in deciding what orders we have to pass against him.

On the other hand, it is clear that in October 1935 the respondent had not been paid his full fee and whereas previously Dr. George and he were on friendly terms (this is shown by the documents) a dispute arose owing to the arbitrator's award being unfavourable to Dr. George over the amount due from one to the other. There is no evidence that the respondent agreed to pay Rs. 130 for Dr. George's professional services or when, if ever, as fee for these services was fixed. The respondent has credited her with Rs. 50 more paid in cash towards his fee than Dr. George says she had paid, and with Rs. 50 on account of her professional services to his wife.

Having regard to all the circumstances, we think it proper to pass the following order: We suspend B from practice for three months but postpone the effect of this order until 1st October 1937 and direct him to pay the costs of the Advocate-General which we fix at Rs. 100 and also Rs. 500 towards the costs of Dr. George, the petitioner in this case. If he pays the said costs before 1st October 1937 the suspension will not take effect. If he does not so pay in the money by that date, the suspension will take effect on 1st October and continue for three months or, if the

money is paid before the expiry of three months, until the money is paid in.

S.O./R.K.

Order accordingly.

A. I. R. 1938 Lahore 251

JAI LAL AND BHIDE, JJ.

Emperor.

v.

Jagiri Lal — Accused — Respondent.

Criminal Appeals Nos. 212 and 213 of 1937, Decided on 20th July 1937, from order of Sess. Judge, Lyallpur, D/- 14th November 1936.

(a) *Telegraphs Act (1885), S. 27—Applicability — For offence under S. 27, there must be transmission of message without recovering charge therefor, required to be recovered before-hand—Defrauding should be result of such transmission — No offence under S. 27 when charge is not required to be recovered before-hand but it is to be recovered in terms of monthly bills submitted to telephone owners.*

Section 27 is intended only to apply to those cases in which the charge prescribed is recoverable before transmission of the message. The section contemplates that the defrauding should be the result of the transmission of the message without recovering the prescribed charge. [P 251 C 2; P 252 C 1]

Where the charges for the messages are not payable before the transmission of the messages according to the rules but it is to be recovered from the telephone owners by submitting monthly bills to them for the calls made by them and the head operator of the telephone exchange transmits a certain message on behalf of the telephone owner without recovering the charge for the message beforehand, the head operator cannot be said to have committed an offence under S. 27 of the Act. [P 251 C 2]

(b) *Interpretation of Statutes — Statute should be interpreted according to plain meaning of words and sentences.*

The first and foremost canon of interpretation is that a statute should be construed according to the plain meaning of the words and sentences contained therein. [P 252 C 1]

Mohammad Munir — *for the Crown.*

A. G. Maurice — *for Respondent.*

Bhide J. — This judgment will dispose of Criminal Appeals Nos. 212 and 213 of 1937, which arise out of two cases under S. 27, Telegraph Act, against the respondent Jagiri Lal. Three charges under this section were tried together in each of these cases. The respondent was convicted by the trial Court on most of these counts, but the learned Sessions Judge having acquitted him, the Local Government has preferred these appeals. The first important question which arises for decision in these appeals is whether the charges

against the respondent fall properly under S. 27, Telegraph Act. The section runs as follows :

If any telegraph officer transmits by telegraph any message on which the charge prescribed by the Government, or by a person licensed under this Act, as the case may be, has not been paid, intending thereby to defraud the Government or that person, he shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both.

The respondent Jagiri Lal was the Head Operator at the telephone exchange at Gojra in the Lyallpur district and the allegation against him was that he transmitted certain messages on behalf of a telephone-owner at Gojra, with the intention of defrauding Government. The charges for these messages were admittedly not payable before the transmission of the messages according to the Rules, but it was the duty of the respondent to prepare certain memoranda and register the particulars of the calls, so as to furnish the basis for the monthly bills to be submitted to the caller for payment. The prosecution case was that the respondent had either omitted to prepare these memoranda or had prepared false ones in order to defraud Government. Assuming for the moment that he did so, the question for consideration is whether the charge would fall under S. 27, Telegraph Act. The learned Sessions Judge has held that it would, though he has found in favour of the respondent on facts. But after carefully considering the wording of the section, it seems to me that the charge cannot properly be held to fall within its scope. The essence of the offence, according to the plain wording of the section would appear to be the transmission of a message 'on which the charge prescribed by the Government has not been paid', and the intention must be 'thereby to defraud the Government'. In the present instance, the charge prescribed by the Government was not payable in advance as stated above and consequently there was nothing wrong in the mere transmission of a message without payment of the charge. It follows therefore that the respondent could not intend to defraud the Government by the mere transmission of the message without payment. The section on the other hand, seems to me to contemplate that the defrauding should be the result of the transmission of the message without recovering the prescribed charge. The word 'thereby' and the con-

text in which it occurs in the section is noteworthy in this connexion.

The learned counsel for the Crown contended that the section is applicable as the message was one which was transmitted without recovering any charges, and the respondent either omitted to record the necessary particulars with respect to the call, or recorded false particulars. But if this be so, the offence would seem to consist in the omission to record the entries required by the rules and not in the transmission of the message without recovering the prescribed charge. The section however says nothing about omission to record the particulars regarding the call. The fact appears to me to be that the section was intended only to apply to those cases in which the charge prescribed was recoverable before transmission of the message and the situation which has arisen in the present case was not contemplated by the framers of the section. The marginal note of the section also would seem to support this view. The construction sought to be placed on the section by the learned counsel for the Crown appears to me to be a forced one. The first and foremost canon of interpretation is that a statute should be construed according to the plain meaning of the words and sentences contained therein and applying this test, I feel no hesitation in holding that the charges against the respondent do not fall properly within the purview of S. 27 of the Telegraph Act. The acts alleged, might constitute offences under the Indian Penal Code, but the respondent was not charged with any other offence and it is therefore not necessary to consider that aspect of the question for the purpose of the present appeals.

On the above finding, it is unnecessary to discuss the findings of facts of the learned Sessions Judge. I would accordingly dismiss these appeals.

Jai Lal J. — I agree.

A.L./R.K. *Appeals dismissed.*

A. I. R. 1938 Lahore 252

ABDUL RASHID J.

Singha Khobi — Convict — Appellant.

v.

Emperor.

Criminal Appeal No. 809 of 1937, Decided on 8th November 1937, from order of Special Magistrate, Punjab and Delhi at Lahore, D/. 20th January 1937.

(a) Penal Code (1860), S. 457—Mere recovery of complainant's shirt from accused person is not sufficient for conviction under S. 457.

The recovery of a shirt alleged to belong to the complainant from the person of accused charged under S. 457 is not alone sufficient for his conviction under that section. [P 252 C 2]

(b) Criminal Trial—Confession retracted—Evidentiary value.

A retracted confession may be valuable evidence against the accused making the confession, but it is of very little value against a co-accused. [P 252 C 2 ; P 253 C 1]

S. N. Bali for Advocate-General —

for the Crown.

Judgment.—On 23rd January 1936 a burglary took place in the quarters of Rishi Raj Sarup and Charanji Lal, railway clerks, at Panipat. Some shirts, coats and other clothing belonging to the two complainants were carried away by the culprits. Four persons, namely Mubarak Ali, Singha, Lajja and Atu, were placed on their trial for this burglary under S. 457, Penal Code. Atu was acquitted by the trial Court. Mubarak Ali and Singha were convicted under S. 457, Penal Code, and sentenced to five years' and nine months' rigorous imprisonment respectively. Lajja was awarded a sentence of six months' rigorous imprisonment under S. 411. The three convicts have preferred separate appeals to this Court from jail which can be conveniently disposed of by one judgment.

Singha, appellant, made a confession on 7th April 1936, and this was duly recorded by a Magistrate under S. 164, Criminal P. C. One shirt (Ex. P.3) belonging to one of the complainants was recovered from the house of Singha on 3rd April 1936. This evidence in my opinion establishes the guilt of Singha, appellant, beyond all reasonable doubt, and I therefore dismiss his appeal. The only evidence against Mubarak Ali, appellant, is that a shirt alleged to belong to one of the complainants was recovered from his person on 11th February 1936. This shirt has been identified by one of the complainants as his property. According to the confession of Singha, only one quilt, one durrie and one mattress were taken away by Mubarak Ali out of the articles stolen at Panipat. The stolen shirt did not fall to Mubarak Ali's share. Moreover, the recovery of a shirt from the person of Mubarak Ali in my opinion is not sufficient for his conviction under S. 457, Penal Code. A retracted confession may be valuable evi-

dence against the accused making the confession but it is of very little value against a co-accused. In these circumstances I am not satisfied that Mubarak Ali participated in the burglary in question. Accordingly I accept the appeal of Mubarak Ali, and acquit him.

Three articles, namely a coat, a durrie and a quilt belonging to the complainants were recovered from the house of Lajja on 12th February 1936, that is, about three weeks after the commission of the burglary. This evidence in my opinion is sufficient for the conviction of Lajja, appellant, under S. 411, Penal Code. I therefore dismiss his appeal.

V.B.B./R.K. *Order accordingly.*

A. I. R. 1938 Lahore 253

DALIP SINGH AND SKEMP JJ.

B. C. G. A. Punjab Limited —
Defendant — Appellant.
v.

Bharat Krishna Trading Company Limited, Plaintiff — Respondent.

First Appeal No. 19 of 1936, Decided on 7th May 1937, from decree of Senior Sub-Judge, Montgomery, D/- 23rd December 1935.

Contract—Pucca Arhtia is so-called agent acting as principal—S. 230, Contract Act, does not apply to Pucca Arhtia.

Ordinarily the words "Pucca Arhtia" convey that the so-called agent is acting as a principal on behalf of the person with whom he buys or sells the commodities in question. There can therefore be no question of the application of S. 230 in his case. [P 254 O 1]

Aohhru Ram and Indar Deva —
for Appellant.

Shamair Chand and Arjan Das —
for Respondent.

Dalip Singh J. — The plaintiff, the Bharat Krishna Trading Co. Ltd. Okara, sued the two defendants, the B. C. G. A. Punjab, Ltd. Khanewal, and the Seeds Department, B. C. G. A. Punjab, Ltd. Khanewal, for recovery of Rs. 51,474.3.0 on the basis of a bahi account. The plaint is reproduced in extenso in the judgment of the trial Court printed in Vol. III of the printed paper-book at p. 65; so also is reproduced the entire written statement of the defendant-respondent, B. C. G. A. Punjab, Ltd. Khanewal. The defence of

the other defendant was naturally the same, as it was alleged by the plaintiff that the one was merely a branch of the other though an alternative plea was taken that in any case defendant 1 was a partner with defendant 2. The plaintiff in brief alleged that he had entered into certain transactions of forward contracts of wheat and gram on behalf of the Seeds Department, Okara, which was again, according to the plaintiff, only a branch of defendant 1, the alternative plea again being taken that defendants 1 and 2 were, at any rate, admitted partners of the Seeds Department, Okara firm. The plaintiff alleged that owing to these transactions, after accounts had been gone into, a loss occurred by reason of the rates falling below the contract rate and in accordance with term 5 of his agreement with the Seeds Department, Okara, printed in Vol. III, p. 108, he called upon the defendants to make good the loss to the extent warranted by clause 5 of the said agreement that the defendants refused to make the deposit demanded by him and that therefore he settled the forward contracts, as he was entitled to do under clause 5 of the agreement, with the result that there was a loss of Rs. 47,325 8 0 principal, in addition to which the plaintiff claimed Rs. 4148.14.0 as interest due: thus making up the total claim of Rs. 51,474.3 0.

The defendants in reply raised all kinds of pleadings which do not now concern us and the trial Court framed issues which are printed in Vol. I, pp. 24 and 27, of the printed paper book, and also in the judgment at p. 74. Most of the relevant issues framed were decided in favour of the plaintiff and finally the Court passed a decree for Rs. 45,129.1.9 with proportionate costs. The reason for the difference between the sum allowed and the sum claimed was that the Court held that the plaintiff was not entitled to settle accounts on 1400 bags of gram Maghar, 200 bags of wheat Pbagan and 800 bags of gram Maghar. This amounted to a total of Rs. 2676.10.3, and, along with an arbitration fee of Rs. 20, which was also disallowed, made the difference between the two sums, adding the item of interest on damages which the Court disallowed. Both sides have appealed, the defendant claiming that nothing was due to the plaintiff at all and the plaintiff claiming that the sums disallowed by the Court

had been wrongly disallowed. I shall deal first with the main appeal, namely that of the defendant. The learned counsel contended, firstly, that the plaintiff was not competent to sue inasmuch as he was only an agent and the names of the principals had been disclosed to the parties concerned. I do not consider that there is any force in this contention at all. It was clearly found by the Court, and it was not contested before us, that the plaintiff acted as a *Pacca Arhtia*. Now, ordinarily speaking, the words "*Pacca Arhtia*" convey that the so-called agent is acting as a principal on behalf of the person with whom he buys or sells the commodities in question. There can therefore be no question of the application of S. 230, Contract Act. What the learned counsel for the appellant endeavoured to argue was that the term "*Pacca Arhtia*," which occurs in the agreement printed in Vol. III at p. 108, meant something different from the ordinary connotation of the term because he contended that the term was not a term with a fixed meaning but varied according to the different markets where the term might be employed. This may be so, but no such plea was taken by the defendants; on the contrary, they pleaded that the plaintiff was not a "*Pacca Arhtia*" at all and when faced with the express agreement, they relied on the fact that Kuljas Rai had not been competent to execute any such agreement, or had not, as a matter of fact, executed it. It was held by the Court and the matter has not been contended before us that Kuljas Rai did execute the agreement in question and therefore the point now sought to be raised by the learned counsel for the appellant does not really arise. I would therefore repel the first contention. (After discussing evidence on other points raised, their Lordships continued.) The result is that the appeal of the defendant-appellant fails and is dismissed with costs. Turning now to the plaintiff's cross-appeal I have already dealt with the item of Rs. 2676.10.3 which must be allowed. The learned counsel for the appellant has not pressed the item of Rs. 20 (arbitration fee) or the item for interest upon damages; nor has he pressed the claim to interest up to date of suit or to future interest. This sum should therefore be added to the sum allowed by the trial Court with proportionate costs to the plaintiff-appellant throughout. The plaintiff's cross-appeal is

therefore accepted with costs proportionate to the amount allowed.

Skemp J.—I agree.

B.D./R.K.

Order accordingly.

A. I. R. 1938 Lahore 254

BHIDE J.

Mohammad Din and others —

Defendants — Appellants.

v.

*Mohammad Din and others, Plaintiffs
and others — Defendants —*

Respondents.

Second Appeal No. 242 of 1937, Decided on 14th June 1937, from decree of Dist. Judge, Sialkot, D/- 29th October 1936.

Limitation Act (1908), Art. 120 — Applicability—Representative suit by certain Mahomedans for declaring certain land as graveyard and for injunction directing defendants to remove buildings erected thereon—Suit is governed by Art. 120.

Where certain Mahomedan residents bring a suit on behalf of all the Mahomedan residents for a declaration that certain property is a graveyard and for an injunction directing certain Mahomedans to remove the buildings erected by them on portions thereof the suit is governed by Art. 120, as the acts of the defendants amount to ouster of the plaintiffs from the use of the common land which was reserved for specific purpose, i.e. for grave-yard : *A I R 1933 Lah 705, Rel. on.*
[P 254 C 2; P 255 C 1]

Shabir Ahmad — *for Appellants.*

Mohammad Amin — *for Respondents.*

Judgment. — This second appeal arises out of a suit by certain Mahomedan residents of Sialkot City suing on behalf of all the Mahomedan residents of Mohalla Sharianwala for a declaration that certain property is a graveyard and for an injunction directing the defendants to remove the buildings erected by them on portions thereof. The suit has been decreed by the Courts below and defendants have appealed. Four points were raised by the learned counsel for the appellants, viz. (i) that the suit was barred by time under Art. 32, Limitation Act, (ii) that it was barred by the rule of *res judicata*, (iii) that the decree for possession was not justified, and (iv) that costs should not be allowed.

As regards the first point, the learned counsel relied mainly on *A I R 1929 Lah 186*.¹ But this ruling was considered in

¹ *Nand Ram v. Jai Chand, A I R 1929 Lah 186*
=112 I C 844.

the Full Bench ruling reported as 14 Lah 267² and in view of the remarks at p. 280 of that ruling, I think the present suit was rightly held to be governed by Art. 120, Lim. Act. It was found by the Courts below that buildings were constructed within four or five years and this finding of fact must be accepted as final. The suit was therefore within time. There is no force in the next contention. The previous suits were not of a representative character and Explan. 6 to S. 11, Civil P. C., is clearly inapplicable. The decree for possession seems to be wrong, the suit being for a declaration and injunction. This was conceded by the learned counsel for the respondents.

As the defendants have succeeded to the above extent, and in view of all the circumstances, I think that parties should bear their costs in this Court. I accept the appeal to the extent of setting aside the decree for possession and granting plaintiffs the declaration and injunction as prayed for. Defendants must remove the buildings within three months of this date, otherwise plaintiffs can take out execution for removal thereof. Parties to bear their costs in this Court.

K.B./R.K.

Appeal allowed.

2. Mastan Singh v. Santa Singh, A I R 1938 Lah 705=145 I O 553=14 Lah 267=34 P L R 618 (F B).

A. I. R. 1938 Lahore 255

DALIP SINGH AND SKEMP JJ.

Madan Lal — Plaintiff — Appellant.

v.

*Ganga Bishan and others —**Defendants — Respondents.*

First Appeal No. 319 of 1936, Decided on 13th July 1937, from decree of Senior Sub-Judge, Gurdaspur, D/. 31st July 1936.

(a) Power of Attorney — Construction — Power of attorney must be strictly construed — Word, "etc." used in such power must be construed as ejusdem generis with rest of document — Power to carry on proceedings in "Court etc." — Document cannot be construed as conferring power to present documents before Sub-Registrar or Registrar.

The Registration Act being a technical measure, must be strictly complied with and it is well settled law that a power of attorney must be strictly construed and limited to the exact words contained therein. The word "etc." used in power of attorney must therefore be construed as ejusdem generis with the rest of the document. A Sub-Registrar or a Registrar is not a Court and therefore a document empowering a person to carry on proceedings in a Court, etc., cannot be construed

as conferring power on such person to present the document before a Sub-Registrar or a Registrar.

[P 257 C 1]

(b) Registration Act (1908), Ss. 34 and 75 (2) — Presentation under S. 75 (2) does not take the place of presentation under S. 34 as procedure followed under each is different (*Obiter*).

A presentation of documents under S. 75 (2), does not take the place of a presentation under S. 34. The procedure to be followed after presentation under S. 75 (2) is different from the procedure to be followed after a presentation under S. 34 and this might make a vital difference in a particular case: A I R 1922 P C 279, *Disting.*

[P 258 C 1]

(c) Registration — Wrong entry — Document intended and ordered to be registered as partnership deed entered by mistake in wrong register — Document is validly registered as partnership deed.

The mere fact that a document, which was intended to be registered as an alienation, is by mistake entered in some wrong book, does not make the registration invalid for the purpose of an alienation; so similarly where a document is intended to be registered as a partnership deed under the order of the Registrar but is by mistake entered in the book pertaining to alienations, the document is not validly registered as an alienation but is only validly registered as a partnership deed.

[P 258 C 1]

(d) Mortgage — Equitable — Suit on — Pleadings must be strictly construed — Documents of title of moveables such as machinery cannot be construed as those of immovables only because in interval machinery had become immovable property by fixation.

In a suit on equitable mortgage, the pleadings must be fairly strictly construed as it is easy to assert an equitable mortgage where none exists merely because some title deed or other has passed to the party asserting the equitable mortgage. The document of title of moveables such as machinery cannot be construed as documents of title of immovable property because in the interval the moveable machinery had by fixation to the earth become immovable property. It is a well-known principle that the scope of an equitable mortgage does not extend beyond the scope of the title deeds.

[P 258 C 2 ; P 259 C 1]

J. G. Sethi and M. L. Sethi —

*for Appellant.*M. C. Mahajan and Shamsheer Bahadur
— *for Respondents.*

Dalip Singh J.—The plaintiff in this case sued for dissolution of partnership, recovery of Rs. 25,000 or as much amount as might be found due to the plaintiff from the defendants, after rendition of accounts, on the security of certain property mentioned in the plaint printed at p. 1 of the paper book. The plaintiff alleged that there had been first a partnership between the defendants and himself under a partnership deed dated 14th June 1932. On 3rd January 1934 this partnership deed was cancelled and accounts being

taken, a sum of Rs. 25,000 was found due to the plaintiff from the defendants. Separate promissory notes on various dates given in the plaint had been given by the defendants with respect to this amount of Rs. 25,000. On 9th January 1934 an equitable mortgage by deposit of title deeds was made with respect to the machinery employed in the business. A writing was also secured giving a list of the documents of title so deposited on 11th January 1934. In order to carry on the partnership business in the future, a new deed of partnership was drawn up on 9th January 1934. In this new partnership deed, there was a clause charging a sum of Rs. 20,000 on the land, building, machinery and goods of the factory. The shares were also fixed in the partnership deed; the plaintiff had a six anna share and the defendants a ten anna share. This partnership continued from 9th January 1934 to 8th August 1934. The defendants had since become insolvents and hence the suit for dissolution of partnership, rendition of accounts and for a declaration as to security.

The defendants denied the equitable mortgage: they denied the legal mortgage, pleaded ignorance of the partnership deed of 9th January 1934 because according to them the deed was not registered, and generally contested the plaintiff's suit except as to dissolution of partnership. The defendants having been declared insolvents, the Official Receiver was made a party. A decree for dissolution of partnership and rendition of accounts was granted without objection and the question of the security and the amount due on this item of Rs. 20,000 and for what period the accounts were to be taken was left open for the final decree. The Court then proceeded, having drawn up issues on the pleadings, to find that the plaintiff had not succeeded in proving any equitable mortgage by deposit of title deeds on 9th January 1934 because the letter of 11th January 1934 embodied the transaction and being a document in writing not registered, no equitable mortgage or any kind of mortgage was effected. As regards the legal mortgage, it held that the document in question had not been properly registered and was not properly stamped and therefore no legal mortgage was effected on the houses and buildings, these being immovable property. On the question of machinery, it pointed out that there was no evidence to determine whether the

machinery was fixed to the earth or not but presumably it was so fixed and that at any rate as land and buildings were included in the property sought to be mortgaged, the deed needed registration and hence there was no legal mortgage on any of the three kinds of property mortgaged. On the question of accounts, etc., it gave no decree on account of the partnership, old or new, but it held that the plaintiff was entitled to a simple money decree for Rs. 20,000 which had been acknowledged in the partnership deed and for which promissory notes had been executed by the defendants. It pointed out that though no claim had been based on these promissory notes, yet the promissory notes were separately mentioned in the plaint and hence it gave a decree in equity for the total amount of the promissory notes. Interest was disallowed as not claimed and hence the plaintiff got a simple money decree for Rs. 20,000 with proportionate costs against defendants 1 and 2.

The plaintiff has come in appeal and his learned counsel urges: (1) that there was a legal mortgage and that the trial Court was wrong in holding that the document was not properly registered; (2) that there was an equitable mortgage, that the trial Court had rightly held that the documents were documents of title and had wrongly held that the writing of 11th January was a repository of the transaction and hence there was an equitable mortgage of the machinery. In urging this plea, he seemed to contend that the machinery was immovable property but really in subsequent arguments he took an alternative position, namely that if the machinery was immovable property, then an equitable mortgage was created on 9th, 10th and 11th January, and if the machinery was moveable property, then the legal mortgage of that machinery was valid to that extent without registration. No other points were really urged in the appeal. As regards the question of the legal mortgage, the defence of the learned counsel for the respondents was that the mortgage deed had never been properly presented for registration and therefore any registration effected was invalid; secondly that the registration was only as a partnership deed and not as a mortgage deed and its mere entry in the book for mortgages did not make the registration valid as a registration of a mortgage deed. On the question of equitable mortgage it

was contended that the plaintiff pleaded an equitable mortgage on 9th January but no equitable mortgage on that date was proved at all. As regards the equitable mortgage created by deposit of documents on 9th, 10th and 11th it was contended: (1) that the letter of 11th of January was a repository of the transaction and therefore needed registration; (2) that there was as a matter of fact no intent to create an equitable mortgage at all and the evidence was reconcilable with the deposit of documents on account of the legal mortgage created on 9th January 1934; (3) that the documents in question were not documents of title at all; and (4) that there could be no equitable mortgage of moveable property to which the documents referred. I shall now take up these points separately: The facts so far as the legal mortgage is concerned are as follows:

One Mohammad Ismail, who had a power of attorney on behalf of the plaintiff to present documents in Court, etc. but who was not specifically authorized to present documents to the Sub-Registrar or the Registrar under S. 33 and whose power of attorney does not appear to have been executed before a Sub-Registrar or Registrar, though it appears to have been authenticated by the Sub-Registrar, presented the mortgage deed in question before the Sub-Registrar. The Sub-Registrar in the absence of the defendants after notice held that the defendants were denying execution by implication and therefore refused registration. An appeal was made to the Registrar and he held that Mohammad Ismail who had presented the appeal and the document was empowered to present documents for registration because of the word "etc." in the power of attorney. I do not consider that this conclusion was correct. The Registration Act being a technical measure must be strictly complied with and it is well settled law that a power of attorney must be strictly construed and limited to the exact words contained therein. The word "etc." must therefore be construed as *eiusdem generis* with the rest of the document. A Sub-Registrar or a Registrar is not a Court and therefore a document empowering Mohammad Ismail to carry on proceedings in a Court etc., cannot be construed as conferring power on Mohammad Ismail to present the document before a Sub-Registrar or a Registrar. Hence I have no hesitation in

1938 L/88 & 34

holding that the first presentation by Mohammad Ismail of the document was not valid and the appeal filed before the Registrar was also not a validly filed appeal. The Registrar therefore had, strictly speaking, no jurisdiction to decide on the question as there was no proper appeal before him. The Registrar however proceeded to hold that the document was not properly stamped as a mortgage deed but that the document represented one transaction with two aspects, namely, (1) as a partnership deed pure and simple and (2) as containing a clause whereby a charge was created on immovable property. He held therefore that the document had to be registered because it could be registered validly as a partnership deed without being registered as a mortgage deed. The question of stamp therefore on the deed in question did not arise for the purpose of registration. It was a matter for impounding the document and levying a penalty, which matter he proposed to deal with subsequently. In the meantime he ordered registration of the document by the Sub-Registrar holding that execution by the defendants was proved. He seems to have taken no steps about impounding the document. The document was re-presented under the provisions of S. 75 (2) to the Sub-Registrar by the plaintiff himself and the Sub-Registrar ordered its registration according to the order of the Registrar. By some mistake in the procedure, the document instead of being entered in the book for registration of partnership deeds was entered in the book reserved for mortgages, etc. It has been contended by the learned counsel for the appellant that the presentation by the plaintiff himself to the Sub-Registrar validated the registration and that the Registrar had no power, having ordered the document to be registered, to determine whether the document was a mortgage or not and the question of the lack of stamp on the document only meant the paying of a penalty now, because the document had been validly registered though improperly stamped.

The learned counsel relied on 44 All 514¹ and 36 P L R 371² at p. 376. The

1. Chhotey Lal v. Collector of Moradabad, A I R 1922 P C 279=69 I C 44=49 I A 375=44 All 514 (P C).

2. Barkhudar Shah v. Mt. Sat Bharal, A I R 1931 Lah 677=182 I O 881=86 P L R 371=15 Lah 583.

second ruling need not concern us. It is a ruling based on particular facts and any extension of the principles, if any, laid down in it, as sought by the learned counsel for the appellant, is not possible in view of the Privy Council rulings reported in 23 All 233³ at p. 241 and 37 All 49⁴ at p. 54. So far as 44 All 514¹ is concerned, it has no bearing on the present case. All that it lays down is that the presentation under S. 75 (2), if valid, makes it obligatory on the Sub-Registrar to register but that if the first presentation under S. 34 is valid, the Sub-Registrar may register without a presentation under S. 75 (2). This is obviously a totally different point from the present one. In the present case what is really sought is that the presentation under S. 75 (2) should take the place of a presentation under S. 34, Registration Act. The matter is not free from difficulty, but as at present advised, I would be inclined to hold that a presentation under S. 75 (2) does not take the place of a presentation under S. 34. The procedure to be followed after a presentation under S. 75 (2) is different from the procedure to be followed after a presentation under S. 34 and this might make a vital difference in a particular case, but I express no final opinion on this point. Secondly, even if I am wrong in this, I am definitely of opinion that the Registrar having ordered registration of the document exclusively as a partnership deed and not as a mortgage deed, the deed could not become mortgage deed merely because by some mistake the entry of the registration was made in the wrong book. It is not clear how this entry came to be made, but it seems to me clear that if, as held by their Lordships of the Privy Council, the mere fact that a document, which was intended to be registered as an alienation, was by mistake entered in some wrong book, does not make the registration invalid for the purpose of an alienation; so, similarly, where a document was intended to be registered as a partnership deed under the order of the Registrar but was by mistake entered in the book pertaining to alienations, the document is not validly registered as an alienation but is only validly registered as

a partnership deed. Therefore the document not being registered as a mortgage deed was not validly registered as such and no legal mortgage of immovable property was thereby created. Hence it follows that there was no legal mortgage of the land and the buildings.

As regards the machinery however, there is no evidence on the point one way or the other and I do not think there is any presumption that the machinery was either immovable or moveable property. It would all depend on the facts and circumstances of each case and the result might be different with reference to particular pieces of machinery. The legal mortgage was therefore good so far as there was any moveable machinery at all. I am unwilling to draw any presumption in favour of the plaintiff on this point because his own plea of the equitable mortgage of the machinery would rather tend to show that there was no moveable machinery at all and that the machinery was a fixture in the land and therefore should be treated as immovable property, but in the absence of evidence on the point, I am not prepared to give a final decision other than to hold as stated before that the legal mortgage was good qua any machinery that was moveable property if any such existed.

I now pass to the question of the equitable mortgage. The various documents of title are Exs. P. 1 to P. 21-A, printed on pages 71 to 114 of the printed paper book. It is unnecessary to give a detailed analysis of each of them. It appears to me that essentially these are documents relating to pieces of machinery. I do not see that documents of title of moveables such as machinery can be construed as documents of title of immovable property because in the interval the moveable machinery had by fixation to the earth become immovable property. It is a well known principle that the scope of an equitable mortgage does not extend beyond the scope of the title deeds. It is not at all clear that the documents of title referred to the entire machinery which formed the machinery as finally erected in the business. I am therefore unable to see how there could be an equitable mortgage created by those documents of title which referred to moveable property. I consider however that the writing of 11th January did not purport to be a repository of the transaction and did not therefore need

3. *Mt. Mujibunnisa v. Abdul Rahim*, (1901) 28 All 238=28 I A 15=7 Sar 829 (P O).

4. *Jambu Prasad v. Muhammad Nawab Aftab Ali Khan*, A I R 1914 P O 16=28 I O 422=42 I A 22=37 All 49 (P O).

registration, differing in this from the trial Court. But here again I also consider that the plaintiff had definitely pleaded an equitable mortgage of 9th January. The evidence shows that documents of title were deposited on 9th, 10th and 11th. It is not shown what documents were deposited on 9th at all. Therefore there was no equitable mortgage on 9th January 1934 as pleaded by the plaintiff and in matters of this kind the pleadings must be fairly strictly construed as it is easy to assert an equitable mortgage where none exists merely because some title deed or other has passed to the party asserting the equitable mortgage. On both these grounds, I would therefore hold that no equitable mortgage of the machinery is proved at all in this case. The result is that the plaintiff's appeal fails. In the peculiar circumstances however I would leave the parties to bear their own costs in this appeal.

Skemp J.—I agree.

S.C./R.K.

Appeal fails.

A. I. R. 1938 Lahore 259

ADDISON AND ABDUL RASHID JJ.

Sonun Ram Mukhi Lal Chand and others — Plaintiffs — Appellants.

v.

Sewa Ram and others — Defendants — Respondents.

First Appeal No. 79 of 1937, Decided on 2nd December 1937, from decree of Sub-Judge, First Class, Dera Ghazi Khan, D/- 4th November 1936.

Partnership—Dissolution — Until accounts are settled, individual partners cannot sue for their share of any separate part of partnership assets.

After dissolution, until the accounts of the partnership are completely settled, individual partners cannot sue for their share of any separate part of the partnership assets. Such suit will lie if the partnership has been completely wound up and the asset has become available to the partnership thereafter.

[P 260 C 1]

R. L. Anand I — *for Appellants.*

L. M. Datta — *for Respondents.*

Addison J. — The plaintiffs are the descendants of Lal Chand. They pleaded that there was a firm whose partners were Lal Chand (a five annas share), Gonda Ram, the deceased father of Pari Ram minor, defendant 2 (a four annas share), Khan Chand, the deceased uncle of Lekhu Ram, defendant 3 (a three and a half

annas share) and Ganga Ram, the deceased nephew of Tharia Ram, defendant 4, (a three and a half annas share). It was stated that Gonda Ram, the father of Pari Ram, minor, usually worked at the shop and that he got from defendant 1, Sewa Ram, a registered mortgage deed, dated 18th January 1924, for Rs. 2500 in his own favour, though the money was really advanced by the firm. Gonda Ram died in 1927 and it is alleged that after his death the mortgagor, Sewa Ram, borrowed a further sum from the firm and executed a new mortgage deed, which is in suit, for Rs. 4500 on 13th November 1929 in favour of the firm which at that time was made up of the plaintiffs, Pari Ram, the minor son of Gonda Ram, Khan Chand and Ganga Ram. It was further stated that Ganga Ram, now deceased, who is represented by Tharia Ram, defendant 4, orally transferred the rights under this last mortgage deed, which included the sum due on the first mortgage deed, in favour of the plaintiffs on 20th July 1932 and had this transaction entered in the firm's books. Accordingly the plaintiffs brought the present suit on the basis of the mortgage, claiming to be entitled to the whole mortgage money.

The suit was resisted by the mortgagor and by the minor Pari Ram, defendant 2. The mortgagor pleaded that there was a contractual partnership, registration of which was necessary, that he had no dealings with, and did not know of, such a firm as was set up in the plaint, that his dealings were with Gonda Ram alone in whose favour the first mortgage deed was executed and that the second deed was secured from him by Lal Chand, a member of the plaintiff's family, by undue influence and fraud. The minor Pari Ram, defendant 2, pleaded that the debt was due to him alone, that he was not bound by the subsequent deed, and that Ganga Ram had no right to transfer his rights in favour of the plaintiffs. He pleaded that the partnership must be taken to have been dissolved by the death of his father. The trial Court held that there was a partnership and that the dealings were those of the partnership. It found that Ganga Ram made the transfer in favour of the plaintiffs but that he had no right to do so without the consent of the minor Pari Ram, who stood in his father's shoes with respect to the partnership and whose grandfather was not consulted though he

was alive. With respect to Khan Chand's share it held that the transfer of it was valid as Lekhu Ram, his nephew, defendant 3, did not object to it. It then went on to hold that the plaintiffs could not sue for the entire mortgage money as the rights of Pari Ram minor could not be transferred and that a suit for the plaintiff's share of the mortgage money would not lie. The suit was therefore dismissed and the plaintiffs have preferred this appeal.

In our judgment this suit was properly dismissed. Under S. 263, Contract Act, after dissolution of partnership the rights and obligations of the partners continue in all things necessary for winding up the business of the partnership. It is true that, seeing that Gonda Ram died in 1927, a suit for dissolution of partnership and settlement of accounts will not lie at the instance of any of the parties except Pari Ram minor, limitation for whom is protected by his minority. Until the accounts of the partnership are completely settled, individual partners cannot sue for their share of any separate part of the partnership assets. It is alleged that this mortgage is a part of those assets. As a suit for accounts is still maintainable at the instance of Pari Ram, with whom no settlement has been made, the suit of any partner for his share of this mortgage cannot lie. It would have been different had the partnership been completely wound up and this asset had become available to the partnership thereafter. In such cases it has been held that a suit will lie for its recovery and that when recovered the money should be distributed according to the shares of the partners. This follows from S. 263, Contract Act, which was in force at the time while S. 47 of the new Partnership Act is more or less to the same effect. For the reasons given above we dismiss this appeal but make no order as to costs of this Court.

D.S./R.K.

Appeal dismissed.

A. I. R. 1938 Lahore 260

YOUNG C. J. AND ABDUL RASHID J.

Uttam Singh Sochet Singh
Convict — Appellant.

v.

Emperor.

Criminal Appeal No. 896 of 1937, Decided on 10th December 1937, from order of Sess. Judge, Amritsar, D/- 23-7-1937.

Criminal Trial—Murder—Enhancement of sentence—Power to enhance sentence should be sparingly exercised by High Court only when failure to do so would lead to serious miscarriage of justice.

The power to enhance sentences should be sparingly exercised by the High Court and sentences should be enhanced only in cases where the failure to enhance the sentence would lead to a serious miscarriage of justice. The mere fact that the High Court, had it been trying the case, might have imposed capital sentence is not a sufficient reason for enhancement. [P 262 C 1]

J. G. Sethi — *for Appellant.*

Diwan Ram Lal, Advocate-General —
for the Crown.

Young C. J.—Uttam Singh, Ghanaya Lal and his son Mulkh Raj have been convicted under S. 302, read with S. 149 I. P. C., for the murder of Narain Singh. Uttam Singh has been sentenced to death, while a sentence of transportation for life has been awarded to each of the other appellants. All the three culprits have also been sentenced to ten years' rigorous imprisonment under Ss. 307/149 I. P. C., for the attempted murders of Jindar Singh and Indar Singh. The learned Sessions Judge has ordered that this sentence will come into operation only if they are acquitted of the charge of murder. Uttam Singh has preferred an appeal to this Court through Mr. Sethi. Ghanaya Lal and Mulkh Raj have filed a separate appeal through Dr. Nand Lal. Both these appeals can be conveniently disposed of by one judgment.

Briefly stated, the case for the prosecution is, that there existed a dispute between Mangal Singh, the father of Narain Singh deceased, and Ghanaya Lal appellant over the possession of a house of which each claimed to be the mortgagee with possession. Shortly before sun set on 9th February 1937, Jindar Singh (P. W. 5) one of the sons of Mangal Singh, was returning home from the fields and as he passed in front of the shop of Ghanaya Lal the appellants together with five others came out of the shop and attacked him. The assailants were armed with spears, takwas and dangs. Jindar Singh raised an outcry and his father Mangal Singh, his mother Mt. Kisso and his brother Indar Singh ran to his assistance. On seeing Indar Singh the assailants left Jindar Singh and assaulted Indar Singh. Narain Singh ran to the assistance of his brothers and he too was attacked and beaten till he dropped down having been pierced through

the chest by Uttam Singh with a spear. The whole occurrence was witnessed by Achhar Singh (P. W. 7), Banta Singh (P. W. 8) and Ajaib Singh (P. W. 9).

Mangal Singh the father of the deceased, at once proceeded to the police station which is situated at a distance of three miles from village Panjgarain. The first information report was lodged by him at 7 P. M. The version of the incident embodied in the first information report tallies in all important particulars with the version put forward by the prosecution in Court. The names of all the witnesses have also been mentioned in this report. The Sub-Inspector at once proceeded to the place of occurrence in a motor lorry and the investigation started at about 7.30 P. M., that is within two hours of the murder of Narain Singh. The statements of all the eye-witnesses were recorded immediately by the Sub-Inspector.

The principal criticism levelled against the eye-witnesses by the learned counsel for the appellants was that Banta Singh, Ajaib Singh and Achhar Singh were related to Mangal Singh, being his collaterals in the third degree, and that as there was enmity between Mangal Singh and his family on one side and Ghanaya Lal and his son on the other, the statements of Banta Singh, Ajaib Singh and Achhar Singh were not entitled to any weight. The murder took place in broad daylight. The first information report was lodged at the earliest possible opportunity, and Banta Singh, Ajaib Singh and Achhar Singh were mentioned therein as eye-witnesses. There was no personal enmity between Banta Singh, Ajaib Singh and Achhar Singh and the appellants. The mere fact that they are related to Mangal Singh is not sufficient, in our opinion, for discarding their testimony, particularly as their names were mentioned in the first information report and their statements were recorded by the Sub-Inspector of Police shortly after the occurrence. Jindar Singh and Indar Singh bore a large number of injuries on their persons and they were undoubtedly present on the scene of the occurrence. It is unlikely that they would give up the real assailants and implicate Uttam Singh, Ghanaya Lal and Mulkh Raj falsely. We are therefore of the opinion that it has been established beyond all reasonable doubt that Uttam Singh, Ghanaya Lal and Mulkh Raj killed

Narain Singh and inflicted a number of injuries on Jindar Singh and Indar Singh.

It was contended by Mr. Sethi on behalf of Uttam Singh that he could not possibly join Ghanaya Lal in the commission of this crime as, according to the prosecution he had been carrying on an illicit intrigue with the wife of Ghanaya Lal. The wife of Ghanaya Lal died about two years before the present occurrence. Uttam Singh had some enmity against Mangal Singh. It is quite likely therefore that after the death of the wife of Ghanaya Lal, Uttam Singh and Ghanaya Lal compromised their differences and were on friendly terms with each other. Moreover, there is no evidence on the record to prove that Ghanaya Lal knew that Uttam Singh had been carrying on an illicit intrigue with his wife. The fact that both Ghanaya Lal and Uttam Singh were inimical to Mangal Singh would naturally draw them together. We are therefore of the opinion that there is no force in the contention that Uttam Singh and Ghanaya Lal could not possibly participate in the commission of murder together. It has not been established that 8 persons participated in the assault on Narain Singh, Indar Singh and Jindar Singh. The provisions of S. 149, I. P. C. are therefore inapplicable to this case. This fact however does not make any material difference as the provisions of S. 34, I. P. C. are fully applicable. For the reasons given above, we dismiss the appeals of Uttam Singh, Ghanaya Lal and Mulkh Raj. We also confirm the sentence of death imposed on Uttam Singh.

The learned Advocate-General has presented a petition on behalf of the Local Government praying that capital sentences should be awarded to Ghanaya Lal and his son Mulkh Raj as they deliberately participated in the assault on Narain Singh which resulted in his death. Narain Singh had nine injuries on his person. All the injuries with the exception of injury No. 5 were of a minor character. Injury No. 5 resulted in his death and this according to the unanimous testimony of all the prosecution witnesses was inflicted on his person by Uttam Singh. In these circumstances, it cannot be said that the learned Sessions Judge was patently wrong in giving the lesser sentence to Ghanaya Lal and Mulkh Raj. Moreover, Mulkh Raj is 18 years of age and this fact

is a further justification for awarding him the lesser sentence permissible under S. 302. We are of the opinion that the power to enhance sentences should be sparingly exercised by this Court and sentences should be enhanced only in cases where the failure to enhance the sentence would lead to a serious miscarriage of justice. The mere fact that this Court had it been trying the case, might have imposed the capital sentence, is not a sufficient reason for enhancement. We therefore dismiss the petition for the enhancement of the sentences awarded to Ghanaya Lal and Mulkh Raj.

R.M./R.K.

Order accordingly.

A. I. R. 1938 Lahore 262

YOUNG C. J. AND MONROE J.

*Anant Ram Maya Ram**Convict — Appellant.*

v.

Emperor.

Criminal Appeal No. 926 of 1937, Decided on 8th November 1937, from order of Addl. Sess. Judge, Gujranwala, D/- 9th August 1937.

Evidence Act (1872), S. 32 Dying declaration—Gunshots in all parts of body—Probability is that victim would immediately become unconscious and would be incapable of making any declaration.

The receipt of forty-two gunshot wounds in the liver, heart, stomach and lungs and profuse haemorrhage occasioned thereby, would cause a great deal of shock and the probability is that the victim becomes unconscious within a few minutes incapable of making any dying declaration.

[P 262 C 2; P 263 C 1]

B. R. Puri — *for Appellant*Nazir Hussain, Asst. Legal Remembrancer — *for the Crown.*

Young C. J.—Maya Ram, Anant Ram, Kirpa Ram and Jagan Nath were charged in the Court of the learned Additional Sessions Judge of Gujranwala with the murder of Kartar Singh. They were also charged under Ss. 148 and 149, I. P. C. The learned Additional Sessions Judge found Anant Ram guilty under S. 302, I. P. C., and sentenced him to death. He convicted Maya Ram under Ss. 302/114, I. P. C. and sentenced him to three years' rigorous imprisonment. He acquitted Kirpa Ram and Jagan Nath. There is also before us an application for enhancement of the sentence passed against Maya Ram.

The motive for the murder of Kartar Singh—the fact that Kartar Singh was murdered is the only certain fact in this case—was alleged to be a quarrel concerning land. It is said that the accused went to the house of Sant Singh, father of the deceased, to tell him that on the next morning they would take possession of this disputed land; that a quarrel took place and that Kirpa Ram and Anant Ram fired guns at Kartar Singh killing him and also wounding other persons. The occurrence took place about 5.45 on the evening of 23rd March. After half an hour a doctor, who lived about a mile away, arrived on the scene. It is alleged that this doctor, seeing the serious condition of Kartar Singh, immediately recorded a dying declaration which dying declaration has been placed on the record. Further, there were nine persons who alleged that they were eye witnesses and who gave evidence. All these persons said that Kirpa Ram had fired his gun at the deceased. The first information report was made by one Hari Singh who, according to Sant Singh, one of the chief prosecution witnesses and the father of Kartar Singh, was present at the spot during the attack and till it was over.

The learned Sessions Judge, in a very careful and well thought out judgment, has come to the conclusion that every one of these prosecution witnesses has lied with regard to the firing of a gun by Kirpa Ram. He also has found that the dying declaration is a false and forged document deliberately produced for the purposes of this case. He also acquits Jagan Nath on the ground that he was not mentioned in the first information report; nor was he mentioned by Hari Singh (who made the first information report) when Hari Singh gave evidence in the committing Magistrate's Court. These various findings of the learned Sessions Judge are, of course, fatal to the prosecution case unless counsel could show that the learned Judge was not justified in coming to any such conclusions upon the evidence. We have carefully examined the evidence and the findings of the learned Additional Sessions Judge. We are satisfied, as he was, that the dying declaration was a forged and false document. Kartar Singh, according to the evidence of the Civil Surgeon, had no less than forty-two gunshot wounds on his body. That means that the gun must have been fired at a moderately close

range. His chest was pierced with fifteen different wounds. There were shot wounds in both right and left lungs. There were shot wounds in the pericardium and there were shot wounds in the heart itself. There were shot wounds in the liver, and, in addition, haemorrhage had been so severe that the various cavities of the body were filled with fluid blood. We would have been ourselves prepared to say, apart from any medical evidence, that a person who had received wounds of this description could certainly not have been conscious for more than a few minutes, and certainly would have been dead within a very short time. The Civil Surgeon takes the same view. He says: "Kartar Singh could not remain in a condition fit to make a statement for more than a few minutes after receiving his injuries." He says the receipt of forty-two gunshot wounds in the liver, heart, stomach and lungs, and the profuse haemorrhage occasioned thereby, would have caused a great deal of shock and that the probability is that the deceased became unconscious within a few minutes.

The Medical Officer, Basbir Mahmood, who took the dying declaration, could have not realized when he either forged the dying declaration by himself, or at the instigation possibly of Sant Singh, the serious nature of the internal injuries which the post mortem examination would disclose. Another point against the dying declaration is that this doctor kept the dying declaration for over 24 hours. He did not, although the Civil Surgeon and the police had arrived, hand over this dying declaration to the proper authorities for this considerable period of time. It appears to have been used as a bargaining factor between the two parties.

Another important point is that Hari Singh in the first information report states that Kartar Singh was dead when he left the scene of the murder. Hari Singh left before the doctor arrived and clearly would know the facts. We are also satisfied that Kirpa Ram never fired a gun even if he was there. Nothing is said about Kirpa Ram in the first information report although Hari Singh according to the father of Kartar Singh himself, was present during the whole occurrence and was the last to leave the spot when he left to make the first information report. Nothing is said about Kirpa Ram firing a gun even in the dying declaration which had been forged. So, whoever instigated the doctor to forge this document, that

person never knew that Kirpa Ram had fired a gun. Hari Singh who made the first information report does not mention that Kirpa Ram fired a gun, even in his evidence in the committing Magistrate's Court, and the final and conclusive point is the fact that although Kirpa Ram had a gun about two and a half years ago it had been forfeited and placed in the mal-khana where it happened to be at the date of this murder. Further no gun was found by the police in Kirpa Ram's house after the occurrence. A clue to the real truth on this matter is contained in the evidence of Fauja Singh. He says in cross-examination: "Everyone was certain that Kirpa Ram had a gun and hence I say that Kirpa Ram had a gun." The truth about this point clearly is that the complainant's party knew that Kirpa Ram had a gun but did not know that it had been forfeited and that it was then deposited in the malkhana.

Another curious point about this case is that no blood marks were found at the alleged scene of the murder, neither were there any spent cartridges found there. The learned Sessions Judge in spite of coming to these very sound conclusions came to the only unsound conclusion in the judgment eventually when he thought that he could on this evidence convict anyone. As regards Anant Ram he comes to the conclusion that there is some evidence of corroboration of this futile and useless evidence. This corroboration is that Anant Ram is proved to have bought a gun the day before the murder and to have bought with it 25 cartridges. It has also been proved that two cartridges have been used. We agree, this would have been corroborative evidence of value provided there had been some evidence upon which reliance could be placed which could be corroborated. We must clearly discard every scrap of evidence in this case, except this alleged "corroborative" evidence. This evidence therefore stands entirely by itself. The mere evidence that Anant Ram bought a gun and that he had used two cartridges and that the gun had been fired, is no evidence upon which the crime of murder could be brought home to him. There are many other occasions and things upon which two cartridges and a gun might be used.

This is a case where evidence, in our opinion, has been forged on behalf of the prosecution to procure a conviction. Every

single witness has given false evidence. There is also evidence of an attempt to implicate innocent persons. Every witness says that in addition to the four persons who were actually prosecuted in this case, there was a second rank of persons standing behind who were also interested in the murder. In this additional rank of persons whom the witnesses alleged were connected with the murder, are included every single male relative of the accused persons with the exception of one who was away at the time. This case presents every single objectionable feature which could possibly be found in any prosecution case. There is no legal evidence upon which we can find anyone guilty and therefore we accept this appeal and set aside the sentence of death passed upon Anant Ram. We accept the appeal of Maya Ram and acquit him and we direct that both Anant Ram and Maya Ram be set at liberty forthwith. The application for enhancement of sentence against Maya Ram is also dismissed. One Fauja Singh has filed an affidavit in this Court which is before us to-day. In this affidavit he says that he shot Kartar Singh and that Anant Ram is innocent. We direct that this affidavit be put in the hands of the District authorities for such action as they may care to take.

B.D./R.K.

Order accordingly.

A. I. R. 1938 Lahore 264

JAI LAL AND DALIP SINGH JJ.

Basheshar Nath Goela, Official Receiver — Plaintiff — Appellant.

v.

Baij Nath and others — Defendants — Respondents.

First Appeal No. 391 of 1937, Decided on 7th October 1937, from decree of Senior Sub.Judge, Delhi, D/- 24th June 1936.

(a) Insolvency — Receiver — Powers of — Estate vesting in Official Receiver — Other Receivers appointed to help Official Receiver — Vesting of estate in Official Receiver not vacated — Official Receiver can by himself maintain suits for recovery of estate.

Where the Insolvency Court vests the estate of an insolvent in the Official Receiver and later on appoints two other persons as additional receivers to administer the estate, without vacating the order vesting the estate in the Official Receiver and making another order vesting the estate in a body of three receivers, the Official Receiver can by himself maintain suits to recover the estate of the insolvent. [P 265 C 2]

(b) Contract Act (1872), S. 25—Mere acknowledgment of liability does not fall under S. 25.

Mere acknowledgment of liability without any express promise to pay or without any reference to the future liability to pay does not fall within the meaning of S. 25. [P 266 C 1]

(c) Limitation Act (1908), Art. 85—Mutual obligations and intentions to set off must be established — Express contract need not be proved.

In order to apply Art. 85, it must be established that there have been mutual obligations and that it has been the intention of the parties that such obligations would be set off against each other. It is not of course necessary that there should be direct evidence of a contract as such a contract can be gathered from the surrounding circumstances. [P 266 C 1]

Mehr Chand Mahajan and Hem Raj Mahajan — *for Appellant.*

Vishnu Datta — *for Respondents.*

Jai Lal J.—The Official Receiver of Delhi representing the estate of the firm, Gobind Parshad Shibban Lal, insolvents, instituted a suit against Baij Nath and his two minor sons Amar Nath and Ram Bharsa for recovery of Rs. 6459-1-6 on account of principal and interest alleged to be due from the defendants. It was alleged in the plaint that Baij Nath as the manager of the joint Hindu family constituted by himself and his two minor sons entered into a partnership with the firm Gobind Parshad Shibban Lal, his share in the profits and losses being two annas in the rupee, that the partnership remained up to 24th October 1928, after which Baij Nath became a servant of the firm on a salary of Rs. 100 per month, that on accounts being taken of the losses of the partnership and of advances made to Baij Nath during his period of service and partnership a sum of Rs. 4485-13-3 was found due from him on 7th July 1929, and that finally on a notice being given by the Official Receiver to Baij Nath he signed an acknowledgment in favour of the Official Receiver on 27th August 1931, in respect of Rs. 6459-1-6. The agreed rate of interest originally was 10 as. per cent. per mensem; but a notice had been served by the Official Receiver on 20th April 1930, demanding interest at 12 per cent. per annum. Interest at this increased rate had been included in the sum acknowledged on 27th August 1931.

Baij Nath defendant denied that he was a partner in the firm. He alleged that he was merely a servant and was promised a salary of Rs. 1200 per year and a share in

the profits of the business equal to two annas in the rupee. He asserted that his minimum salary was to be Rs. 1200 per year, and if the profits of the business did not amount to Rs. 1200 a year, then he had to be paid that sum by Gobind Parshad, one of the partners of the firm. He admitted that he had taken moneys from the plaintiff firm from time to time, but he pleaded that the plaintiff's suit was barred by time. The other two defendants pleaded that they were not liable for the money advanced to Baij Nath. Amar Nath attained the age of majority during the pendency of the suit and was allowed to plead as a major.

The trial Judge held that there was no partnership between the parties and that the suit with regard to the items advanced to Baij Nath prior to 28th August 1928 was barred by time; but that it was within time with regard to the items subsequent to that date. Adding interest at Rs. 12 per cent. per annum from the date of the notice and at 0.9.6 per cent. per mensem prior to that date he held that a sum of Rs. 1699.8.9 was due from the defendants to the plaintiff for which he granted a decree with proportionate costs and future interest at the rate of 6 per cent. per annum from the date of the suit till realisation against the defendants. Defendants 2 and 3 however were not made personally liable but only to the extent of their interest in the coparcenary property. Against this decree, the Official Receiver has preferred this appeal, and it is claimed on his behalf that the entire sum claimed by him should have been decreed by the trial Judge.

An objection in the form of a preliminary objection was taken by the respondents that the appeal by the Official Receiver alone was not competent. An objection also had been taken at the trial to the maintenance of the suit by the Official Receiver. It appears that when the firm Gobind Parshad-Shibban Lal was adjudicated insolvent, the Official Receiver was appointed as the Receiver of its assets which therefore vested in him. Subsequently however there was a scheme of composition agreed to between some of the creditors and the insolvents. This was presented to the Insolvency Judge who issued a notice to all concerned, and on 24th April 1930, passed an order that two persons Kishori Lal and Basheshar Lal are appointed additional receivers along with the Offi-

cial Receiver to administer the estate. Report by Official Receiver on 19th June 1930.

It is contended that by the addition of those two persons as additional receivers the Official Receiver ceased to have any authority to administer the estate alone. It appears however that before filing the suit the Official Receiver had made an application to the Insolvency Judge for permission to institute the suit and permission was granted to him not only in respect of this case but also with regard to all other cases to institute suits in his own name without joining the two persons mentioned above. The argument of the learned counsel for the respondents is that on 24th April 1930, the learned Judge having constituted the two persons as joint receivers with the Official Receiver he was not competent, without setting aside the previous order, subsequently to authorize the Official Receiver alone to institute the suit.

It appears however that on 24th April 1930, the Insolvency Judge did not modify his previous order vesting the estate of the insolvent firm in the Official Receiver and therefore if an order was necessary expressly cancelling the order of 24th April 1930, it was for the same reasons necessary to pass an express order on 24th April 1930, divesting the Official Receiver of the estate and vesting the same in the three receivers said to have been appointed on 24th April 1930. But it is urged that the order of 24th April 1930, did not constitute the two persons as joint receivers with the Official Receiver and that they were merely appointed to help the Official Receiver in the administration of the estate with a view to carry on the scheme of composition. It is not necessary to decide this matter. It may be remarked that this scheme of composition has admittedly not been sanctioned even up to this time. In my opinion the Official Receiver was alone competent to sue in this case apart from any order by the Court authorising him to do so. But the order passed by the Insolvency Judge puts the matter beyond any controversy and I hold that the suit was properly instituted by the Official Receiver and consequently he is entitled to present this appeal.

On the merits, it is contended on behalf of the appellants that the view of the learned trial Judge that the items before 28th August 1928 are barred by time is erroneous and that the whole of the amount

claimed by the plaintiff is within limitation and that in any case even if it be held that the acknowledgment of 27th August 1931, does not constitute a novation of the contract, as was urged on behalf of the appellants, then at the most the suit would be barred by time only in respect of the principal sum of Rs. 121.15.6 and proportionate interest thereon. It was claimed on behalf of the appellants that the balance of 27th August 1931 should be considered to contain an express promise by the debtor to pay and therefore to fall within S. 25, Contract Act. The acknowledgment is in the following form :

The bahi account having been checked and understood, the sum of Rs 6459-1-6 was found due from me and my minor sons whose lawful guardian I am to the firm Gobind Parshad Shibban Lal and I admit the amount to be due from me.

It is contended that the last sentence "I admit the amount to be due from me" which in the original document is 'mere zima wajib hain' contained an express promise to pay. It was conceded that unless an express promise to pay is held to be contained in this acknowledgment, the acknowledgment can be used only to extend limitation under S. 19, Limitation Act. No authority was cited in support of the main contention. After reading the acknowledgment carefully, I hold that there is no doubt that it cannot be read to contain an express promise to pay. There is no reference to the future liability to pay the amount. It is merely an acknowledgment of liability which does not fall within the meaning of S. 25, Contract Act. It was then urged that the suit is governed by Art. 85 of Sch. 1, Limitation Act, which relates to suits for balance due on a mutual, open and current account where there have been reciprocal demands between the parties. Now in order to apply this Article, it must be established that there have been mutual obligations and that it was the intention of the parties that such obligations would be set off against each other. It is not of course necessary that there should be direct evidence of a contract as such a contract can be gathered from the surrounding circumstances. In the present case it has been found that there was really no partnership between the parties, that Baij Nath had joined the firm as a servant on a salary of Rs. 1200 per year and a share in the profits. Baij Nath being the manager of the firm began to borrow money from the firm. It does not appear

that he obtained the express consent of the partners of the firm before doing so. The amounts were generally drawn by him in small items. It also appears that he used to draw from the firm amounts with the intention of using them for the purpose of carrying on the business of the firm; but sometimes he utilized portions thereof on his own account. The amounts taken by him are described as uchant in the dealings of the partners.

It seems that there were other agents of the plaintiff firm who used to take money from the firm as uchant. The amounts so taken by Baij Nath and other agents as uchant used to be entered in daily balances in the rokar bahi of the firm under the heading of uchant but periodically accounts were taken from the agents and whatever remained unaccounted for by them was debited to their respective accounts in the rokar bahi and the entry as to uchant proportionately reduced. The item finally found due from the agents on the day of taking accounts out of the uchant advance or on account of money taken by them from the firm after the previous settlement of the account was debited in the rokar bahi to the agents individually. This was done in the case of Baij Nath also. I have stated that Baij Nath was to be paid a salary of Rs. 1200 a year and a share in the profits; but I find that the first entry crediting him with his salary was made in his favour after a considerable time from the commencement of his service and that entries have been made in respect of his share of profits subsequently. This state of accounts in my opinion does not necessarily establish the existence of a mutual and current account such as is contemplated by Art. 85, Limitation Act. It appears that the partners of the firm did not intentionally make any advances to Baij Nath. On the other hand, Baij Nath being in charge of the firm without the express permission of the partners began to utilize money for his own purpose and no objection was taken because it was considered that salary would become due to him and probably the amount would be repaid by him. The contention of the appellants' counsel does not seem to be sound and the suit is not governed by Art. 85.

There is however force in one contention of the appellants' counsel that the amounts due from the respondent must be deemed to have been advanced to him as loan on

the day on which they were debited to him in the rokar bahi. Previous to that the amounts could not be ascertained and they were in the form of a suspense account. It also appears that interest has been charged against the respondents from the date of the entry in the rokar bahi and not from the actual date on which the amount was appropriated or utilised by the respondents for their own purposes. In fact these dates cannot be ascertained. The acknowledgment of 27th August 1931 admittedly can be relied upon to save limitation under S. 19, Limitation Act. It follows therefore that the view of the learned trial Judge that only those items can be held to be within limitation by virtue of this acknowledgment which were actually taken by the respondent within three years from the date of the acknowledgment is not correct because the liability of the respondent began from the date when the entries were made against him in the rokar bahi and not before and it is from that date that the amounts were deemed to have been advanced to him. It may be mentioned that all the entries in the book are in the hand-writing of the respondent himself including the balances struck from time to time.

It was also argued that as the whole of the account is in the hand-writing of Baij Nath and as he has made entries in the account book debiting the various items against him and as on one occasion, i. e. on 7th July 1929 he made an entry of Rs. 4485.13.3 in the plaintiff's account book as due from him the making of this entry would amount to an acknowledgment of liability under S. 19, Limitation Act. The contention of the learned counsel was that though there is no signature of the respondent under this entry but as the opening entry of the account mentioning that it was the account of Baij Nath was in his own hand-writing therefore all the entries made by him subsequently below the heading must be deemed to have been signed by him. It is necessary to mention this argument to reject it as untenable. The entry has not been signed by Baij Nath and cannot be deemed to have been signed by him merely because the heading of the account is in his hand-writing.

As a result of the above discussion it follows that all the items which are debited to the respondent within three years from 28th August 1928 would be within

time and it is conceded before us that in this manner the plaintiff's suit would be within time except with regard to Rupees 121.15.6 and proportionate interest thereon. Interest calculated at as. 9.6 per cent. per mensem comes to Rs. 27.10.9. Therefore the total deduction from the plaintiff's claim would be Rs. 149.10.3. The plaintiff would thus be entitled to a decree for Rs. 6309.7.3. I would therefore accept this appeal and modify the decree of the trial Judge by increasing the decretal amount to Rs. 6309.7.3 with proportionate costs throughout. The decretal amount shall carry interest at the rate of six per cent. per annum from the date of the suit till realisation.

Dalip Singh J. — I agree.

B.D./R.K.

Order accordingly.

A. I. R. 1938 Lahore 267

ADDISON AND DIN MOHAMMAD JJ.

*Municipal Committee, Amritsar —
Defendant—Appellant.*
v.

Kanshi Ram—Plaintiff—Respondent.

First Appeal No. 111 of 1937, Decided on 24th October 1937, from decree of Sub-Judge, First Class, Amritsar, D/- 7th December 1936.

Limitation Act (1908), Art. 115—Municipal Committee using another's land for cattle fair for years—Implied agreement to compensate land owner — Suit for compensation is governed by Art. 115 and not by Art. 39 or Art. 120.

Where a Municipal Committee continues to hold a cattle fair on another's land from year to year, an inference can be drawn that there was an implied contract between the Committee and the landowner that the Committee should pay to the owner and that the owner should allow the Committee to hold the fair :

A suit therefore for compensation not received will be governed by Art. 115 and not by Art. 39 or Art. 120. [P 268 C 1]

M. Sleem and Behari Lal —

for Appellant.

Achhru Ram and Vishnu Datta —

for Respondent.

Judgment.—The Municipal Committee of Amritsar holds a cattle fair twice a year. The land on which the fair is held did not belong to the Committee but to different landowners. The fair has been held on the same ground for a considerable number of years, though it is not definitely established when this commenced. No compensation was paid to the various landowners up to 1919. In

that year compensation was claimed by the plaintiff and other landowners. Most of the claims have been settled but the Municipal Committee and the plaintiff did not come to terms. Accordingly the plaintiff instituted the present suit against the committee on 23rd July 1935 for Rs. 7250 as compensation for the land from 1929 to Baisakhi 1935. Various defences were raised. The trial Court decreed the claim to the extent of Rs. 5800 with proportionate costs and the Municipal Committee has appealed.

It was held by the trial Court that Art. 120, Lim. Act, applies. In our opinion this is not so. Nor do we think that Art. 39 applies as it cannot be said that there was any trespass, for obviously there was an implied understanding or contract that the fair should be held there. This is the only possible inference from the fact that it has been held there for so many years. This means that the proper Article is 115, that is the suit must be treated as a suit for compensation for a breach of an implied contract not in writing registered and not specially provided for. The time when limitation begins under this Article is when the contract is broken or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing) when it ceases. It seems to us however that the question of limitation does not arise in this suit. The plaintiff has been asking for compensation since 1929. For the first three years from 1929 to 1931 a cheque for Rs. 2400 was actually made out in the Committee's office and on 13th June 1931 the President, to whom full powers had been handed over to settle the matter, ordered the cheque to be paid. It was not however paid but the fair continued to be held on the land and the Committee and the plaintiff continued to dispute as to what was the proper rate of compensation. The land supervisor of the Committee (D. W. 1) has stated that so far as he knew the matter was still pending before the committee. This means that the committee has never refused to pay though the rate of compensation has been in dispute. No breach therefore can be said to have occurred and limitation cannot be held to have started.

The trial Court has taken the report of the Tahsildar as the best basis for com-

puting the compensation due. It is in evidence that many of the other landowners have been compensated at that rate. There was another report by a servant of the committee, but it is not so reliable as that of the Tahsildar, while the principal reason given in that report for reducing the Tahsildar's figure was that the plaintiff did not own much of the land which he claimed. There is not much difference as to the actual rate. There is now no dispute that the land as mentioned in the plaint did belong to the plaintiff. On the record therefore there is no question but that the report of the Tahsildar, (who went into the witness-box) corroborated as it is by certain other evidence, is the best evidence as to what should be given in the present case. The Tahsildar however allowed a special rate for 25 kanals of land for the first three years. It does not seem to have been established that this special rate is correct. We therefore reduce the compensation for the first three years by Rs. 1000. The rate allowed for the subsequent years is reasonable and is justified on the record. In the result we accept the appeal so as to reduce the decretal amount to Rs. 4800 with proportionate costs on that amount in the trial Court. The parties will bear their own costs here. The cross-objections were not pressed and are dismissed without costs.

B.D./R.K.

Order accordingly.

A. I. R. 1938 Lahore 268

YOUNG C. J. AND MONROE J.

Dharam Singh—Convict—Appellant.

v.

Emperor.

Criminal Appeal No. 1065 of 1937, Decided on 28th October 1937, from order of Addl. Sess. Judge, Ferozepore, D/- 4th September 1937.

Criminal Trial—Dying declaration—Wound puncturing liver, lung, stomach etc. — Victim, held not capable of making any declaration.

Where a deceased received a spear wound which penetrated the chest wall on the right side, went through the ribs, through the diaphragm, penetrated the right lobe of the liver, completely penetrated the whole liver and came out of the left lobe of the liver and then went through the stomach and finally through the ribs on the left side of the chest and through the chest wall :

Held that there was great difficulty in believing that the deceased could possibly have lived

for two hours after receiving an injury of this description, much less could have been conscious. The probability of his ever living to make a dying declaration two hours later is too remote to be considered. [P 269 C 1, 2]

Mahtab Singh — *for Appellant.*

Anant Ram Khosla for Advocate-General — *for the Crown.*

Young C. J.—Dharam Singh has been condemned to death by the learned Additional Sessions Judge, Ferozepore, for the murder of Chanan Singh. It is alleged that Dharam Singh together with Gulabu, who has been made an approver in this case, and Kaka, an absconder, lay in wait for Chanan Singh, attacked him and killed him and that each of the three persons engaged in the murder inflicted wounds upon the deceased. Apart from the approver's statement, the only evidence of corroboration tending to connect Dharam Singh with the crime is the evidence of a dying declaration by Chanan Singh. This corroborative evidence has been severely attacked in our Court, and we consider, with great justification. In the first place, the deceased Chanan Singh received a spear wound which according to the medical evidence penetrated the chest wall on the right side, went through the ribs, through the diaphragm, penetrated the right lobe of the liver, completely penetrated the whole liver and came out of the left lobe of the liver. It then went through the stomach and finally through the ribs on the left side of the chest and through the chest wall. According to the evidence of Lt. Colonel Batra, I. M. S. this was one wound. In fact, the spear completely transixed the body spitting the liver on the way through. A mass of liquid blood on post mortem was found in the pleural cavities and in the peritoneal cavity. We are invited to believe that after receiving this wound the deceased took off his turban, tied it round his chest to stop the blood flowing from his body, then walked about 200 yards and fell outside the house of a man who clearly is a bitter enemy of the accused, that there after he was taken to the hospital, another 200 or 300 yards away, and eventually, some two hours after receiving the injury that he made this dying declaration.

We have great difficulty in believing that the deceased could possibly have lived for two hours after receiving an injury of this description, much less could he have been conscious. It is within our own

knowledge, from medical evidence in previous cases, that an injury of this description to the liver would result in the sufferer losing consciousness in a very short time. The probability of his ever living to make a dying declaration two hours later is too remote to be considered.

Secondly, the approver and the dying declaration say that three separate blows by the three different persons were inflicted. The opinion of the Civil Surgeon is, as pointed out above, that only one blow was inflicted. Whether the Civil Surgeon is right or wrong in this opinion, it is again a matter throwing doubt upon the dying declaration. The approver himself is not too satisfactory. He is a bad type of approver and, according to his own statement in the committing Magistrate's Court, became an approver after he heard that Dharam Singh was likely to be made an approver.

In view of the above, we think that it would be extremely dangerous to rely upon this dying declaration as corroboration of the approver's statement. We therefore have to accept this appeal, set aside the conviction and sentence and direct that Dharam Singh be set at liberty if he is not required for any other offence.

B.D./R.K.

Appeal allowed.

A. I. R. 1938 Lahore 269

YOUNG C. J. AND MONROE J.

Karamat Hussain Mulla
Convict — Appellant.

v.

Emperor.

Criminal Appeal No. 864 of 1937, Decided on 10th November 1937, from order of Sess. Judge, Rawalpindi, D/. 17th July 1937.

Penal Code (1860), S. 100—Woman being terribly beaten by her husband rushing to her brother for protection—Husband saying that he would continue to beat her — Brother killing him with hatchet in order to save his sister and himself from being killed—Brother held acted in right of self-defence.

A woman was being brutally beaten by her husband. She rushed out of her room and asked her brother who was sleeping near by to protect her. She was followed by her husband who said that he was going to continue the beating. He was a very brutal and dangerous man. The brother of the woman thereupon seized a hatchet and killed him. There was evidence that if he had not done so the deceased might have killed him ;

Held that under these circumstances the brother acted in the right of self-defence not only of his sister but of himself and he could not therefore be said to have committed any offence. Moreover the right of self-defence could not be said to have been exceeded. [P 270 C 2]

L. M. Datta — *for Appellant.*

Ch. Nazir Hussain, Asst. Legal Remembrancer — *for the Crown.*

Young C. J. — Karamat Hussain was charged with the murder of his brother-in-law Fazal. The learned Sessions Judge, Rawalpindi, found him guilty and sentenced him to transportation for life. Karamat Hussain from the very beginning admitted having killed Fazal; but his defence has been throughout that he acted in defence of his sister and himself. The sister of Karamat Hussain was married to Fazal. According to the prosecution evidence, this Fazal appears to have been a brute and a dangerous man who had been suspected of murders and who was a village bully and who had threatened every one. He was a man of powerful physique. He again according to the evidence of the prosecution brutally ill-treated his wife, the sister of Karamat Hussain. On the night when Fazal was killed, Fazal had again been beating this unfortunate woman. She rushed out of her kothri to where her brother was sleeping and pleaded with him to protect her. She was followed by Fazal. Karamat Hussain then asked his brother-in-law why he was continuing beating his wife and asked him to stop. According to the evidence of Hukam Dad, the witness, on whom the Judge mainly relies, Fazal said that he would beat his wife and would not spare her. Thereupon Karamat Hussain seized a hatchet and hit the deceased on the head and killed him. It is also in evidence that immediately after this was done Karamat Hussain said that if he had not killed his brother-in-law, his brother-in-law would have killed him. This brother-in-law, according to the evidence, could easily have killed Karamat and he was certainly a man of such a temperament that he might have done it.

It appears to us that the above is a true statement of what occurred. Under these circumstances, we have to consider what offence, if any, has been committed. We think that the accused Karamat Hussain had a perfect right to defend his sister from the brutal treatment she was getting from her husband. The whole

episode of that night may be treated as one. There was the fact that the woman was getting a terrible beating, that she rushed out and asked her brother for protection, that she was followed by her husband who said he was going to continue the beating and therefore we think the right arose to Karamat Hussain to defend his sister. In addition, there is some evidence that the axe with which Fazal was killed was originally in the hand of Fazal, deceased. The woman herself gave evidence and she definitely said so. The learned Judge however doubts this evidence perhaps not unnaturally. No doubt the woman would be inclined to help her brother. On the other hand however her evidence possibly may be true. Karamat Hussain himself at once stated that he had taken the axe from the hand of the deceased. In any event, whether this be true or not, we think that the right of private defence of his sister arose and it is difficult to say by how much that right has been exceeded. It is very possible, as suggested by all the evidence, that if Karamat Hussain had not killed or seriously disabled Fazal he himself would have been in great danger of being killed. Taking into consideration the brutal character of Fazal and the right of Karamat Hussain to interfere, we think it can be said that Karamat Hussain had reasonable apprehension for his own life. Under these circumstances it is difficult to say that Karamat Hussain has committed any offence. We therefore hold that Karamat Hussain acted in the right of self-defence not only of his sister but of himself and it would be very difficult to hold that under the circumstances of this particular case he exceeded that right. We accept this appeal and set aside the sentence of transportation for life and acquit the accused.

D.S./R.K.

Appeal allowed.

A. I. R. 1938 Lahore 270

ADDISON AND DIN MOHAMMAD JJ.

Messrs. Jaini Brothers and Co. —

Defendant—Appellant.

v.

Shankar Lal — *Plaintiff* —

Respondent.

Second Appeal No. 443 of 1937, Decided on 25th November 1937, from preliminary decree of Addl. Dist. Judge, Delhi, D/- 17th February 1937.

(a) **Accounts—Suit for—Official Receiver of ex-broker's assets in insolvency assigning definite sum of money due from latter's principal and not right to sue for accounts—Suit for rendition of accounts for recovery of sum assigned is incompetent.**

Where, what is assigned to the plaintiff by the Official Receiver of an ex-broker's assets in insolvency, is a definite sum of money due from the latter's principal and not a right to sue for account, if any, a suit for rendition of account for the recovery of the amount thus assigned is incompetent. [P 271 C 2]

(b) **Deed—Construction—Instrument must be construed according to plain meaning of words and sentences contained therein.**

An instrument must be construed according to the plain meaning of the words and sentences contained therein. It is not proper to assume an intention apart from the language of the instrument itself and having done so to bend the language in favour of the assumption so made. [P 271 C 2]

(c) **Pleadings — Amendment — High Court will not interfere with discretion of trial Court unless discretion is exercised arbitrarily.**

The trial Court has complete discretion whether to allow or refuse a prayer for an amendment of pleadings and where the discretion has not been exercised injudiciously or arbitrarily, the High Court will not interfere. [P 272 C 1, 2]

M. C. Mahajan and Shamsher Bahadur
— *for Appellant.*

J. N. Aggarwal — *for Respondent.*

Din Mohammad J. — The suit out of which this appeal has arisen was for rendition of accounts and was instituted by an assignee of an ex-broker's assets in insolvency against the latter's principal. It was resisted on the grounds, inter alia, that a right to sue for accounts had not been assigned, that a broker who worked on commission had no right to call for accounts, that even if he had such right, it could not be assigned in law, and that, in any circumstances, the suit was time barred. The Subordinate Judge held that a right to sue for accounts had been assigned by the Official Receiver, that a broker could under the trade usage prevailing in Delhi call for accounts from his principal, that the right to take such accounts could be legally assigned and that the suit was within time under Art. 120, Lim. Act. From this decision an appeal was preferred to the District Judge who did not go into the matter whether what was assigned was an ascertained sum or a right to sue for accounts but agreed with the Subordinate Judge in holding that a broker could sue for rendition of accounts. He however based his decision on an

admission of a member of the defendant firm made in a previous suit between another broker and a different firm. On the question whether such right could be transferred, he relied on some judgments of the Allahabad and Calcutta High Courts, and treating it as a claim for money had and received, came to the conclusion that its transfer was permissible. On the question of limitation, he was of opinion that Art. 113 and not Art. 120, Lim. Act, governed the matter and remanded the case under O. 41, R. 25, Civil P. C. after indicating the points to be determined by the trial Court to fix the terminus a quo for the suit. The trial Court submitted its report in due course and the Additional District Judge who had succeeded the District Judge in the mean time holding the suit to be within time dismissed the appeal. The defendant presented a second appeal to this Court which came before one of us and, in view of the conflict of judicial decisions on some of the points involved in the case, was referred to a Division Bench for disposal.

After hearing counsel on both sides, we have come to the conclusion that this appeal must succeed on the ground that what was assigned by the Official Receiver to the plaintiff was a definite sum of Rs. 2600 and not a right to sue for accounts, if any, and that for the recovery of a specified sum thus assigned, a suit for accounts did not lie. As stated above, this matter was decided against the defendant by the trial Court and though it was again raised in the grounds of appeal, was not considered by the District Judge in any explicit manner. The trial Court mainly relied on the wording of the deed as interpreted by the Official Receiver, but in spite of the fact that the Official Receiver could be taken to be the best judge of the signification of the words used by him in the deed of assignment, we are constrained to remark that the construction put by him on the plain wording of the deed is, to say the least, altogether far-fetched and erroneous. In the words of Lord Halsbury

Whatever the instrument, it must receive a construction according to the plain meaning of the words and sentences therein contained . . . and it is arguing in a vicious circle to begin by assuming an intention apart from the language of the instrument itself, and, having made that fallacious assumption, to bend the language in favour of the assumption so made. (Maxwell on the Interpretation of Statutes, Edn. 7, p. 6).

The words used in the deed were *haquo dakhli wa kharji wasuli wa adum wasuli* which, literally interpreted, mean "rights, internal and external, of recovery and non-recovery" and by no stretch of imagination could they be taken to include a right to sue for accounts. The words "external or internal rights" are generally used in deeds relating to immovable property and were altogether out of place in this document which concerned specific sums of money only. They appear to have been used as a mere matter of habit and conveyed no sense whatever in regard to the thing assigned. The sum in dispute was not the only sum assigned by the deed. There were two other sums also included in the schedule annexed to the deed of assignment and whatever rights the plaintiff possessed in respect of the other two items assigned to him, the same he could exercise in respect of the item in suit too. It cannot be seriously urged on his behalf that he could sue for accounts for recovery of those two items and if he could not do so in their case, it passes one's comprehension, how he could resort to that method in respect of this item. We hold therefore that what was assigned to the plaintiff was an ascertained sum of money and for the recovery thereof a suit for rendition of accounts is incompetent. In fact the plaintiff himself realized the weakness of his position and applied to the trial Court for permission to amend the plaint so as to convert his suit in the alternative into one for recovery of Rs. 2600. This application of his was however disallowed. Counsel for the respondent has submitted that he may now be allowed to amend his plaint and to bring a suit in the regular form on payment of proper court-fee. We are not however inclined to accede to his request at this late stage, especially as there are no equities in favour of the respondent, he having purchased outstandings amounting to Rs. 6900 odd for a paltry sum of Rs. 70 only. Not being content with the profit he had made on this bargain, he deliberately sought to evade the provisions of the Court-fees Act in this case and started with eyes open in a manner which was obviously risky. Further, his prayer for amendment has once been refused by the trial Court which had complete discretion in the matter to allow or refuse the suggested amendment and we are not prepared to say that that discre-

tion was so injudiciously or arbitrarily exercised as to call for our interference.

In the view of the case that we have taken, no other question arises and it would be sheer waste of time to attempt to decide other matters the decision on which will be mere obiter dictum. We accordingly accept this appeal and set aside the decisions of the Courts below. The appellant will get his costs from the respondent in all the Courts.

R.M./R.K.

Appeal allowed.

A. I. R. 1938 Lahore 272

JAI LAL AND DALIP SINGH JJ.

Bawa Sohan Singh and another — Defendants — Appellants.

v.

Shiromani Gurdwara Parbandhak Committee, Amritsar — Petitioner — Respondent.

First Appeal No. 360 of 1936, Decided on 19th October 1937, from decree of Sikh Gurdwaras Judicial Commission, Lahore, D/- 9th May 1936.

(a) Punjab Sikh Gurdwaras Act (8 of 1925), S. 142—Member of Gurdwara acquitted of charge of negligence — Costs should be awarded.

Where the Judicial Commission acquits a member of the Committee of Management of a Gurdwara of charges of negligence etc. it should award him his costs. [P 273 O 1]

(b) Punjab Sikh Gurdwaras Act (8 of 1925), S. 142—Acts done in due course of business — Negligence of agents — Member cannot be warned.

Where a member of the Committee of Management of a Gurdwara does acts in the due course of its management and it is found that persons on whom he had to rely were negligent in their duties, such member cannot be warned by the Judicial Commission. [P 273 O 1, 2]

Bhagat Singh — for Appellants.

Charn Singh — for Respondent.

Jai Lal J.—An application under S. 142, Sikh Gurdwaras Act, was made by the Shiromani Gurdwara Parbandhak Committee, Amritsar, to the Sikh Gurdwaras Judicial Commission, against Bawa Sohan Singh, President, and S. Narain Singh member of the Committee of Management of the Gurdwara at Muktsar. It was alleged that on the occasion of Maghi in January 1934 a mela was held at Muktsar and Rs. 870 were alleged to have been spent on account of travelling allowances and refreshment expenses of sewadars.

The mela was under the supervision of a Mela Sub.Committee of which S. Narain Singh was the chairman. The expenses were incurred under the direct supervision of Narain Singh but were finally sanctioned by Bawa Sohan Singh. It was alleged that the expenses incurred or alleged to have been incurred were extravagant and proper receipts had not been obtained and it was complained that the defendants had committed misfeasance with regard to Rs. 300 out of Rs. 870. After evidence of both the parties had been recorded and arguments heard, the Judicial Commission came to the conclusion that Bawa Sohan Singh was not guilty of any negligence. They dismissed the application against him but left the parties to bear their own costs. As to S. Narain Singh it was held that he had made payments to Ishar Singh and others who were jathedars and had relied upon their word that payments had been made to sewadars. They did not hold that Narain Singh was guilty of any negligence. On the other hand their conclusion was that though several payments shown to have been made to the sewadars were fictitious, in this case they could not blame S. Narain Singh for what was done by Ishar Singh. He had no doubt been negligent to some extent in taking absolutely no steps to see whether the payments were actually made by the jathedars to the sewadars. But his fault was not very grave, because at the time of such a rush one is apt to depend upon others.

Under these circumstances they thought that a warning to S. Narain Singh for discharging his duties as a member of the Gurdwara Committee negligently in this respect would meet the ends of justice. They consequently warned S. Narain Singh for his negligence. Both the defendants have preferred this appeal—Bawa Sohan Singh with regard to the order as to costs and S. Narain Singh with regard to the warning given to him.

It is claimed on behalf of Bawa Sohan Singh that in view of the finding of the Judicial Commission, there was no justification for not ordering the costs to follow the event. No reasons are given by the Judicial Commission for not awarding him costs against the petitioner. There is force in this contention. Having found that Bawa Sohan Singh was not guilty of any negligence or dishonesty and having dismissed the application against him, costs should have been awarded to him against the petitioner. As to the appeal of S. Narain Singh, I am unable to see on

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what ground the Judicial Commission could give him a warning. He had done what was normal in such circumstances. He trusted Ishar Singh and other jathedars and paid them the amounts according to the bills prepared by them. These amounts had to be distributed by the jathedars to the sewadars and if there was any irregularity on the part of these jathedars or any dishonesty, Narain Singh could not be made responsible. Indeed the Judicial Commission do not make him responsible and admit that on such occasions one has to rely upon others. That being so, the warning given to Narain Singh was not justified.

Cross-objections have been filed on behalf of the Shiromani Gurdwara Parbandhak Committee but nothing has been urged in support of them. Consequently this appeal must be accepted and the order of the Judicial Commission giving a warning to Narain Singh should be set aside and also the order leaving the parties to bear their own costs. The costs in this case should follow the event and the Shiromani Gurdwara Parbandhak Committee shall pay the costs of both the appellants both before the Judicial Commission and also in this Court.

Dalip Singh J.—I agree.

B.D./R.K.

Appeals allowed.

A. I. R. 1938 Lahore 273

ADDISON AND DIN MOHAMMAD JJ.

*Kanshi Ram Sharma and another —
Plaintiffs—Appellants.*

v.

*Lahori Ram and another —
Defendants — Respondents.*

Second Appeal No. 405 of 1937, Decided on 19th October 1937, from decree of Addl. Dist. Judge, Ferozepore, D/- 11th January 1937.

(a) Punjab Pre-emption Act (1 of 1913), S. 16 (Sixthly) — Waiver—Contract with third party not in existence!—Property offered for sale but declined by pre-emptor amounts to waiver.

The right of pre-emption can be waived by a pre-emptor when property is offered to him for sale before a definite contract of sale with any other person has come into existence and such person has refused to purchase the property or intimated his intention of not purchasing the property: *A I R 1929 Lah 265 and A I R 1935 Lah 884, Foll.*

[P 274 O 2]

(b) Pre-emption — Hindu joint family — Word 'co-sharer' is not proper.

The word 'co-sharer' is not the right word to use as regards the joint property of a joint Hindu family. The members of the family are coparceners but have no 'share' until there is disruption of the family: 35 P R 1908, *Doubted*; 67 I C 76 and A I R 1925 Oudh 352, *Rel. on.* [P 274 C 2]

(c) Pre-emption—Waiver of right by karta of joint Hindu family..

A waiver of right to pre-empt by the manager of a joint Hindu family operates as a complete waiver by all the members of the family: A I R 1918 P C 154 and A I R 1931 All 216, *Rel. on.* [P 275 C 1]

J. N. Aggarwal and R. P. Khosla —
for Appellants.

Achhru Ram and Faqir Chand Mital —
for Respondent No. 1

Addison J. — This is a second appeal in a pre-emption suit by the plaintiffs, Kanshi Ram and Hans Raj, who form a joint Hindu family, the manager being Kanshi Ram. The only question, involved in the appeal, which was argued, was that of waiver. It had been pleaded by the defendants that the house was offered to Kanshi Ram and that he refused to purchase it; this amounting to waiver. The sixth issue was therefore struck on this question, namely whether the plaintiff was asked to purchase and was estopped from suing? The right of pre-emption claimed by the plaintiffs was under S. 16 (Sixthly), Punjab Pre-emption Act 1 of 1913, that is they claimed as persons who owned immovable property contiguous to the property sold. It was not counter-pleaded in the trial Court by the plaintiffs that Hans Raj would not be estopped from suing merely because his brother was estopped. It seems then to have been considered that if Kanshi Ram had waived his right to pre-empt, the suit must fail. Accordingly the trial Judge dismissed the suit, holding that waiver was established. There was an appeal to the District Judge, when it was contended before him for the first time on behalf of Hans Raj that the evidence and finding simply amounted to this, that Kanshi Ram, one of the appellants, had waived his right of pre-emption. The District Judge therefore remanded to the trial Court an additional issue as to whether the waiver of the right of pre-emption by Kanshi Ram operated as waiver by both the plaintiffs. Thereafter, the District Judge held that the two brothers constituted a joint Hindu family holding the contiguous property from which they derived their right to sue and other property as copar-

ceners of that family of which Kanshi Ram was the manager and that, as the manager had waived his right to pre-empt, Hans Raj was also estopped and had no separate right of suit. Against this decision this appeal has been preferred.

It has now been settled by this Court in A I R 1929 Lah 265¹ and A I R 1935 Lah 884² that the right of pre-emption can be waived by a pre-emptor when property is offered to him for sale before a definite contract of sale with any other person has come into existence and such person has refused to purchase the property or intimated his intention of not purchasing the property. There is no doubt therefore that Kanshi Ram is estopped.

There remains the question whether Hans Raj can pre-empt in the circumstances described. It was stated in 35 P R 1908³ that where the property, on the ownership of which the right to pre-empt is based, belongs to a joint Hindu family, the right of pre-emption vests under Cl. 7 of S. 13, Pre-emption Act 1905, in every co-sharer in such property. It seems to us that the word "co-sharer" is not the right word to use as regards the joint property of a joint Hindu family. The members of the family are coparceners but have no "share" until there is disruption of the family. Besides, though the head-note of the authority mentioned refers to the Punjab Pre-emption Act 1905, the case was apparently one governed by the Punjab Laws Act 1872. We were also referred to 6 Lah 1,⁴ but that case does not purport to decide the question before us.

It was held by the Court of the Judicial Commissioners, Oudh in 88 I C 879⁵ that an undivided member of a joint family cannot, apart from the other members of the family, unless he represents the whole family as karta, claim to be a cosharer within the meaning of S. 9, Oudh Laws Act. The expression "cosharer" in that Section means a juristic person and not merely an individual who collectively with other individuals constitutes a single juristic person. A converse case was decided

1. Ram Sahai v. Muhammad Tufail, (1929) 16 A I R Lah 265=115 I C 767=30 P L R 88.
2. Sardar Muhammad v. Khuda Bakhsh, (1935) 22 A I R Lah 884=10 I C 937
3. Ishri Parshad v. Bashehar Nath, (1908) 35 P R 1908=92 P W R 1908=179 P L R 1908.
4. Sa Narain v. Behari Lal (1925) 12 A I R P O 18=84 I C 88=52 I A 22=6 Ah 1 (P O)
5. Gajadhar v. Lal Behari (1925) 12 A I R Oudh 352=88 I C 879=28 O C 189=2 O W N 264.

in this Court and reported in 67 I C 76.⁶ It was held there that the sons in a joint Hindu family cannot maintain a suit to pre-empt a sale of joint family property, made by the father as managing member of the family, and which is not alleged to be otherwise than for necessity. Here again the idea is that the family is one until separation. A case on all fours with the present is A I R 1931 All 216⁷ where it was held that the refusal of a karta of a joint Hindu family to purchase the property sought to be pre-empted bound the coparceners as well and they could not claim a separate right of pre-emption. This principle also obtains some support from the decision of their Lordships of the Privy Council in 82 P R 1919.⁸ The occupancy tenants of a village sued for pre-emption in respect of the sale of the village by the proprietor. It was found that two of the body of tenants, acting on behalf of the whole village, introduced the vendees to the vendor's agent as prospective purchasers, telling him that an agreement had been come to whereby those vendees should pay the money and acquire the property, which should then be held as three-quarters for the vendees and one quarter for the tenants. Thereafter the tenants sued to pre-empt the sale, but it was held that they were estopped as two of the tenants, acting for the village, had helped the vendees to have the purchase effected. It was held further that there was no need that the two representatives of the whole village should have held powers of attorney and that it would require very strong and cogent reasons to compel the Court to hold so extremely reasonable arrangement bad simply because some of the villagers happened to be infants.

On the authorities therefore, we hold that a waiver by the manager of a joint Hindu family operates as a complete waiver by all the members of the family. That is the only reasonable view which can be taken. The appeal accordingly fails and is dismissed. We however make no order as to costs of this Court.

B.D./R.K.

Appeal dismissed.

6. Sukha Ram v. Kotu Ram, (1922) 67 I C 76.

7. Suraj Prasad v. Oudh Behari, (1931) 18 A I R All 216=131 I C 681=1931 A L J 204.

8. Idris v. J. Skinner, (1918) 5 A I R P O 154=56 I C 723=82 P R 1919.

A. I. R. 1938 Lahore 275

ADDISON AND DIN MOHAMMAD JJ.

Mt. Sat Bhawan — Plaintiff —
Appellant.

v.

Bedi Ram Kishen Singh and others —
Defendants — Respondents.

First Appeal No. 18 of 1937, Decided on 18th October 1937, from order of Sub-Judge, First Class, Amritsar, D/- 21st December 1936.

(a) Court-fees — Possession — Possession howsoever obtained is good possession—Constructive possession through tenant is good possession.

Possession although obtained by force, fraud or collusion is valid possession in the eye of the law for the purposes of the Court-fees Act. Possession may be actual or constructive and possession through tenant is recognised by law. [P 276 C 2]

(b) Court-fees Act (1870), Sch. 2, Art. 17 (vi) and S. 7 (v)—Person not in possession of property claiming to be entitled to it—S. 7 (v) and not Art. 17 (vi) applies.

If a person is not in possession of property to which he considers he is entitled on the strength of any right, title or interest that he claims in relation thereto and seeks to obtain possession thereof from the person who is keeping it back from him, there being no jointness of possession or title between the two, his suit is one for possession bare and simple, to which the provisions of S. 7 (v) apply, and no occasion arises to invoke Art. 17 (vi) of Sch. 2 in his favour: A I R 1930 Lah 839 and A I R 1934 Lah 563 (F B), Disting.

[P 277 C 1]

Shamair Chand and D. N. Aggarwala
— for Appellant.

Nihal Singh — for Respondents.

Din Mohammad J. — The suit out of which this appeal has arisen was instituted by Mt. Sat Bhawan widow of Baba Manmohan Singh and her married daughter Mt. Har Narinjan Kaur. It was brought on 19th August 1935 and was 'for partition of property by metes and bounds.' The principal defendants in the suit were Bedi Ram Kishen Singh brother of Baba Manmohan Singh and his son Devindar Singh. The plaintiffs alleged that the two brothers, Baba Manmohan Singh and Bedi Ram Kishen Singh, separated about 21 years ago and since then had been in possession of their respective shares. The immovable property, however, was left joint. On 3rd May 1931, Baba Manmohan Singh bequeathed his property to the two plaintiffs and on 16th February 1933 he died. The relations of the parties became strained after Baba Manmohan Singh's death and as the plaintiffs apprehended loss

at the hands of Bedi Ram Kishen Singh, they claimed a decree for 'possession by partition and separation of their one half share.' A court-fee stamp of the value of Rs. 10 only was paid on the plaint.

The suit was resisted on various grounds by the principal defendants. While admitting that the property was joint of the two brothers, Baba Manmohan Singh and Bedi Ram Kishen Singh, they denied the factum of partition as alleged in the plaint. Besides, both the existence and the legality of the will as also the status of the plaintiffs were repudiated. Along with the pleas on facts, certain technical pleas were also raised of which the sole plea with which we are at present concerned is that of the insufficiency of court-fee stamp. This plea was raised on the ground that neither of the plaintiffs was in possession of any portion of the property in suit and was mainly founded on a previous order made by another Court in a previous suit brought by these plaintiffs on the same facts. The Subordinate Judge recorded certain evidence on this issue and came to the conclusion that the plaintiffs had failed to show that they were in possession of any part of the property in suit and could not consequently institute it unless they paid ad valorem court-fee on the value of the whole property claimed by them. The plaintiffs did not comply with the requisition of the Court and their plaint was accordingly rejected. Dissatisfied with this order the plaintiffs have appealed.

Two questions fall for determination in this case : (a) Whether the plaintiffs were in possession of any part of the property in suit at the time of the presentation of the plaint and (b) if so, what is the proper court-fee chargeable on the plaint. We take up question (a) first. It is in evidence that several shops forming part of the property in suit are in possession of the plaintiffs through the tenants occupying them. Several rent-deeds have been placed on the record which have been duly proved by the executants thereof. For example, Ghulam Muhammad son of Muhammad Ramzan (P. W. 3) admits having executed the rent deed Ex. P. 7 in favour of the plaintiffs. Similarly Ghulam Muhammad son of Asal Wain (P. W. 4) proves the rent deed Ex. P. 1, Bawa Mal (P. W. 5) the rent deed Ex. P. 8 and Puran Chand (P. W. 7) the rent deed Ex. P. 10. Gobind Ram (P. W. 6) deposes to having taken

two shops and the first floor on lease from the plaintiffs. Narain Singh (P. W. 1) is the scribe of some of these rent deeds and formally proves their execution by the respective executants. There is thus ample testimony to establish that some of the tenants occupying some items of the property in suit have attorned in the plaintiff's favour. The only objection taken by the respondents on these deeds is that they have been collusively executed in favour of the plaintiffs by these witnesses who have been given most favourable terms therefor and as they are fictitious, no value should be attached to them nor should any conclusion of possession be derived therefrom. We have however not been referred to any authority on the basis of which it can be said that possession obtained by force, fraud or collusion is not a valid possession in the eye of the law for the purposes of the Court-fees Act. Possession may be actual or constructive and there can be no doubt that possession through tenants is constructive possession recognized by law. It may be that at the time when the previous suit was instituted by the plaintiffs this possession had not come into existence but that circumstance does not militate against a different finding in this case in any manner. The only conclusion possible from the evidence adduced by the plaintiffs is that they are constructively in possession of a part of the property in suit.

The answer to the second question is fraught with difficulties. The trend of authority has not been uniform on this matter and although an effort was made to set all doubts at rest in a Full Bench judgment reported in 15 Lah 531,¹ the present case unfortunately does not fall within the terms of the rule enunciated there. Neither the property involved in this case is joint family property nor are the plaintiffs the members of any such family. On their own allegations, they claim through a separated member and seek to obtain possession of the property that had fallen to his share long ago. They further claim to be the devisees of the property on the strength of a will said to have been executed in their favour by the separated member in 1931. This being so, there is no jointness of title between

1. *Asa Ram v. Jagannath*, (1934) 21 A I R Lah 568=150 I O 994 = 15 Lah 531 = 36 P L R 48 (F B).

them and the defendants and consequently they cannot claim the benefit of the rule laid down in the Full Bench judgment.

Counsel for the appellants further draws our attention to a Division Bench authority of this Court reported in 31 P L R 315² but in our view that case also does not help him as it proceeds on different premises. There the plaintiff alleged that he was in joint possession of the property in suit and all that he claimed was separate possession thereof. Both the learned Judges who delivered separate judgments in the case emphasized that aspect of the case and on that basis decided that Art. 17 (vi) of Schedule 2, Court-fees Act, applied. In the present case, the state of affairs is quite different. The plaintiffs, no doubt, have been found to be in possession of some items of the property in suit but their possession on their own showing is not joint but exclusive, and their title too is not joint with the defendants. Evidently therefore to their case the reasoning used in that judgment does not apply.

In our view if a person is out of possession of property to which he considers he is entitled on the strength of any right, title or interest that he claims in relation thereto and seeks to obtain possession thereof from the person who is keeping it back from him, there being no jointness of possession or title between the two, his suit is one for possession, bare and simple, to which the provisions of S. 7 (v), Court-fees Act, apply and no occasion arises to invoke Art. 17 (vi) of Sch. 2, Court-fees Act, in his favour.

We accordingly uphold the judgment of the Subordinate Judge though on a different ground and dismiss this appeal. In the peculiar circumstances of the case however we make no order as to the costs of this appeal.

B.D./R.K.

Appeal dismissed.

2. Nikka v. Fazal Dad Khan, (1930) 17 A I R Lah 839=123 I C 525=31 P L R 315.

A. I. R. 1938 Lahore 277

DALIP SINGH AND SKEMP JJ.

Goenka Cotton Spinning and Weaving Mills Ltd., Delhi — Plaintiffs — Appellants.

v.

Messrs. Duncan Stratton and Co. — Defendants — Respondents.

First Appeal No. 1769 of 1935, Decided on 13th July 1937.

(a) Limitation Act (1908), Art. 115 — Company A wishing to erect weaving shed, asking firm B to send specification for same — Specifications sent containing three estimates of different machinery covered by single letter giving total price of all machinery — Letter also stating that one-third of total price be paid with order — Order placed and machinery delivered — Some machinery found to be of different make — Suit for breach of contract against firm B — Almost all machinery including one complained of delivered more than three years before suit but part of engine delivered within three years — Art. 115 held applied and suit was within time as order was single whole.

Certain company A informed the firm B that they wished to erect a weaving shed and asked them to send a complete specification for the same. Specifications containing three estimates for different machines were covered by a single letter which gave a total price of all the machinery and stated that one-third of such total price should be paid in advance with the order. The order was placed and delivery taken, but it was found that some machinery was not of the same make as ordered. A suit was brought by company A against firm B for damages for breach of contract. Almost all the machinery including the subject matter of the suit was delivered more than three years before the date of the suit but a part of an engine was delivered within three years. The trial Court dismissed the suit as time-barred holding that the order was an order for separate pieces of machinery and time ran from delivery of each machine :

Held Art. 115, applied. The clause about payment conclusively showed that the order was regarded as a single whole and the time began to run from the date of the last delivery. The suit therefore was within time. [P 279 C 2 ; 280 C 1]

(b) Principal and Agent — Relationship — Suit for accounts — Firm A ordering certain machinery from firm B according to its specifications — Firm B supplying some machinery with prices fixed but rest subject to fluctuations of prices and its commission on actual prices — Firm A selling all machinery to company G with all rights under contract with firm B — Firm B informed accordingly — Subsequent changes in constitution of firm B held did not affect its liability to G.

The firm is an entity and in the absence of any notice to those with whom it had dealings, if the various partners and proprietors assume the liabilities as well as the rights of the current firm, the existing proprietor of the firm must be regarded as the agent of those with whom the firm had dealings in the same way as his predecessors.

[P 281 C 2]

A, a firm ordered certain machinery from the firm B according to the specifications and estimates submitted by firm B. According to the invoices, the firm was to supply certain machinery from their own stock with the prices fixed but the prices of the rest of the machinery were made subject to fluctuations in them and the firm B was to charge five percent as their commission upon actual prices. For certain other purposes such as insuring, shipping and clearing goods the firm B acted as agents of firm A. During the transaction the firm A sold all the machinery to company G

and informed the firm B to credit all advances made by firm A to the name of company G who also confirmed this and asked the firm B to correspond and to draw upon them in future. There were also changes in the firm B. S who was sole proprietor of the firm when order was placed took some other people into partnership but these partners gradually retired. Ultimately S also retired and W became the sole proprietor. The company G instituted a suit against the firm B for rendering accounts on the ground that the firm B as their agents had charged far in excess of the price actually paid to the suppliers. It was pleaded on behalf of firm B that it was acting as principal and not as an agent and even if it was an agent the existing sole proprietor W was not liable to render accounts and at any rate the firm B was not an agent of company G as the relationship of principal and agent existed between the firm A and S the then sole proprietor :

Held that the firm B acted as an agent with regard to the machinery the prices of which were made subject to the fluctuations and acted as principal with respect to the machinery the prices of which were fixed. [P 281 C 1]

Held further that the change in the firm B did not affect this relationship in the absence of notice to those dealing with it as the firm is an entity. The existing proprietor was therefore liable to render accounts. [P 281 C 2]

Held also that the firm B was also an agent of the company G as the firm A had not only transferred the machinery bought from firm B to company G but also the entire rights under the contract. The firm B therefore was liable to render accounts to firm G for the items for which they acted as agents. [P 282 C 1]

M. C. Mahajan, J. N. Aggarwal and R. C. Soni — *for Appellants.*

Achbru Ram, Bhagwat Dayal, Keshab Chandra and Vishnu Datta — *for Respondents.*

Skemp J.—This is an appeal against a judgment and decree of the Senior Subordinate Judge of Delhi dismissing a suit for damages and accounts. The plaintiff is styled "the Goenka Cotton Spinning and Weaving Mills, Ltd., Delhi, through their Managing Agents Messrs. Paras Ram Harnand Rai," and the defendant is a firm trading as Messrs. Duncan Stratton & Company. In 1919 Messrs. Paras Ram Harnand Rai wished to start a weaving shed in Delhi and early in 1920 they ordered from the defendant firm an engine and machinery of considerable value. The defendants' detailed specifications and estimates were submitted and the plaintiffs' order given in January 1920. Dealings went on till 1923. It was the time of the post-war boom, which did not last long, for cotton goods and of a soaring and falling exchange. In February 1920 when the plaintiffs made their first big remittance to England, the rupee was at

2s. 7½d., but on 21st May 1921 it was 1s. 2.13/16d. During the dealings, Messrs. Paras Ram Harnand Rai informed the defendant firm that the machinery bought by them had been sold to the Goenka Cotton Mills and authorized the defendant firm to place all sums advanced to the credit of the Mills.

There were also changes in the constitution of the defendant firm. Until 5th February 1920 Mr. F. B. Stratton was the sole proprietor. On that date he took into partnership Richard Forshaw, John Cardiff Watson, Edmund Mills Harwood and Frank Harwood, but the deed provided that Mr. Stratton was to have absolute control. On 1st March 1920 Mr. Forshaw withdrew and on 2nd September 1922 a further agreement was executed showing that Mr. Stratton had withdrawn from 31st March 1921. Mr. David Watson became a partner on 1st April 1923 and Mr. E. M. Harwood died on 11th November 1923, so that, from that date, Mr. J. C. Watson, Mr. Frank Harwood and Mr. David Watson were partners. A deed of dissolution was executed on 16th March 1926 whereby Mr. J. C. Watson and Mr. Frank Harwood retired, Mr. David Watson remaining the sole proprietor. Mr. Frank Harwood is however the firm's representative in England.

The plaint was lodged on 9th October 1924 and an amended plaint on 21st December 1925. The original claim was for Rs. 25,000 damages, and the plaintiffs prayed for a decree for that amount together with a decree for the return of one machine or refund of its price. In the amended plaint, the plaintiffs set forth that they had ordered machinery in accordance with the detailed estimates given by the defendants in January 1920, that the machinery reached India in the beginning of 1921 and took about six months to be brought to Delhi, opened and fitted. Some parts of the machinery were broken but the defendants failed to obtain insurance for the greater part of it. The defendants had supplied two machines, water mangle and starch mangle, under different names in order to increase their bill and the plaintiffs sought that one might be returned or that they might receive compensation. The plaintiffs had ordered an engine by Newton, Bean and Mitchell but the engine was supplied by another maker, Pollit and Wigzell, of different horse-power and different speci-

ations. The defendants, who acted for the plaintiffs merely on a commission basis, had charged far in excess of the price actually paid to the suppliers. They sought a decree for damages and also for accounts and a decree for the return of one of the mangles.

The defendants pleaded that the Delhi Courts had no jurisdiction, that the suit was barred by time, that as early as 1920 the plaintiffs knew that they were getting a Pollit and Wigzell engine and that they had accepted it, that both a water mangle and a starch mangle were necessary, that the plaintiffs were responsible for the loss about insurance because they had not lodged their claim promptly and that they, defendants, were not the agents of the plaintiffs but acting as principals. On 7th February 1925 the Senior Subordinate Judge, Delhi, framed the following issues :

1. Has a Delhi Court no jurisdiction? 2. Is the suit within time? 3. Has there been any change in the constitution of the defendant firm? If so, how does it affect the case? 4. Are plaintiffs estopped from bringing the claim and to what extent? 5. Were any parts of the machinery broken; and are the defendants liable on that account? If so, to what extent? 6. Is water mangle and starch mangle one and the same thing and are the plaintiffs entitled to return one of the machines or to receive from the defendants compensation regarding the duplication? If so, in what amount? 7. Did the plaintiffs order the Pollit and Wigzell engine which was supplied? 8. If not, are the plaintiffs entitled to any damages on account of the said engine being different, defective or less efficient or otherwise? If so, to what extent? 9. Are plaintiffs entitled to receive any compensation on account of the difference in the said and other machinery as alleged in para. 7 of the plaint? If so, to how much? 10. Have the plaintiffs suffered any actual loss on account of the defendants' breach of contract and warranty if any? If so, how much? 11. To what relief are the plaintiffs entitled? 12. What is the relationship between the parties and, are defendants bound to render accounts to the plaintiffs?

On 18th March 1926 the defendants lodged a petition for revision of the order permitting amendment of the plaint, which was dismissed by a Division Bench of this Court on 10th May 1927. Commissions then issued for examination of witnesses in Bombay and in England. There were considerable difficulties about the examinations and notably, the same documents were required for examination of the witnesses in Bombay and in England. Hence the commissions for the witnesses in England were not sent until after the Bombay witnesses were finished in 1929. Commissions were executed in England

between 1930 and 1933. The plaintiffs did not even know English; they did not know the procedure; they were uncertain exactly which witnesses they wished to examine and all these circumstances delayed matters. After the Commissions were executed, evidence was taken in Delhi between August 1933 and January 1935. Arguments were heard in March and April and judgment pronounced on 30th May 1935 by the last of the various Subordinate Judges who had handled the case. We have spent 11 days in hearing arguments and unfortunately the case will not be finally disposed of now. This is a bad history even for a Delhi case.

The Judge who decided the case, L. Siri Ram Puri, held that the Delhi Court had jurisdiction, that the suit was within time for accounts but barred by time for damages or for the return of a mangle, that the changes in the constitution of the defendants' firm were of no effect, that there was no question of estoppel except with reference to insurance, that the plaintiffs were not entitled to return a mangle or receive compensation, that the plaintiffs had accepted, paid for and worked a Pollit and Wigzell engine for over two years and must be taken to have ordered it, that the defendants were not the agents of the plaintiffs and the plaintiffs were not entitled to accounts. On the minor issues he held in favour of the defendants and he dismissed the suit with costs. The first point argued was limitation. Admittedly the Article applicable is 115 of the Limitation Act and the period three years from the date of the breach. The Senior Subordinate Judge held that the plaintiffs' order was an order for separate pieces of machinery and time would run with regard to each machine as and when it was delivered. Nearly all the machinery was delivered in Bombay more than three years before the institution of the suit, and if it were held that time ran from delivery at Delhi, there was no evidence on that point. The suit regarding the engine and the mangle was also barred by time; only the claim for accounts was within time.

Mr. Mehr Chand Mahajan for the appellants argued that the suit was within time because the order for the machinery was single and indivisible and because there was also unity of object. The dealings began by the plaintiffs, on 2nd December 1919, (V. 3) informing the defendants that they wished to erect a weaving shed for

three hundred looms and asking them to send a complete specification for the same. The replies are the specifications of 12th and 13th January 1920, printed at pp. 4 to 15 of Vol. V. and covered by a single letter of 13th January 1920 (V. 15, 16). The first estimate is for an engine, Lancashire boiler, fire service pumps, humidifier pump and articles for the mechanic's shop. The second estimate was for saturating machine, kiers, chemicking machine, water mangle and starch mangle. The third estimate was for a calendar and the baling press. The covering letter gave the total price of these as £18,026-16-6 and laid down that the plaintiffs should "pay one-third in advance with the order, and will hand us within the next ten days a sterling demand draft for £6000." The clause about payment seems to me to show conclusively that the order was regarded as a single whole and that time would run only from the date of the last delivery. Admittedly, part of the engine was delivered within three years of the suit and the suit is therefore within time.

I will consider next the twelfth issue, the main issue in the case. It was argued before us for the appellants that the defendant firm was the plaintiffs' agent, for the respondents, that the parties were principals, on the admitted basis that if the defendant firm was plaintiffs' agent, it would have to render accounts, but it is worth bearing in mind the exact wording of the issue. The learned Senior Subordinate Judge began his discussion by saying that even in the amended plaint it was not alleged that the relationship between the parties was that of principal and agent. In para. 8 (a) of the amended plaint it is set forth :

The defendants who acted for the plaintiffs merely on commission basis, charged the plaintiffs for the machinery far in excess of the price actually paid to the suppliers. The plaintiffs further understand that defendants have overcharged the plaintiffs in other respects also. The defendants are responsible to render to the plaintiffs full and true accounts of the dealings relating to the purchase of the machinery in suit and to pay back to the plaintiffs all amounts charged in excess of the actual payments or disbursements as also all amounts received back by the defendants from the suppliers and not accounted for to the plaintiffs together with interest on sums found due.

This can only mean that the defendant firm were acting as agents of the plaintiffs. For the respondents, it is admitted that they were acting as the plaintiffs'

agents for certain purposes, such as for insuring, shipping and clearing goods. In the first instance the defendants firm submitted three invoices, the first being for the engine, boiler, fire service pump, humidifier pump, a lathe and a drilling machine. There was a note that

The prices of the Boilers, Economizers and Donkey Pump are basis prices only, and subject to advance if cost of machinery has to be advanced from the time the order is booked up to time of completion and shipment, should there be any increase in cost of raw material and wages. The rest of the items which form portion of our stock lines, and which we have already ordered from home, are fixed prices.

The rest of the items include the fire service pump, humidifier pump, the lathe and the drilling machine, the two latter not now being in dispute. It was further noted that the fire service pump was in stock at Bombay, and the drilling machine in stock. It was also noted that :

Freight and insurance charges to Bombay are not included in above quotations, and will be charged extra at actual costs. Please note that the above prices have been calculated without any commission or profit for ourselves, so on to all above prices will have to be added 5 per cent. for our own commission. The final cost will therefore be £6692 as shown above, plus £334-12-0 for our commission, total £7026-12 0 basis price F. O. R. Steamer English Port.

The second estimate was for the mangles and some other machines not now in dispute. It contained a clause that the prices in the estimate were only current basis prices and subject to advance similar to that just quoted but in this estimate there was nothing at fixed prices. The third estimate was for a cloth finishing calendar and baling press of which the latter is now in dispute. It also contained a note that the quotations were only current basis quotations subject to increase. The first estimate is dated 12th January 1920, the other two dated 13th January. On the latter date there is a letter (V. 15) in which the defendants apparently set down the conclusions come to in "our interview with you this morning in company with Mr. K. A. Desai." In reference to the engine, boiler, pumps and mechanics shop tools, and also in reference to the calendar and bale pressing plant, i. e. the items of the first two invoices, in place of 5 per cent. commission the defendants agreed to accept only 2½ per cent. and in reference to the third estimate for bleaching and finishing machinery it was understood that the defendants' basis quotations included commission. Every-

thing ordered in the three estimates was then summarised and it was noted :

It is agreed that with the exception of the fire service pump, humidifier pump, lathe and drilling machine covered by our estimate of yesterday's date, the prices of which are to be considered fixed, the prices of all the other machinery are current basis prices, subject to fluctuation and to increase according to advances

It was noted that the fire service pump, humidifier pump, lathe and drilling machine would be from stock. It was also noted :

We shall as usual arrange for shipment of the machinery to Bombay, covering all freight and insurance charges, which will be paid extra by you according to actual costs.)

Now, in my judgment, in reference to the articles which the defendant firm contracted to supply at fixed prices, they were principals. At any rate, in view of this contract they are not liable to render accounts. For the other machinery supplied, however, the defendants were acting as the plaintiffs' agents. There is no evidence as to what is meant by "basis prices." It must be remembered that Mr. Stratton is dead and that this Mr. Frank Harwood, although at the time he was an assistant in the firm, was not present at any of the original negotiations, (III, 50; see also III, 54, answer 53). Desai cannot be found: the plaintiffs probably did not understand. But it clearly meant that the defendants should pay the price which might vary according to variations in the cost of manufacture in England, and as the price was not fixed but depended on what the defendants had to pay to other people, the conclusion is inevitable that the defendants were acting as the plaintiffs' agents in making these payments.

The defendant firm undertook exchange operations on behalf of the plaintiffs. A letter from the defendants dated 6th September 1921, shows that as the best means of making remittances to England at a low and dropping exchange they had decided to place the plaintiffs' money with the Mercantile Bank and had arranged an overdraft in London against the floating account in Bombay so that whenever the exchange rose, a remittance could be made forthwith. It is not possible to explain this transaction on the supposition that the defendants were principals. If they were principals, as in the case of the pumps, they were only concerned with receiving payment for the goods which they had sold and not with making

the plaintiffs' financial arrangements for payment to other parties.

Mr. Aohbru Ram for the respondents contended that the changes in the defendant firm protected them from liability. It is indeed a striking fact that at the time the contract was entered into, Mr. F. B. Stratton was the sole proprietor of the firm ; now Mr. Stratton is dead, and the sole proprietor is Mr. D. Watson who had nothing to do with the firm till 1st April 1923 ; but the firm is an entity and in the absence of any notice to those with whom it had dealings, the various partners and proprietors assumed the liabilities as well as the rights of the current firm. Hence, in my opinion, the present proprietor of the firm must be regarded as the agent of the plaintiffs in the same way as his predecessors. It was finally urged that at any rate the defendant firm were not the agents of the Goenka Cotton Mills. On 19th December 1920 Pars Ram Harnand Rai wrote to the defendants :

We beg to inform you that the machinery bought by us has been sold to Messrs the Goenka Cotton Spinning and Weaving Mills Co., Ltd., and Mr. Desai will explain to you the same and you will please do all what he tells you to do on our behalf.

The defendants wanted further authority and on 24th January 1921 the plaintiffs wrote :

Since we have sold all our machinery bought through you to the Goenka Spinning and Weaving Mills Co. Ltd., Delhi, we hereby authorize you to place all the sums advanced by us hitherto to the credit of the said Mills.

On the same date a letter was written on behalf of the Mills confirming this and asking the defendants " to correspond and draw upon us in future ". The copy of this letter on the record is not signed. The plaintiff firm consists of three brothers : Seth Sat Narain, Ganga Dhar and Durga Parshad. One of the partners Seth Ganga Dhar giving evidence said : " We started the Goenka Cotton Mills with an authorized capital of Rs. 20 lakhs ", of which about ten lakhs was subscribed, Rupees 9,25,000 by the managing agents. Mr. Desai also purchased shares of the value of Rs. 10,000, but never paid for the shares which were transferred to Pars Ram Harnand Rai. The company failed to materialize, but it appears that the plaintiffs wished to add to their other profits those of company promoting and as part of those profits asked the defendants to

increase their invoices on the whole of machinery ordered by 15 per cent.

Mr. Achhru Ram argues that the relationship of principal and agent existed only between Messrs. Pars Ram Harnand Rai and Mr. F. B. Stratton, not between the Goenka Cotton Mills and Mr. Watson. I have already held that Mr. Watson was responsible for all the liabilities of the firm Duncan Stratton and Co. The answer to the other point depends on whether Pars Ram Harnand Rai transferred to the Goenka Cotton Mills only the machinery which they had bought or their entire rights under the contract. I would answer this in the latter sense because Pars Ram Harnand Rai asked the defendant firm to place sums hitherto advanced to the credit of the Mills. But it is not really necessary to go into this because this point was not specifically pleaded by the defendants or specifically put in issue. I would therefore hold that the defendant firm are liable to render accounts to the plaintiffs and will in the remainder of this judgment indicate as far as possible to what extent. (After discussing the evidence regarding the extent of liability to render accounts with respect to different items his Lordship proceeded further.) The result of this discussion is that the defendants will have to pay to the plaintiffs £300, the secret commission paid to Desai, and ancillary charges, £6 the difference in price between the two mangles and £67.18.3, freight and insurance charges for the fire service pump apparently not actually incurred. They have to account to the plaintiffs for the price of the boiler and the baling press; and for the rupee and sterling overdraft account. The final order will therefore be that the appeal is accepted and the plaintiffs given a decree for the items specified plus anything which may be found due on the other items of account. Unless the three last items of account can be settled simply, I would earnestly advise the parties to compromise, as it is possible that the litigation on these points may cost more than the total sum ultimately found due. If the defendants can trace accounts from Alex. Young and Co., and from the sterling overdraft account of the Mercantile Bank in London, it might settle the matter. It is possible that Alex. Young's accounts may not be forthcoming. It is very striking how witness after witness has stated that books have been destroyed or accounts

cannot be traced; this is true even of the clerk who gave evidence on behalf of the Mercantile Bank, Bombay. The defendants have deposed that they have put on the record everything in their possession relating to the transactions in question; but it was part of the appellants' case that they had deliberately destroyed their books. This I do not believe; but Mr. Frank Harwood admitted that a number of books and papers had been destroyed on two occasions when dead rats were found in the Record Room (III, 88); and Mr. Watson said that a number of books were destroyed under his instructions in 1926, "when we installed quite a new system by Boneo, when I took over the firm", (III, 32). The suit for accounts had been lodged in 1925 and whatever the reason the defendant firm are responsible for the unfortunate results of the destruction of account books.

I would therefore accept this appeal and grant the plaintiffs a preliminary decree for accounts to be rendered by the defendant firm in accordance with the foregoing. In view of the result, plaintiffs having failed on several issues, the defendant firm is to pay half the plaintiffs' costs. The case is now remitted to the Court of the Senior Sub-Judge, Delhi, to take an account of the amounts due on (a) the secret commission paid to Desai, and ancillary charges thereon, (b) the boiler, (c) the baling press, (d) the rupee and sterling account. The amounts due on the difference between the two mangles, and on insurance of the Fire Service Pump have been definitely ascertained above.

Dalip Singh J. — I agree generally.

S.C./R.K.

Appeal allowed.

A. I. R. 1938 Lahore 282

ADDISON AND DIN MOHAMMAD JJ.

*Secretary of State and another —
Defendants — Appellants.*
v.

*B. A. Malak, Plaintiff and another,
Defendant — Respondents.*

First Appeal No. 211 of 1936, Decided on 8th October 1937, from decree of Sub-Judge, First Class, Lahore, D/- 11th February 1936.

(a) Punjab Municipal Works Rules (1925), R. 11 — "Professional standing" prior to obtaining degree from University is possible.

The words "professional standing" in R. 11 are too vague to be properly defined and the mere fact that a person obtains his degree from a University in a certain year does not necessarily exclude the possibility of having a professional standing prior to that period. [P 285 C 1]

(b) Punjab Municipal Act (3 of 1911), S. 41—Word "unfit"—Meaning.

The word "unfit" in S. 41 does not refer to the absence of professional qualifications. [P 285 C 2]

(c) Punjab Municipal Act (3 of 1911), S. 41—Executive Officer or President of Committee cannot arrogate powers to remove municipal employee to themselves.

There is no provision in the Punjab Municipal Act or in the Executive Officers Act nor in any rule or bye-law made under these enactments which can authorize the Executive Officer or the President of the Municipal Committee to arrogate to themselves the powers of removing a municipal employee. [P 285 C 2; P 286 C 1]

(d) Punjab Municipal Account Code—Person holding substantive appointment is entitled to provident fund even though appointed on probation.

Under the Punjab Municipal Account Code, every servant who holds a substantive appointment is entitled to the benefit of the provident fund, and every person who holds a substantive appointment comes within the letter of that rule even though he is appointed on probation.

[P 286 C 1]

J. N. Aggarwal and S. C. Chatterji —
for Appellants.

M. C. Mahajan, M. A. Majid and Darbari Lal — for Respondent (Plaintiff).

Din Mohammad J. — This appeal has arisen out of a suit instituted by Mr. B. A. Malak against the Municipal Committee, Lahore, and the then Executive Officer for recovery of Rs. 5655.4.0 and for the issue of an injunction against the Executive Officer prohibiting him from interfering with the plaintiff in the performance of his duties.

The plaintiff alleged that by resolution No. 150, dated 23rd May 1933, the Municipal Committee, Lahore, appointed him to the post of Municipal Engineer (Buildings and Roads) on Rs. 300 per mensem and the usual conveyance allowance, if he actually maintained a car, and that in pursuance of that resolution, he took over charge on 26th May 1933. His appointment was on six months' probation but on the expiry of that period, the Municipal Committee did not dispense with his services. On 17th January 1934, he was all of a sudden required by Mr. Richards, Municipal Engineer, Water Works, to relinquish charge of his office. Mr. Richards however was not in a position to inform him of the circumstances in which his services

were dispensed with and he consequently continued to discharge his official duties. On 18th January 1934, the Executive Officer personally handed him a letter issued by himself stating that his services had been terminated under orders from the Government. He asked for a copy of the orders of the Government relied on by the Executive Officer but this was refused. On 26th January, when he went to attend his office he found the door of his room locked. On 30th January 1934, he surrendered the charge under protest.

The position taken up by the plaintiff was that neither had the Government dispensed with his services nor was it authorized to do so and that the only authority competent to dismiss him was the Municipal Committee which had not passed any resolution to that effect till then. On these grounds he claimed his full salary from the date of his appointment up to the time of the institution of the suit. In addition, he claimed his provident fund to which, he alleged, he was entitled under the rules; and further stated that if it was found that the order of his dismissal was not ultra vires, he was entitled to one month's salary in lieu of one month's notice which is necessary to be issued to every municipal employee whose services are dispensed with.

Both the defendants submitted separate written statements but they were practically to the same effect. Various pleas were raised by the defendants. It was contended that the plaintiff did not possess the necessary qualifications as required by R. 11 of the Municipal Works Rules and could not be employed without the approval of the Local Government, presumably under S. 38, sub.s. (2), Municipal Act. It was further urged that the plaintiff was removed under the directions of the Secretary, Transferred Department, which directions the Local Government was competent to issue under S. 41, Municipal Act. The plaintiff's right to recover the provident fund was denied as well as his right to recover one month's salary in lieu of one month's notice. Both the defendants further made an attempt to justify the withholding of the plaintiff's salary from the date of his appointment up to the time of his removal and even claimed a set off.

On the pleadings of the parties the following issues among others were struck :

1. Whether the appointment of the plaintiff as an Engineer of defendant 1 was made subject to the approval of the Local Government? O. P. on defendants.

2. If not, whether the appointment of the plaintiff as Municipal Engineer by defendant 1 was not valid? O. P. on defendants.

3. Whether the services of the plaintiff have been dispensed with validly under the provisions of the Municipal Act and Rules thereunder? O. P. on defendants.

4. Whether the plaintiff is entitled to any contribution to the provident fund for the period during which he worked as Municipal Engineer of defendant 1?

The Subordinate Judge disposed of issues 1, 2 and 3 together and came to the conclusion that the plaintiff's appointment did not require, and was not made subject to, the approval of the Local Government, that his appointment was valid and that his services had not been validly dispensed with under the provisions of the Municipal Act. He also found that the plaintiff was entitled to the provident fund claimed by him. On these findings he decreed the plaintiff's claim in full. Hence this appeal.

Counsel for the appellant has very frankly conceded that at the time when the appointment of the plaintiff was made, S. 38, Municipal Act, as amended by the Amendment Act of 1933, was not in force and that consequently the approval of the Local Government was not necessary to the plaintiff's appointment. He has, however, strenuously contended that the Municipal Committee was not empowered under the rules to appoint the plaintiff without the previous sanction of the Local Government inasmuch as his professional standing did not extend to a period of ten years and he thus lacked the requisite qualifications. In support of this contention he has relied on R. 11 of the Municipal Works Rules, the material portion of which reads as follows:

No person shall be appointed by a Committee as its Municipal Engineer if he does not possess at least the following technical qualifications:

(a) In the case of a first class Committee such qualifications as are prescribed by the Local Government for the recruitment of Officers to the Provincial Engineering Service and in addition ten years' professional standing.

(b) Provided that a first class Committee with the previous sanction of the Local Government may, subject to such condition as may be prescribed, appoint an Engineer who does not possess these qualifications.

In support of the plea that the plaintiff did not possess professional standing for the period prescribed by the rules, reliance

is placed on the opinion expressed by the Chief Engineer as stated in the letter of the Secretary, Transferred Department, dated 4th January 1934, to the address of the Commissioner. Beyond this there is nothing definite on the record in support of this statement. In view of the fact that the appointment of the plaintiff did not require the approval of the Local Government, the onus lay upon the defendants to establish that his appointment was invalid and we have no hesitation in saying that they have failed to discharge the burden that lay on them. It was incumbent on the defendants to produce the Chief Engineer or the Secretary, Transferred Department, who had endorsed the opinion of the Chief Engineer to throw light on the matter and to state definitely as to how the Government had come to the conclusion that the professional standing of the plaintiff did not extend to the period prescribed in the rules, especially when the plaintiff had claimed that experience in the application originally submitted by him and the Municipal Committee by majority had decided that he did possess that standing.

At the trial, the plaintiff offered himself as a witness and stated on oath that besides possessing the B. Sc. (Honours) degree of the Glasgow University, he had worked as an Assistant Civil Engineer to one Mr. Wilson, District Engineer to the Borough of Motherwell in Scotland, during the years 1921 to 1923. He spent about four years in the University itself and after receiving his degree in 1927 he returned to India where he was employed by the Local Government in the Cadre of the Provincial Engineering Service. He spent three and a half years there and was then retrenched. He later continued to perform his professional duties privately. According to his calculation therefore, his contact with Engineering work extended to more than ten years. He further produced Mian Nasir Din, Municipal Commissioner, who was a member of the Public Works Sub-Committee responsible for recommending the plaintiff for employment as Municipal Engineer, and he stated that from the papers submitted by the plaintiff along with his application it was clearly established that his professional standing did extend to a period of ten years. This question was on objection raised by certain members of the Municipal Committee discussed at the time of the plaintiff's appointment too and by majority it was resolved

that the plaintiff was fully qualified as required by the rules. It is significant to remark that the then President of the Municipal Committee, who was examined as a witness for the defendants, unequivocally stated that he "considered that according to the rules then prevailing the plaintiff had due qualifications" and that no approval of the Local Government was necessary for his appointment. It is true that the testimonials on which the plaintiff relies have not been placed on the record but for this the plaintiff is not to blame. He had submitted his testimonials in original to the Local Government when the question of his appointment was under consideration and there is nothing on the record to show that these testimonials were ever returned to him. He made an application to the Court to send for those testimonials from the Local Government but the testimonials could not be procured.

In the face of the positive evidence led by the plaintiff, and in the absence of any evidence led by the defendants to discharge the onus that lay heavily on them, the only conclusion possible is that the plaintiff was in possession of the requisite qualifications at the time when his appointment was made and that in these circumstances no previous sanction of the Local Government was necessary to validate his appointment. We may also remark in this connexion that the words 'professional standing' are too vague to be properly defined and that the mere fact that a person obtains his degree from a University in a certain year does not necessarily exclude the possibility of his having a professional standing prior to that period. To give a concrete instance, a person who has worked as Sub-Assistant Surgeon in the Medical Department or as Overseer in the Engineering Department cannot be said to have no professional standing during the period that he has so worked if later in order to gain superior qualifications he obtains a higher degree from a recognized University.

It now remains to be considered whether the removal of the plaintiff from his appointment was in consonance with law. As stated above, the defendants relied on S. 41, Municipal Act, but a mere perusal of that Section shows that it has no application to the facts of the present case. It is true that the Section contemplates the removal of a person who in the opinion of

the Local Government is unfit for employment, but in our opinion the word 'unfit' there does not refer to the absence of professional qualifications. We are supported in our conclusion by the rules made by the Local Government itself under S. 240, Municipal Act, and published in the Punjab Government Gazette, dated 23rd September 1932 (see Notification No. 30256 dated 16th September 1932). R. 7 which was added to the old rules then in existence clearly lays down that if the Commissioner or the Deputy Commissioner proposes to remove a municipal employee under S. 41, he will have to observe the procedure laid down in R. 3. That rule requires the framing of a definite charge against the employee so intended to be removed and also the holding of a regular enquiry into the matter. From whatever point of view therefore the matter is looked at, it cannot be gainsaid that the procedure adopted in the removal of the plaintiff was altogether illegal. In the first instance, the Local Government had no authority to remove him, and, secondly, if the Government did intend to take action under S. 41, it was bound to observe the rules promulgated by itself under S. 240.

What happened on receipt of the letter from the Secretary, Transferred Department, cannot be justified on any grounds. It is stated that a copy of the letter addressed to the Commissioner was sent direct to the Municipal Committee and immediately on its receipt executive officer wrote to the President to order the removal of the plaintiff and, although the President remarked that the papers should be placed before the general meeting, no such action appears to have been taken and the plaintiff was forcibly removed from his office without any resolution by the committee to that effect. It cannot be seriously contended that either the executive officer or the President of the Municipal Committee constituted the committee or could exercise the powers which the committee alone could do. All that has been contended before us is that the executive officer could order the removal of the plaintiff from his office under the directions of the Local Government, but we have been referred neither to any provision of the Municipal Act or the Executive Officers' Act on the point nor to any rule or by-law made under those enactments which could authorize the executive officer or the President of the Municipal

pal Committee to arrogate these powers to themselves. Had either of these officials conducted himself in a constitutional way, all this trouble would not have arisen. Instead of taking a hasty step in the matter, they could have coolly deliberated on the action open to them under the law and secured a resolution from the Municipal Committee dispensing with or terminating the services of the plaintiff in a manner which was permissible under the law. Instead of having recourse to legal action, these two officers appear to have taken the law into their own hands and issued orders which they had no authority to do. We conclude therefore that the dismissal of the plaintiff in the circumstances in which he was dismissed was opposed to all canons of law and justice and that as he was forcibly removed from discharging his functions and actually locked out of the room, he is entitled to his full salary for the period during which he was not allowed to hold his office and to perform his duties.

The only other question that falls for determination is whether the plaintiff is entitled to recover his provident fund under the rules. The defendants contend that as the plaintiff had been appointed on probation, he was not entitled to that benefit. Here again they are wrong. Under the Municipal Account Code, every servant who holds a substantive appointment is entitled to the benefit of the provident fund, and as explained by the Assistant Examiner, Local Audit Department, Punjab, at the trial, every person who holds a substantive appointment comes within the letter of that rule even though he is appointed on probation. In view of the findings arrived at above, the question whether the plaintiff was entitled to one month's salary in lieu of one month's notice does not arise. On all the grounds stated above we uphold the judgment of the Subordinate Judge and dismiss this appeal with costs. We may add that the prayer for injunction which was granted by him has become ineffectual inasmuch as the plaintiff was reinstated after the issue of the injunction and is now said to have been removed once more by the Administrator.

D.S./R.K.

*Appeal dismissed.***A. I. R. 1938 Lahore 286**

ADDISON AND DIN MOHAMMAD JJ.

Mian Nizam Din — Defendant — Appellant.

v.

Lala Ram Sukh Das, Plaintiff and another, Defendant — Respondents.

First Appeal No. 29 of 1937, Decided on 1st November 1937, from preliminary decree of Sub.Judge, First Class, Lahore, D/. 7th November 1936.

(a) Mortgage—Prior mortgagee—Rights of—Prior mortgagee purchasing property mortgaged to him—He must be deemed to keep mortgage alive for his benefit as against subsequent mortgagee in absence of evidence to contrary.

It should always be presumed that in India, a purchaser of previous mortgagee rights intends to keep the mortgage alive for his benefit. Though the Transfer of Property Act is not in force in the Punjab, the general principles to be applied are those embodied in the Amended Act of 1929 which must be held to be more in accordance with the principles of justice, equity and good conscience. [P 287 C 2]

S, who owned four houses mortgaged two of them to K and although the mortgage was one with possession, S, instead of delivering the mortgaged property to K executed a lease thereof in his favour. Afterwards S mortgaged all the four houses to R. Later on K's grandson Z brought a suit against S for recovery of rent and in execution of the simple money decree obtained therein he had the judgment-debtor's property sold and himself purchased the equity of redemption in the houses. Z then sold the two houses to N. R brought a suit against S and N for recovery of his mortgage money, by sale of the property mortgaged to him by S. N claimed priority over R's mortgage in respect of the two houses purchased by him from K :

Held that the principles contained in S. 101, T. P. Act applied. That having purchased the rights of Z, N stepped into his shoes and was in relation to the property purchased by him, clothed with all the privileges which his vendor K possessed. N was therefore entitled to subrogate and claim priority over R in respect of his own transaction and that N by reason of his holding the position of defendant in the suit could claim to retain possession of the mortgaged property until all his claims were satisfied although he might have lost his right by lapse of time : 10 Cal 1035 (PC); A I R 1932 Lah 56 and A I R 1933 Lah 151 Rel on; A I R 1927 Mad 631 and 39 Cal 527 (PC), Disting. [P 288 C 1, 2]

(b) Limitation—Defence of.

Even if a claim based on certain facts is barred by efflux of time, a defence based on those facts is not so barred. [P 288 C 1]

Mohammad Nazir and Sultan Ali—
for Appellant.

Barkat Ali — for Respondent
(Plaintiff)

Din Mohammad J.—This appeal has arisen out of a suit instituted by Ram Sukh Das against Muhammad Said and Nizam-ud-Din for recovery of Rs. 7000 with costs and future interest by sale of the property mortgaged to him by Muhammad Said. The chief contesting defendant in the case was Nizam-ud-Din who had purchased a part of the mortgaged property from the previous mortgagee-vendee and who on that account claimed priority over the plaintiff's mortgage.

The material facts are these. Muhammad Said owned four houses bearing Nos. 2005, 2007, 2414 and 2415. On 5th May 1913, he mortgaged houses Nos. 2414 and 2415 to Karim Bakhsh for Rs. 2500. Though this mortgage was with possession, the mortgagor instead of delivering possession of the mortgaged property to the mortgagee had himself executed a lease thereof in his favour. Some time afterwards, Muhammad Said mortgaged all the four houses to Ram Sukh Das for Rs. 7000. In 1927 Zahur-ud-Din, a grandson of Karim Bakhsh, instituted a suit against Muhammad Said for recovery of rent that had fallen due and in execution of the simple money decree obtained therein he had the judgment debtor's property sold and himself purchased the equity of redemption in the houses in dispute. On 8th February 1929, Zahur-ud-Din sold a part of the two houses to Nizam-ud-Din who soon afterwards rebuilt the property acquired by him. On 8th August 1931, the remaining portion of the two houses was also sold by Zahur-ud-Din to Nizam-ud-Din and in 1933 he carried out extensive repairs in the newly acquired portion too. In October 1934 the present suit was instituted. Nizam-ud-Din resisted the suit on various grounds. The Subordinate Judge, while disposing of the issues arising in the case, held that the plaintiff's mortgage deed included the two houses in dispute, that on those two houses a prior mortgage did exist in favour of Karim Bakhsh, that Zahur-ud-Din, a representative-in-interest of Karim Bakhsh could alone take benefit of that mortgage and not Nizam-ud-Din who in his assignment had not expressly kept the mortgage alive for his benefit, that Nizam-ud-Din had spent Rs. 1044.4.0 in rebuilding a part of the property in dispute in 1929 and had purchased bricks of the value of Rs. 425 in 1933 for repairing the remaining portion of the property in question and

that the only priority that Nizam-ud-Din could claim was in respect of these sums which aggregated Rs. 1469.4.0. He accordingly made a decree in favour of Ram Sukh Das in terms of the relief prayed for with the reservation mentioned above. Nizam-ud-Din has appealed. We have heard counsel for the parties and have come to the conclusion that this appeal must succeed. The Subordinate Judge has misdirected himself in law and his decision, therefore, cannot be maintained. S. 101, T. P. Act, as introduced in 1929, is clear on the point and needs no further comment. It reads as follows :

Any mortgagee of, or person having a charge upon, immovable property, or any transferee from such mortgagee or charge-holder, may purchase or otherwise acquire the rights in the property of the mortgagor or owner, as the case may be, without thereby causing the mortgage or charge to be merged as between himself and any subsequent mortgagee of, or person having a subsequent charge upon, the same property and no such subsequent mortgagee or charge-holders shall be entitled to foreclose or sell such property without redeeming the prior mortgage or charge, or otherwise than subject thereto.

There can be no doubt therefore that Nizam-ud-Din was entitled to subrogate and could in the present suit claim priority over the plaintiff in respect of his own transaction. Though the Transfer of Property Act is not in force in the Punjab, the general principles to be applied are those embodied in the Amended Act of 1929 which must be held to be more in accordance with the principles of justice, equity and good conscience : see A I R 1933 Lah 151.¹ Further, as laid down by their Lordships of the Privy Council in 10 Cal 1035,² in the absence of evidence to the contrary, it should always be presumed that in India where the question to ask is, in the interests of justice, equity and good conscience, what was the intention of the party paying off the charge, a purchaser of the previous mortgage right intended to keep the mortgage alive for his own benefit. In 135 I C 201,³ a learned Judge of this Court observed that where a mortgagee purchased the property in execution sale without taking care to see that his mortgage was mentioned in the proclamation

1. Muhammad Abdullah v. Mohammad Yasin, (1933) 20 A I R Lah 151 = 141 I C 377 = 34 P L R 245.

2. Gokal Dass Gopal Das v. Puran Mal Prem-sukh Das, (1934) 10 Cal 1035 = 11 I A 126 = 4 Sar 543 (P O).

3. Gurdit Singh v. Hakumat Rai, (1932) 19 A I R Lah 56 = 135 I C 201 = 32 P L R 759.

of sale and in the sale certificate, this fact alone was not sufficient to show that he had given up the charge. In the present case, the charge was mentioned in the deed in favour of Zahur-ud-din and if Zahur-ud-din is entitled in law to subrogate, we see no valid reason to deprive his assignee, Nizam-ud-din, of that legal right. By purchasing the rights of Zahur-ud-din, he veritably stepped into his shoes and was in relation to the property purchased by him clothed with all the privileges that his vendor possessed.

Counsel for the respondent has frankly conceded that if the principles embodied in S. 101 Transfer of Property Act, were held applicable, he had no case on the merits. He however contended that Nizam-ud-din had lost his right on account of lapse of time and relied on 50 Mad 626⁴ in this connection. It is not necessary to discuss that judgment at length in this case as in our view it is clearly distinguishable. As stated by Wallace J. at page 632 of the report, the mortgagee there had succeeded to the original mortgage rights not as a usufructuary mortgagee but as a simple mortgagee. Here the mortgage in favour of Karim Bakhsh was with possession and the appellant who had succeeded to those rights was also in possession of the property at the time of the institution of the suit and still holds possession thereof. Moreover, in the judgment of their Lordships of the Privy Council reported in 39 Cal 527⁵ on which 50 Mad 626⁴ was based, the person claiming priority was a plaintiff and not a defendant in the suit, while the present mortgagee holds the position of a defendant and as such can claim to retain possession of the mortgaged property until all his claims are satisfied. It is well known that even if a claim based on certain facts be barred by the efflux of time, a defence based on those facts is not so barred.

On these grounds, we hold that Nizam-ud-din was entitled in law to urge that the plaintiff could not ignore the rights acquired by him in respect of the previous mortgage and he was therefore justified in claiming priority over the plaintiff in

regard to the mortgage money falling due on the previous mortgage. This amount is conceded to be not less than Rs. 4500, i. e. the amount claimed by Nizam-ud-din in this appeal.

In this view of the case we need not discuss the question of improvements as Nizam-ud-din has sought the enhancement of the sum for which priority is to be directed by Rs. 4500 only and has paid court-fee on that amount alone. We accordingly allow this appeal and modify the decree of the Subordinate Judge to this extent, that Nizam-ud-din will first be entitled to recover from the sale proceeds of houses Nos. 2414 and 2415, if sold, a sum of Rs. 4500 in addition to Rs. 1469-4-0 already allowed to him under the decree of the trial Court. The plaintiff-respondent will recover his costs of the original suit from Muhammad Said alone and in the appeal before us Nizam-ud-din will get his costs on Rs. 4500 from Ram Sukh Das. The cross-objections put in by Ram Sukh Das relate to the costs of improvements but have not been pressed. We dismiss them but make no order as to costs.

R.M./R.K.

Appeal allowed.

A. I. R. 1938 Lahore 288

YOUNG C. J AND MONROE J.

Mehnga Allah Bakhsh
Convict — Appellant.

v.

Emperor.

Criminal Appeal No. 1108 of 1937.
Decided on 3rd November 1937, from
order of Addl. Sess. Judge, Amritsar, D/-
10th September 1937.

Criminal Trial — Duty of trial Court —
Trial Judge must be strictly accurate in
making comments on evidence given before
him.

Judges sitting in appeal are inclined to attach great weight to the views of the trial Judge on the manner in which evidence has been given before them. It is therefore essential that a trial Judge should endeavour to be strictly accurate in making any comment on the evidence given before him.
[P 289 O 1]

Fayaz Hassan Shah — *for Appellant.*R. C. Soni for Advocate-General —
for the Crown.

Young C. J. — Mehnga was charged with five other persons with the murder of Bhola : the five others were acquitted.

4. M. Kotappa v. P. Raghavayya, (1927) 14 A I R Mad 631=102 I O 316=50 Mad 626=52 M L J 582.

5. Mohamed Ibrahim Hossein Khan v. Ambika Pershad, (1912) 39 Cal 527=89 I A 68=14 I O 496=16 O W N 505=15 O L J 411 (P O).

Mehnga was convicted and sentenced to death. There are many unsatisfactory features about this case. The murder took place between 8 and 9 A. M. on 22nd June 1937: the first information report was not made till 4.30 P. M. at a distance of only five miles. The learned Sessions Judge and the assessors disbelieved the witnesses for the prosecution about the other five accused, who were acquitted and after inspecting the scene of the murder, the Sessions Judge arrived at the conclusion that the two principal eyewitnesses could not, from the position in which they placed themselves, have seen what they said that they saw. In addition there are many discrepancies in the evidence of these witnesses.

There was time and opportunity to concoct a case; the evidence is not sufficiently satisfactory to inspire confidence and bears many indications of untruth; it is possible that there was no witness present at the murder, because there was a ceremony in the neighbourhood on the morning of the murder which was attended by many of the villagers, and indeed the appellant claimed that he was present there, when news of the murder was brought. The assessors who gave their reasons, seem to have taken the correct view of the case: one of them said "I do not think Mehnga is proved to be the murderer because the prosecution witnesses are discrepant. He may well in fact be the murderer." We agree with this view, allow the appeal and set aside the conviction.

We have difficulty in understanding how the learned Sessions Judge came to write the note at the end of the evidence of Dhuman. He noted that the witness impressed him most favourably. "He gave his evidence throughout in an absolutely convincing and straightforward manner." This follows a record of the cross-examination in which the witness repeatedly contradicted or denied his statements to the police and in the committing Magistrate's Court. The Judge's view is in conflict with the record of the witness's evidence and fortunately so, for Judges in appeal are, in our opinion rightly, inclined to attach great weight to the views of trial Judges on the manner in which evidence has been given before them. It is therefore essential that a trial Judge should endeavour in making such comments to be strictly accurate.

R.M./R.K.

Appeal allowed.

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** A. I. R. 1938 Lahore 289

ADDISON AND DIN MOHAMMAD JJ.

*Central Bank of India Ltd., Lahore —
Decree-holder — Appellant.*

v.

*Attar Chand and others —**Judgment debtors — Respondents.*Exn. First Appeal No. 312 of 1936,
Decided on 3rd January 1938.

** Civil P. C. (1908), O. 34, R. 5 (3) — Decree for sale under O 34, R 5 (3) — Sale proceeds should be applied first in discharge of amount found due in preliminary decree and not towards costs or interest—Principle of S 60, Contract Act, cannot be applied.

There is no doubt that a creditor to whom principal and interest are due, is entitled to appropriate against the interest any sum the debtor pays without stipulating that it is to be appropriated against the principal. But there is no reason why this principle should be imported into the execution of decrees which are provided for by the Code of Civil Procedure. In cases in which a decree has been passed in the usual form, prescribed under R. 5 of O 34 costs and interest cannot have priority over the actual mortgage debt declared to be due in the preliminary decree and the rule laid down in O. 34, Rr 10 and 13, relating to properties which are subject to prior mortgages cannot be inferentially applied to cases in which the property sold is not subject to any mortgage other than the one for the realization of which the property of the judgment-debtor was ordered to be sold: *A I R 1931 Rang 153, Approved; A I R 1928 Lah 901, Dissented.* [P 290 C 2; P 291 C 1, 2]

Tirath Ram — *for Appellant.*

Ram Chand Manchanda —

for Respondents.

Jhanda Singh —

*for Respondent (Mt. Samitran).***Order of Reference.**

Tek Chand J.—On 6th February 1926, the appellant Bank instituted a suit against the respondents for recovery of Rupees 12,123.13.10, alleged to be due on foot of an equitable mortgage effected by the defendants in its favour. On 5th August 1927, a preliminary decree was passed declaring that the amount due to the plaintiff on account of principal, interest and costs calculated upto 1st February 1926 was Rupees 12,128.13.10 and that such amount shall carry interest at Rs. 10 per cent per annum until realization. The decree further directed that if the defendants paid into Court the amount declared to be due on or before 31st August 1927, the plaintiff Bank shall deliver up to the defendants the title deeds etc., and retransfer the property to the defendants free from all incumbrances, but that

If such payment was not made on or before the said day of 31st August 1927 the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale), be paid into Court and applied in payment of what is declared due to the plaintiff as aforesaid, together with subsequent interest and subsequent costs, and that the balance, if any, be paid to the defendant.

Nothing having been paid within the time fixed, a final decree was passed on 31st August 1927. The defendants came in appeal to this Court, but the appeal was dismissed on 31st October 1934. In execution the mortgaged properties were sold in various lots. The first sale was on 25th April 1929, when a sum of Rs. 3089 was realized after defraying the expenses of the sale, and paid to the decree-holder. The second lot was sold on 22nd November 1935, when a sum of Rs. 3633 was paid to the decree-holder. A third set of the mortgaged properties was sold subsequently and the sale proceeds amounting to Rs. 21,700 were deposited in Court. A dispute then arose between the parties as to the amount which was then outstanding against the judgment-debtors. The decree-holder contended that the payments of Rs. 3089 and Rs. 3633, made on 26th April 1929 and 22nd November 1935 respectively, should first be appropriated towards the payment of costs and interest on the sum of Rs. 12,128-13-10 which had been declared to be due in the preliminary decree and which carried interest at 10 per cent. per annum from 1st February 1926. The judgment-debtors, on the other hand, maintained that the aforesaid payments should be appropriated towards the payment of the sum declared due in the preliminary decree viz. Rs. 12,128-13-10. They urged, therefore, that the proper way of calculating the amount would be that the principal and interest due up to 11th July 1936 be made up, and then all the repayments with interest thereon at Rs. 10 per cent. per annum be added up and the total of the latter be deducted from the former. The difference between the two modes of calculation comes to Rs. 2458.12.0. The executing Court has accepted the judgment-debtors' contention and has ordered that out of the sale proceeds of the third lot of properties, Rs. 17,754-9-0 be paid to the decree-holder in full satisfaction of the decretal amount.

The decree-holder Bank has appealed and on its behalf it has been contended that the mode of calculation followed by

the lower Court is erroneous and that it is entitled to a sum of Rs. 2458.12.0 over and above the amount which has been ordered to be paid to it by the lower Court. In support of this contention Mr. Tirath Ram has relied upon R. 13 of O. 34, Civil P. C. That rule, however, relates to cases in which the property is subject to a prior charge, and has been sold with the consent of the prior mortgagee, free from his incumbrance, as provided in R. 10. R. 13 therefore is clearly inapplicable. The Code appears to be silent on the particular point, which arises for decision in this case. The learned Judge of the Court below has followed a Division Bench ruling of the Rangoon High Court in A I R 1931 Rang 153=9 Rang 186.¹ In that case, after an elaborate discussion of the caselaw on the subject, the learned Judges, disagreeing with the decision of the Madras High Court in 25 M L J 552=21 I C 691,² held that in cases in which a decree has been passed in the usual form, prescribed under R. 5 of O. 34, Civil P. C., costs cannot have priority over the actual mortgage debts declared to be due in the preliminary decree and that the rule laid down in O. 34, Rr. 10 and 13, Civil P. C., relating to properties which are subject to prior mortgages cannot be inferentially applied to cases in which the property sold is not subject to any mortgage other than the one for the realization of which the property of the judgment-debtor was ordered to be sold.

The only case of this Court which has a bearing on the point and which has been cited before me is a Single Bench judgment of Bhide J. in A I R 1928 Lah 901³ in which the facts were somewhat similar to those of the present case and the decision was given in favour of the decree-holder. The question was not discussed at any length but the learned Judge relied upon the decision of their Lordships of the Privy Council in 48 Cal 839⁴ which however was not a case of a mortgage decree but in which the question raised was whether a creditor, to whom the principal and interest were due was

1. Maung Po Mya v. M. A. S. Chettyar Firm, (1931) 18 A I R Rang 153=133 I C 225=9 Rang 186.

2. Sabapathi Pillai v. Chokalinga Pillai, (1913) 25 M L J 552=21 I C 691.

3. Ram Chand v. Bank of Upper India Ltd. Simla, (1928) 15 A I R Lah 901=109 I C 592.

4. Nemichand v. Radha Kishan, (1922) 9 A I R P O 26=63 I C 904=48 Cal 899 (P C).

entitled to appropriate against interest any sum which the debtor had paid to him. That case, as also the earlier Privy Council decision referred to therein, 44 Mad 570⁵ at p. 573, were decided on S. 60, Contract Act. It is contended that the principle of S. 60 cannot be extended to mortgage decrees passed under O. 34, Civil P. C. This argument does not appear to be without force and, as at present advised, I am inclined to the view taken by the learned Judges of the Rangoon High Court. In view of this conflict of opinion and having regard to the general importance of the question, I think the case should be decided by a larger Bench. Accordingly, I refer it to a Division Bench. An early date will be fixed.

Judgment.—The facts have been fully stated by Tek Chand J. in his referring order and need not be repeated. Besides 25 M L J 552³ and A I R 1928 Lah 901,³ there are two other cases which seem to take a somewhat similar view, namely 71 I C 937⁶ and 41 I C 348.⁷ We are however in agreement with Tek Chand J. that the decision in 9 Rang 186¹ is to be preferred. There is no doubt that a creditor, to whom principal and interest are due, is entitled to appropriate against the interest any sum the debtor pays without stipulating that it is to be appropriated against the principal. But there is no reason why this principle should be imported into the execution of decrees which are provided for by the Code of Civil Procedure. It was not contended before us that O. 34, R. 13, Civil P. C., applied but it was argued on the general principle that all payments should be applied first towards interest. By O. 34, R. 5 (3), where payment in accordance with sub-r. (1) has not been made, the Court shall, on application made by the plaintiff in this behalf, pass a final decree directing that the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale be dealt with in the manner provided in sub-r. (1) of R. 4. Sub-r. (1) of R. 4 is to the effect that in a suit for sale the Court shall pass a preliminary decree and that

the plaintiff shall be entitled to apply for a final decree and that in default of the defendant paying, the plaintiff shall be entitled to apply for a final decree directing that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale be paid into Court and applied in payment of what has been found or declared under or by the preliminary decree due to the plaintiff, together with such amount as may have been adjudged due in respect of subsequent costs, charges, expenses and interest, and the balance, if any, be paid to the defendant or other persons entitled to receive the same. Lastly, by S. 73 (1) (c) it is enacted that where any immovable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon, the proceeds of sale shall be applied, first, in defraying the expenses of the sale, secondly in discharging the amount due under the decree, thirdly, in discharging the interest and principal moneys due on subsequent incumbrances, if any, and, fourthly, rateably amongst other decree-holders.

There is thus no express provision for the payment of interest or costs to be made first. In the preliminary decree, the sum found due is expressed and by the Code the sale proceeds have to be applied in payment of what is declared due to the plaintiff in the preliminary decree together with subsequent interest and subsequent costs. The sum therefore found due should be first discharged and interest and costs should be subsequently discharged. This is what has been done in the present case and it seems to us the fairest method of discharging the decree. The judgment-debtor is, as a result of the decree, having his property compulsorily sold and there is no reason why the decree-holder should be unduly favoured by being allowed to apply the sale proceeds first towards interest. The sum found due as laid down in the Code of Civil Procedure in the preliminary decree is the amount which has first to be discharged. There is no force in this appeal which we dismiss with costs.

D.S./R.K.

Appeal dismissed.

5. Venkatadri Appa Row v. Partha Sarathy Appa Row, (1922) 9 A I R P O 288=61 I O 81=48 I A 150=44 Mad 570 (P O).

6. Barolay v. Mt. Dhande, (1928) 10 A I R Pat 822=71 I O 937=4 P L T 112.

7. Blawanath Bhattacharjee v. Someswar Sarma, (1918) 5 A I R Cal 605=41 I O 848=21 O W N 1055.

A. I. R. 1938 Lahore 292

YOUNG C. J. AND MONROE J.

*Surat Singh Buta Singh**Convict — Appellant.*

v.

Emperor.

Criminal Appeal No. 1334 of 1936, Decided on 3rd March 1937, from order of Sess. Judge, Multan, D/- 24th November 1936.

Criminal Trial — Confession — Confessing accused must be sent to judicial lock-up after confession and not to police custody— In case accused is sent to police custody, Court must look into surrounding circumstances to satisfy itself that confessions are voluntary.

The confessing accused must invariably be sent to the judicial lock-up as soon as possible after confession and on no account be returned to police custody. If the police thereafter wish the accused for any particular purpose, the police must put in an application stating the purpose for which the accused are required. If the accused are handed back to the police, the Court must look very carefully at the confessions and the surrounding circumstances in order to satisfy itself that the confessions are in fact voluntary. [P 293 O 1, 2]

B. R. Puri — *for Appellant.*D. R. Sawhney, Public Prosecutor —
for Respondent.

Young C. J.—Surat Singh, Vir Singh and Sohan Singh were charged under S. 302, I. P. C., with the murder of Ismail. The learned Sessions Judge of Multan acquitted Sohan Singh, convicted Surat Singh and Vir Singh and condemned them to death. In this case, the history of this crime is taken from the confessions of Surat Singh and Vir Singh. Both the accused in these confessions relate that they together with Sohan Singh agreed together to commit highway robbery. In pursuance of their scheme, they went to the pukka road between Boorewala and Joya. On the way to the road they enquired from Roshan, who has appeared as a prosecution witness, the way to the pukka road. They waited for some time when they got to the scene of operations and eventually Ismail came along on a bicycle; they stopped him and robbed him. After the robbery had taken place the three agreed that it would be safer to murder Ismail. Sohan Singh then killed Ismail with his kirpan. Vir Singh parted from Sohan Singh and Surat Singh and went off by himself; Sohan Singh and Surat Singh took the bicycle which had been used by the murdered man, walked

three miles to Arifwala and then from Arifwala they went on a lorry to Montgomery staying the night in the serai Ghamaunda Singh. The name and description of Surat Singh was taken on the register of the Serai and, in the column of remarks, there was a note made that Sohan Singh and a bicycle were there too. The next morning Surat Singh and Vir Singh left the serai and went to chak Malianwala. There they had a meal at the shop of Mohan Singh who has appeared as a prosecution witness and who is the uncle of Sohan Singh.

The murder took place on 31st July 1935 and the body of the murdered man was discovered shortly afterwards. Investigation took place but the police failed to discover any clue to the murderers. The case was practically shelved until the month of March 1936, when a policeman at Amritsar, whose duty it was to check bicycles at Amritsar on behalf of the Criminal Investigation Agency, inspected a bicycle in the possession of one Mohammad Akbar. The police in the Multan District had at the time of the murder discovered that the bicycle Ismail was using was missing. They had also discovered the name and number of the bicycle. This had been circulated in the Police Gazette. When the constable at Amritsar therefore took the number and name of the bicycle in possession of Mohammad Akbar, it was found that this was the very bicycle which had been in the possession of the murdered man Ismail. An investigation traced the bicycle from Mohammad Akbar's possession to the possession of another Sohan Singh, a cousin of Surat Singh. From this point it was easy for the police to lay their hands upon Surat Singh. Through Surat Singh the names of Vir Singh and Sohan Singh were obtained. Eventually, Surat Singh and Vir Singh made confessions under S. 164, Criminal P. C., to the Additional District Magistrate of Multan.

Sohan Singh was discharged by the learned Sessions Judge mainly on the ground that the evidence against him was unsupported by a confession by himself and was insufficient in itself. The evidence against Surat Singh and Vir Singh is their confessions and, in addition, evidence which corroborates those confessions. The confessions themselves, if believed, would be enough upon which to base conviction. With regard to the con-

fessions counsel has argued that the two confessing accused were returned to police custody by the District Magistrate after they had made their confessions. He therefore argues that they ought not to be treated as voluntary. We have pointed out on more than one occasion that this practice might easily, under certain circumstances, induce a Court to come to the conclusion that the confession was not voluntary. Circulars have been recently issued to all Magistrates that they must send the confessing accused to the judicial lock-up and not return them to police custody. In this case the Magistrate has not carried out the orders issued to him upon this matter. Disobedience to these orders in this case is not however as serious as it might otherwise be. The police put up to the Additional District Magistrate a petition asking that the accused should be examined under S. 164, Criminal P. C., and also that a Magistrate should be appointed to go round the spots connected with the murder with the accused as they were willing to point out these places.

The Additional District Magistrate apparently has misconstrued the orders issued to him: he has thought that if the police wished the accused for any purpose after the confessions had been made he could immediately hand the accused over to the police. The meaning and spirit of the orders issued to the Magistrates however are clear; the confessing accused must invariably be sent to the judicial lock-up as soon as possible after confession and on no account be returned to police custody. If the police thereafter wish the accused for any particular purpose the instructions lay down clearly that the police must put in an application stating the purpose for which the accused are required and for that purpose they may be handed over to the police: there certainly ought to be an interval between the taking of the confession and the handing over of the accused to the police for any subsequent purpose. Further in a case such as this where the Magistrate was required to take the accused round the district in order that they might point out certain spots to the police, the accused ought to be handed over in the presence of the Magistrate who should be in charge throughout, and the accused should be returned to the judicial lock-up by the Magistrate.

The fact that the accused in this case were handed back to the police makes us therefore look very carefully at the confessions and the surrounding circumstances in order to satisfy ourselves that the confessions were in fact voluntary. On a careful consideration of the arguments of counsel and upon the fact that in the Court of the committing Magistrate neither of the accused made the slightest suggestion against the police and in fact merely denied having made a confession at all, we see no reason to believe that the confessions were forced or induced. We are satisfied that the confessions in this case are true: the very nature of the confessions completely proves that the confessions could not have been put into the mouths of the confessing accused by the police. (After discussing the evidence his Lordship proceeded.) We are satisfied therefore that the learned Judge was right in convicting Surat Singh and Vir Singh. The murder was deliberate and there is no extenuating circumstance. We therefore confirm the sentence of death in both cases.

We would like to record our appreciation of the way in which this case has been investigated by the police: the manner in which a careful record of the bicycle was kept and the way in which it was used by the Amritsar Police: the way in which the bicycle was traced and the culprits discovered reflects credit on the Investigation Department. The case too has been left without any attempt to strengthen it by improper evidence.

V.B.B./R.K.

Appeal dismissed.

A. I. R. 1938 Lahore 293

SPECIAL BENCH

ADDISON, MONROE AND
DIN MOHAMMAD JJ.

Mr. George Ernest Moody — Petitioner.
v.

Mrs. Vera Alice Moody — Respondent
and others — Co-respondents.

Matrimonial Reference No. 9 of 1937,
Decided on 17th December 1937, for
confirmation of decree of Dist. Judge,
Ambala, D/. 20th April 1937.

Divorce Act (1869), Ss 2, 17—Person aged
42, in service of railway in this country from
1922. Statement that he would continue to
reside here is not proof of domicile.

The mere statement of the petitioner, who is 42 years old, and is in this country, because he is in the service of the Railway from 1922, that he intends to continue to reside here is not proof of his domicile in India. [P 294 C 1]

Lakshmi Narain Verma and Fakir Chand Mital — *for Petitioner.*

Order. — We are not satisfied that the petitioner is domiciled in India, to which he came on service in 1922. He is still only 42 years old and his mere statement that he intends to continue to reside here is not enough, especially as he is here because he is in the service of the Railway. For this reason, we refuse to confirm the decree of the District Judge. The petitioner can still claim relief but under the Indian and Colonial Divorce Act. There will be no order as to costs throughout.

V.B.B./R.K. *Petition dismissed.*

A. I. R. 1938 Lahore 294

TEK CHAND J.

Mt. Fatima — Petitioner.

v.

Nura and others — Respondents.

Civil Revision Petn. No. 347 of 1937, Decided on 28th October 1937, from order of Sub.Judge, First Class, Jhang, D/- 22nd January 1937.

Civil P. C. (1908), O. 23, R. 1 (2) (b) — 'Other sufficient grounds,' meaning of.

'Other sufficient grounds' in Cl. (2) (b) of R. 1 of O. 23 must be ejusdem generis with the ground mentioned in Cl. (2) (a). [P 294 C 2]

Where there was neither any formal defect in the plaint nor any other sufficient cause shown and the suit had reached its final stages :

Held that that was not the time at which the suit should be allowed to be withdrawn with liberty to bring a fresh suit. [P 294 C 2]

Dr. Nand Lal — *for Petitioner.*

J. L. Kapur — *for Respondents.*

Order. — This is a petition for revision of an order under O. 23, R. 1, Civil P. C., passed by the Subordinate Judge, First Class, Jhang, permitting the plaintiffs to withdraw his suit with liberty to bring a fresh suit.

The suit was instituted on 19th February 1936. Issues were framed and the parties produced oral and documentary evidence, and closed their respective cases. On 26th November 1936 arguments were heard in part, but could not be completed for want of time, and the case was adjourned for the next day. On 27th, arguments were not completed and the case

was again adjourned to 5th December. On that date, the plaintiffs asked for permission to amend the plaint. This was opposed by the defendants. The Court ordered that before deciding as to whether the amendment should or should not be allowed, the plaintiffs should file a copy of the proposed amended plaint. This was done and the defendants, on 6th January 1937, filed a written reply objecting to the amendment at that stage. The case was adjourned to 22nd January for arguments on this point. On that date the plaintiffs applied for permission to withdraw the suit under O. 23, R. 1, alleging that there was a 'formal defect' in the plaint. The Court has granted this application and has allowed the suit to be withdrawn with liberty to bring a fresh suit.

The order of the lower Court is clearly wrong and must be set aside. Under R. 1 (2) of O. 23, a suit can be allowed to be withdrawn with permission to institute a fresh suit if (a) it must fail by reason of some 'formal defect', or (b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the same subject-matter or a part thereof. Counsel for the respondents has not been able to show that there was any 'formal defect.' It has been ruled in this Court that "other sufficient grounds" in Cl. (2) (b) of R. 1 must be ejusdem generis with the ground mentioned in (2) (a). In this case neither any "formal defect" in the plaint has been disclosed nor any "other sufficient cause" shown. The suit had reached its final stages, and this was not the time at which it should have been allowed to be withdrawn with liberty to bring a fresh suit. The order of the lower Court is therefore illegal and cannot be maintained.

I accept the petition for revision, set aside the order of the Court below and remand the case to it for disposal in accordance with law from the stage at which it was when the application for withdrawal was made on 22nd January 1937. No order on the plaintiffs' application for amendment of the plaint appears to have been passed. The Court should consider that application now and pass such orders on it as it thinks fit. Parties to bear their own costs in this Court.

S.O./R.K.

Case remanded.

A. I. R. 1938 Lahore 295

TEK CHAND J.

Jowand Singh — Plaintiff —
Petitioner.

v.

Ala Singh — Defendant —
Respondent.

Civil Revn. Petn. No. 500 of 1937,
Decided on 28th October 1937, from order
of Sub. Judge, First Class, Amritsar, D/- 2nd
March 1937.

(a) Civil P. C. (1908), O. 47, R. 3 — Copy of
order sought to be reviewed is not necessary
— Nor application need be accompanied by
affidavit.

Under O. 47, R. 3 it is not necessary, nor is it
the practice of the Courts in the Punjab, to require
a petitioner for review to file a copy of the order
sought to be reviewed, as the application is made
in the same Court and the previous order is on its
own records. Nor does the law require that an
application for review should invariably be accom-
panied by an affidavit. [P 295 C 2]

(b) Civil P. C. (1908), O. 9, R. 9 — Break-
down of lorry on way is sufficient reason for
non-appearance.

Where on the date of hearing the plaintiff was
delayed by about half an hour by reason of the
breakdown of the lorry on the way:

Held it was sufficient reason for his non-appear-
ance within the meaning of O. 9, R. 9. [P 295 C 2]

C. L. Aggarwal — *for Petitioner.*

T. D. Khanna — *for Respondent.*

Order. — The plaintiff instituted a suit
against the defendant for recovery of a
certain sum alleged to be due on a promis-
sory note. In this suit, 24th July 1936
was fixed for filing a list of witnesses.
When the case was called on that date,
the plaintiff was absent and the suit was
dismissed in default. Within a few minutes
of the order of dismissal, the plaintiff
appeared and filed an application for res-
toration stating that he was outside the
Court room preparing the list of witnesses
and praying that the suit be restored. The
Court allowed the application and restored
the suit on payment of Rs. 10 as costs,
which were ordered to be paid before the
next date of hearing. On that date, the
plaintiff's pleader was present in Court
when the case was called but the plaintiff
was absent. As the costs had not been
paid, the learned Judge dismissed the
application for restoration. The plaintiff
appeared at 10.30 and filed an application
purporting to be under O. 47, R. 1 and

O. 9, R. 19, Civil P. C., for setting aside
the order. He stated that he was coming
in a lorry from Batala to Amritsar, that
there was a breakdown on the way, and
for this reason he was delayed by about
half an hour. He further stated that he
had brought Rs. 10 as costs of the opposite
party, which he offered to pay.

The learned Judge has dismissed the
application on highly technical grounds.
He has held that an application under
O. 47, R. 1, did not lie as no copy of the
order sought to be reviewed had been filed
with the application, nor was the applica-
tion accompanied by an affidavit. He has
further held that O. 9, R. 19, had been
cited wrongly and therefore he could take
no notice of the prayer under that Rule.
The learned Judge has apparently mis-
understood O. 47, R. 3, which is to the
effect that the provisions as to the "form
of preferring appeals" shall apply *mutatis
mutandis* to applications for review. Under
this rule it is not necessary, nor is it the
practice of the Courts in this province, to
require a petitioner for review to file a
copy of the order sought to be reviewed,
as the application is made in the same
Court and the previous order is on its own
records. Nor does the law require that an
application for review should invariably
be accompanied by an affidavit. O. 9,
R. 19, as mentioned at the top of the
heading of the application, was obviously a
mistake for O. 9, R. 9. The learned Judge
should not have been so meticulous in
dismissing the application because of this
clerical error. I hold that on the facts
disclosed on the record there was sufficient
cause for the non-appearance of the peti-
tioner on 14th December 1936.

I accept the petition for revision, set
aside the orders of the Court below and
direct that the suit be restored at its
original number on payment of Rs. 10 by
the plaintiff to the defendant, and disposed
of in accordance with law. Costs shall
abide the event.

Both counsel have been directed to
cause their respective clients to appear
before the trial Court on 22nd November
1937, when a date for further proceedings
in the case will be fixed.

D.S./R.K.

Petition accepted.

A. I. R. 1938 Lahore 296

SPECIAL BENCH

COLDSTREAM, MONROE AND

ABDUL RASHID JJ.

Inder Singh — Defendant—Appellant.
v.*Bhana and others — Plaintiffs —*
Respondents.

Letters Patent Appeal No. 82 of 1937,
Decided on 22nd November 1937, from
the order of Din Mohammad J., D/. 26th
April 1937.

(a) Practice—Relief—Plaintiff should state
all facts constituting cause of action—On
failure to establish them, suit should be
dismissed—It should not be decreed on proof
of different set of facts which defendant
had no opportunity to controvert.

It is incumbent on the plaintiff to state pre-
cisely in the plaint all the facts that constitute
his cause of action. If he fails to establish the
facts that constitute his cause of action his suit
must fail on that ground alone. On his failure to
establish the facts which form the basis of his
suit, he cannot contend that he is entitled to a
decree all the same on proof of a different set of
facts which the defendant had no opportunity
to controvert, and which did not form the subject
matter of any issue in the trial Court.

[P 299 C 1]

The plaintiffs came to Court for a perpetual
injunction to the effect that the defendant had no
right to build on the land in dispute on the sole
ground that the land in dispute had been reserved
for public purposes, and that by taking possession
of this land the defendant was depriving them of
the use of land on the occasions of marriages and
deaths. This fact was denied by the defendant,
and it was stated that another piece of land had
been reserved for common purposes for use on the
occasions of marriages and deaths. The defendant
produced evidence to show that another piece of
land had been reserved for use for public pur-
poses. The land was found to be part of shamilat
abadi and the plaintiffs were granted the injunc-
tion :

Held that if the plaintiffs had stated in the
plaint that they were entitled to a permanent
injunction on the ground that they were proprie-
tors in the village and that none of the proprie-
tors could do anything which altered the condi-
tion of the joint property without the consent of
all the cosharers it would have been open to
the defendant to plead that there was a custom
in the village allowing a proprietor to make
exclusive use of a part of the shamilat abadi
land so long as the area of land appro-
priated by him did not exceed the area that
would fall to his share on partition. As the only
ground of attack urged by the plaintiffs was the
reservation of the land in dispute for public pur-
poses the defendant was never called upon to
plead custom in his favour. In view of the
pleadings of the parties no question of special
damage arose in the peculiar circumstances of
the case and the plaintiffs' suit for injunction
should be dismissed.

[P 299 C 2]

(b) Custom (Punjab)—Shamilat land—One
cosharer erecting building—Other cosharers
can restrain him by injunction from so
doing even without proof of special damage
to them (*Obiter*).

Per Din Mohammad J. — No individual pro-
prietor can appropriate to himself a portion of the
common land without the consent of all other
cosharers and use it in such a way as to affect the
rights of all the cosharers at the time of partition.
Where therefore a cosharer begins building on a
part of common land (shamilat abadi) the other
cosharers can restrain him from so doing without
proving any special damage to them and relief of
injunction can be granted in such a case : *C A*
No 2788 of 1917, Foll.; A I R 1920 Lah 34,
A I R 1921 Lah 157, A I R 1925 Lah 287 and
38 P L R 679, Rel. on ; A I R 1925 Lah 518,
A I R 1915 Lah 310; A I R 1924 Lah 293 and
A I R 1934 Lah 278, Disting. [P 297 C 1, 2]

Shamair Chand and Gullu Ram —

*for Appellant.*D. N. Aggarwal — *for Respondents.*

Din Mohammad J. — The facts bear-
ing upon the question of law involved in
this case may shortly be stated. The
plaintiffs are some of the proprietors of
the village Dhamian Bedi and the defen-
dant also is a proprietor like them. The
defendant began to build on a vacant site
contiguous to his house and the plaintiffs
instituted the suit out of which the pre-
sent appeal has arisen, for a perpetual
injunction restraining the defendant from
encroaching upon the land in any manner
and in the alternative for ejectment in
case he puts up any structure on the site
in suit. The defendant resisted the suit on
various grounds. The trial Court however
passed a decree in favour of the plaintiffs
for joint possession of the site in suit. On
appeal, the Senior Subordinate Judge
affirmed the decree passed by the trial
Court. Dissatisfied with the decree granted
to them, the plaintiffs have appealed. The
main issue that falls for determination in
this case is, to what relief are the plain-
tiffs entitled if the site in suit forms part
of the common land, even though not
reserved for the use of general public.
Both the Courts below have found that
the land in suit is a part of the shamilat
abadi but not reserved for any common
purposes of the village. On behalf of the
plaintiffs it is contended that on the
finding arrived at by the Courts below
they were entitled to a decree for injunc-
tion while on behalf of the defendant it is
urged that the decree granted by the
Courts below was, in the circumstances of
the case, the only relief to which the
plaintiffs were legally entitled.

Numerous authorities dealing with the subject have been cited at the Bar on both sides, disclosing unfortunately an apparent divergence of views. Some of these decisions seem to lay down that a co-sharer encroaching upon a part of the common land cannot be disturbed in his exclusive possession unless special damage is proved by the other co-sharers. Others lay down that in such cases it is not necessary to prove special damage and that a co-sharer, even without proof of such damage, can be restrained from so altering the nature of the property as would be prejudicial to the interests of the other co-sharers. In fact, the conflict is so pronounced that the present commentator of Rattigan's Digest of Customary Law has expressed a hope that the matter would soon be referred to a Full Bench for final disposal of this complicated question (Rattigan's Digest of Customary Law, 1929 edition, page 503). I am personally inclined to agree in general with the principle laid down in para. 225 of Rattigan's Digest that

In the absence of custom none of the proprietors can do anything which alters the condition of the joint property without the consent of all the co-sharers.

This view appeals to me to be most equitable and just. What belongs to all must not be interfered with without the consent of all. To hold otherwise would amount to putting a premium on high-handedness and force. If once a permanent encroachment is allowed to be made by one co-sharer on a piece of common land, the other co-sharers lose it for good and it is no consolation to them to be told that they can throw it in the hotchpot at the time of partition, as partition of abadi rarely takes place. In Civil Appeal No. 2788 of 1917, the plaintiffs who were some of the proprietors of a village, sued for a permanent injunction restraining the defendants from sinking a well in a part of the village common land. It was clear that the well had not been sunk when the suit was instituted. During the pendency of the suit however the well was sunk and the suit of the plaintiffs was dismissed on the ground that no special damage had been proved. Scott-Smith J. who decided the case on 15th January 1919 observed :

If the plaintiffs are held not to be entitled to relief in the present case it does not appear to me that there is any case in which the proprietors could restrain one of their number from appropriating to himself a portion of the common land unless they

could show material and substantial injury. The plaintiffs' suit was brought in accordance with the well established custom that no individual proprietor can appropriate to himself a portion of the common land and use it in such a way as to affect the rights of all the co-sharers at the time of partition. The case of a co-sharer who cultivates part of the common land clearly is not analogous. I therefore hold that the plaintiffs are entitled to the injunction asked for.

These observations were quoted with approval in 1 Lah 249.¹ That case went on appeal before a Letters Patent Bench and the judgment of the single Judge was confirmed : 2 Lah 73.² In another case reported in 6 L L J 548,³ 1 Lah 249¹ was followed. In a recent case reported in (1936) 38 P L R 679,⁴ Bhide J. again relied on that judgment and decided the case in accordance with the principles of law enunciated there. Counsel for the respondent has referred me to A I R 1925 Lah 518,⁵ 160 P W R 1915,⁶ A I R 1924 Lah 293⁷ and A I R 1934 Lah 278.⁸ Nothing however that is laid down there induces me to change my opinion. These decisions mostly proceed on their own facts and in none of them has Civil Appeal No. 2788 of 1917 been dissented from. I do not consider therefore that I shall be showing any disrespect to any of the learned Judges of this Court if I choose to follow Civil Appeal No. 2788 of 1917 and hold that the plaintiffs were entitled to the injunction prayed for.

I accordingly allow this appeal, set aside the judgments of the Courts below and grant the plaintiffs a permanent injunction restraining the defendant from building any structure on the site in suit. As no structure has been put up so far, no occasion arises for the grant of the alternative relief asked for in this case. In view however of the divergent nature of the

1. Manji v. Ghulam Muhammad, A I R 1920 Lah 34=57 I C 207=1 Lah 249=172 P L R 1920.
2. Manji v. Ghulam Muhammad, A I R 1921 Lah 167=61 I C 415=2 Lah 73=68 P L R 1921.
3. Bishna v. Sapuran Singh, A I R 1925 Lah 287=84 I C 917=6 L L J 548.
4. Mangat Ram v. Ghulam Husain, (1936) 38 P L R 679=163 I C 148.
5. Saad Ullah v. Ibrahim, A I R 1925 Lah 518=85 I C 553.
6. Nihal Singh v. Mal Singh, A I R 1915 Lah 810=31 I C 862=160 P W R 1915.
7. Muhammad Amin v. Karam Dad, A I R 1924 Lah 293=69 I C 671.
8. Ram Singh v. Radha Singh, A I R 1934 Lah 278=150 I C 99=15 Lah 708=86 P L R 202.

authorities I certify that the case is a fit one for appeal under Cl. (10) of Letters Patent (Lahore). There will be no order as to costs.

Judgment of Letters Patent Appeal

Abdul Rashid J. — This appeal has arisen out of a suit instituted by six proprietors of village Dhamian in the Hoshiarpur district against Indar Singh another proprietor of the same village. It was stated in the plaint that the land in dispute measuring about 5 marlas belongs to the proprietary body of the village, that it has been reserved since time immemorial for general public use on the occasions of marriages and deaths, that the defendant had taken possession of this land a week before the institution of the present suit by placing stacks of bricks and wooden beams thereon, that he intends to build a room and that as the land has been reserved for public purposes the defendant is not entitled to take exclusive possession of it. It was prayed by the plaintiffs that a decree for a perpetual injunction to the effect that the defendant has no right to build on the land in dispute may be passed in their favour. It was pleaded by the defendant, *inter alia*, that the land in dispute had been in his possession and that of his ancestors for a very long time and had not been reserved for general public use. It was further stated in the written statement that another piece of shamilat abadi land had been reserved for public use on the occasions of marriages and deaths, and that the other proprietors had never made any use of the land in question. An objection was also raised to the effect that the plaintiffs were not competent to institute the present suit without making all the other proprietors of the village parties to the suit. On these pleadings the trial Court framed the following issues :

(1) Whether Sundar Singh and Kishan Singh, the brothers of the defendant, are necessary parties to the suit? (2) Whether the site in dispute is common land and is reserved for the use of the general public? (3) To what relief are the plaintiffs entitled.

The first Issue was not pressed. On Issue 2 it was held by the trial Court that the land in dispute was shamilat abadi and had not been reserved for the common purposes of the village. According to the trial Court, the land in dispute had been occupied by the house of a non-proprietor and had been taken possession of

by the defendant thirteen years before the institution of the suit, when the non-proprietor had left the village. A decree for joint possession of the site in suit was passed in favour of the plaintiffs, but no injunction was granted to them. It was observed in the judgment that there was no evidence on the record that by the defendant's occupation of this site the plaintiffs' right would be prejudiced. The plaintiffs were not satisfied with a decree for joint possession only and preferred an appeal in the Court of the Senior Subordinate Judge praying that a decree for an injunction may be passed in their favour.

The defendant filed cross-objections challenging the decree for joint possession granted to the plaintiffs. After a consideration of the entire evidence, the learned Senior Subordinate Judge held that the land in dispute was a part of the shamilat abadi, that it had not been reserved for the common purposes of the village, that it was once occupied by Kahna and Jiwan Singh, non-proprietors, who left about thirteen years ago and that the defendant whose house is contiguous to it, had taken possession of it five years prior to the institution of the suit by building his khurlis etc. After giving his findings of fact, the learned Senior Subordinate Judge observed that the principal question for determination was, what should be the form of the decree which ought to be passed in such cases. After a review of various rulings of this Court the learned Senior Subordinate Judge held that as the rights of the plaintiffs had not been prejudiced by the defendant taking possession of a small piece of shamilat abadi land, the only remedy to which the plaintiffs were entitled was a decree for joint possession. The appeal and the cross-objections were accordingly dismissed. Against this decision the plaintiffs preferred a second appeal to this Court which was heard by a learned single Judge. The learned Judge was of the opinion that as the land in dispute was part of the shamilat abadi it belonged to all the proprietors, and that "what belonged to all must not be interfered with without the consent of all." He held that it was not incumbent on the plaintiffs to prove special damage for the purposes of obtaining a decree for permanent injunction restraining the defendant from building any structure on the site in suit. He accepted the appeal of the plaintiffs and

granted them a permanent injunction, leaving the parties to bear their own costs. In view, however, of the divergent nature of the authorities, he certified that the case was a fit one for appeal under clause 10 of the Letters Patent. The defendant has accordingly preferred a Letters Patent appeal. The relevant portions of the plaint and the written statement have been reproduced in an earlier part of the judgment. It is clear from the plaint that the plaintiffs based their claim on the fact that the land in dispute had been reserved by the proprietors for public purposes and that the defendant by taking exclusive possession of this land had deprived all the proprietors of the use of this land on the occasions of marriages and deaths. The plaintiffs are some members of the proprietary body: the other proprietors of the village were not joined as plaintiffs or defendants in this suit. It was not stated in the plaint that even if the land be held not to have been reserved for public purposes, the plaintiffs were entitled to a permanent injunction merely because the land formed part of the shamilat abadi. In my opinion, it is incumbent on the plaintiff to state precisely in the plaint all the facts that constitute his cause of action. If he fails to establish the facts that constitute his cause of action, his suit must fail on that ground alone. On his failure to establish the facts which form the basis of his suit, he cannot contend that he is entitled to a decree all the same on proof of a different set of facts which the defendant had no opportunity to controvert, and which did not form the subject-matter of any issue in the trial Court. In the present case the plaintiffs came to Court on the sole ground that the land in dispute had been reserved for public purposes, and that by taking possession of this land the defendant was depriving them of the use of land on the occasions of marriages and deaths. This fact was denied by the defendant, and it was stated that another piece of land had been reserved for common purposes for use on the occasions of marriages and deaths. As a result of these pleadings Issue 2 was framed in the following words: "Whether the site in dispute is a common land and is reserved for the use of the general public?" The defendant produced evidence to show that another piece of land had been reserved for use for public purposes. On this finding, alone the plain-

tiffs' suit for permanent injunction was liable to dismissal and the only decree that they were entitled to was a decree for joint possession.

If the plaintiffs had stated in the plaint that they were entitled to a permanent injunction on the ground that they were proprietors in the village and that none of the proprietors could do anything which altered the condition of the joint property without the consent of all the co-sharers it would have been open to the defendant to plead that there was a custom in the village allowing a proprietor to make exclusive use of a part of the shamilat abadi land so long as the area of land appropriated by him did not exceed the area that would fall to his share on partition. Reference may be made in this connection to Para. 225 of Rattigan's Digest of Customary Law, which lays down that in the absence of custom none of the proprietors can do anything which alters the condition of the joint property without the consent of all the co-sharers.

As the only ground of attack urged by the plaintiffs was the reservation of the land in dispute for public purposes, the defendant was never called upon to plead custom in his favour. In my opinion, in view of the pleadings of the parties no question of special damage arises in the peculiar circumstances of the present case and the plaintiffs' suit for injunction, was therefore, rightly dismissed by the trial Court. For the reasons given above I would accept this appeal, set aside the judgment and the decree of the learned single Judge of this Court and restore that of learned Senior Subordinate Judge. Having regard to all the circumstances of the case, I would leave the parties to bear their own costs throughout.

Coldstream J.—I agree.

Monroe J.—I agree.

K.S./R.K.

Appeal accepted.

A. I. R. 1938 Lahore 299

FULL BENCH

YOUNG C. J., MONROE AND

DIN MOHAMMAD JJ.

Kishan Singh and others — Plaintiffs
— Appellants,

v.

Mt. Santi and others — Defendants —
Respondents.

Second Appeal No. 1868 of 1935, Decided
on 13th November 1937.

his petition before us is a belated one. We have gone through the evidence on the record and we do not think that any further enquiry or additional evidence is necessary. It has been established that Nawab, the husband, had an illicit connexion with Mt. Mehran, the widow of his brother, and that he turned his wife out of the house when she was pregnant after beating her. For a husband to live in open adultery in the same house with another woman is certainly cruelty. His wife was away for more than two years and he took no steps to secure her return, nor did he take any steps to defend the petition for divorce though he was served. After service in the proceedings, he could not fail to find out where the case was, if he had tried. We therefore confirm the decree of the District Judge dissolving the marriage of the petitioner with Nawab.

V.B.B./R.K.

Decree confirmed.

A. I. R. 1938 Lahore 30

TEK CHAND J.

Nasir Din and others — Defendants —
Petitioners.

v.

Abdul Rahim and others — Plaintiffs
— Respondents.

Civil Revns. Nos. 365 and 858 of 1937,
 Decided on 30th November 1937, from
 decree of Judge, Small Cause Court,
 Lahore, D/. 6th April 1937.

Co-sharers — Exclusive possession — One cosharer in exclusive possession of land owned in common by cosharers—Other cosharers are entitled to money compensation in respect of exclusive user.

Where one of the cosharers owning certain land in common, is in exclusive possession of the land, the other cosharers are entitled to money compensation in respect of the exclusive use of the land from the cosharer in possession :
18 Cal 10, Foll. [P 808 C 2]

Duni Chand Kapur — *for Petitioners.*

Shamair Chand — *for Respondents.*

Judgment.—This judgment will dispose of Civil Revision No. 365 of 1937 and Civil Revision No. 858 of 1937, both of which arise from the same decree. The facts are set out fully in the detailed judgment of the Court below, and it is not necessary to repeat them here. A certain property situate in Abkari Road, Anarkali, Lahore, was originally owned by one Ghulam Mohi-ud-Din, who died many years ago, leaving three sons, Nasir-ud-Din, Imam-ud-Din

and Zahir-ud-Din, and two daughters, Mt. Nasiran and Mt. Habiban. The plaintiffs in the present suit are the descendants of Mt. Nasiran. Nasir-ud-Din is defendant 1. Defendants 2 to 7 are the descendants of Imam-ud-Din and Zahir-ud-Din. Mt. Habiban is defendant 8, and her son Abdul Khaliq is defendant 11. In a previous suit between the descendants of Ghulam Mohi-ud-Din, it was determined that Mt. Nasiran (plaintiff) had a one-sixth share, Mt. Habiban (defendant 8) a one-sixth share, and the three sons Nasir-ud-Din (defendant 1), and Imam-ud-Din and Zahir-ud-Din, (the predecessors-in-interest of defendants 2 to 7) had a 2/9ths share each. The plaintiffs have since sold their one-sixth share of the property to defendants 9 and 10 by a sale deed executed on 16th March 1936 and registered on 30th April 1936. The present suit was instituted by the plaintiffs, the descendants to Mt. Nasiran, for recovery of Rs. 414, being the share of the plaintiffs in the rent, alleged to have been realised by defendants 1 to 8 from the tenants of a portion of the joint property from 15th June 1933 to 29th April 1936, (when they sold their share to defendants 9 and 10) and also for compensation for the exclusive use of another portion of the property by defendant 8 and her son defendant 11.

The suit was resisted by defendants 1 to 8 and 11 on numerous grounds, which it is not necessary to set out here. The learned Judge, Small Cause Court, has passed a decree for Rs. 59.5.4 with proportionate costs against defendant 1 only ; and for Rs. 86.4.0 with proportionate costs against defendants 8 and 11. The suit has been dismissed against the other defendants. Defendants 1, 8 and 11 have come in revision, praying for the total dismissal of the suit against them, while the plaintiffs also have applied for revision of the decree, urging that the suit should have been decreed for the full sum claimed.

Most of the pleas raised by the defendants were repeated in the petition for revision preferred by defendants 1, 8 and 11, but at the time of arguments their learned counsel confined himself only to four points. He urged (1) that there was no evidence on the record to support the finding of the Court below that defendant 1 had realised any rent during the period in dispute, and that the plaintiffs' share therein amounted to Rs. 59.5.4; (2) that defendant 11 was not a party to the pre-

vious litigation and therefore he was not bound by the decision as to the plaintiffs' right to a one-sixth share in the property in dispute and that as against him the suit could not be tried by the Small Cause Court; (3) that in the plaint no prayer was made against defendant 11 and therefore the decree had been erroneously passed against him; and (4) that defendants 8 and 11 are not liable to pay any compensation for exclusive use of any portion of the joint property, as it has not been proved that there was an ouster of the plaintiffs from it.

After hearing counsel, I see no force in any of these contentions. The learned Judge, Small Cause Court, has examined the evidence with great care and has found that defendant 1 did realise rent from tenants to whom portions of the joint property had been let during the period in dispute, and that the plaintiffs' share therein amounted to Rs. 59.5.4. The decree for this sum against defendant 1 has therefore been rightly passed and must be maintained. It is no doubt true that defendant 11 was not a party to the previous suit between the descendants of Ghulam Mohi-ud-Din in which the respective shares of his sons and daughters in the joint property were determined; but his mother Mt. Habiban, defendant 8, was a party, and both she and her sister Mt. Nasiran, mother of the plaintiffs, were held to be entitled to a one-sixth share each. Abdul Khaliq, defendant 11, is the only son of Mt. Habiban and is living with her. He has no independent right to succeed to any portion of Ghulam Mohi-ud-Din's property, and it was conceded that he holds possession along with his mother Mt. Habiban. In these circumstances, there can be no doubt that he is bound by the decision in the previous suit, and cannot deny the plaintiffs' title to a share equal to that of his mother. No question of title really arises and I hold that the claim against him was cognizable by the Small Cause Court.

The plaint in the suit was drawn up loosely, but reading it as a whole, there can be no doubt that the plaintiffs made a claim against defendant 11 who was living with his mother defendant 8, and the learned Judge could pass a decree against him if on the facts he found that this defendant was liable to pay any sum to the plaintiffs. The finding of the learned Judge is that Abdul Khaliq has occupied a large

portion of the ihata in which he has set up a laundry, and of this portion he was in exclusive possession during the period in dispute. The plaintiffs and their mother have been living in Delhi, and it has been proved that they have not lived in any part of the property in dispute during the period covered by the suit. In these circumstances, they are, on the principle laid down by their Lordships of the Privy Council in the well-known case, 18 Cal 10,¹ clearly entitled to money compensation at a proper rate in respect of exclusive use by defendant 8 who, though one of the co-sharers, was in exclusive possession, along with her son defendant 11. It was not urged that the learned Judge has assessed the amount at an unduly high figure. Defendants 1, 8 and 11 therefore fail on all the grounds urged before me and their revision must be dismissed.

In the other revision, Civil Revision No. 858 of 1937, filed by the plaintiffs, the only prayer made was that the amount allowed was small and that it should be increased to the sum claimed in the plaint. The findings of the learned Judge on this point are based upon a detailed examination of the evidence and the learned counsel for the plaintiffs was unable to urge anything substantial, justifying interference on the revision side. This petition also fails and is dismissed. As neither party has been successful, I leave them to bear their own costs in this Court. The order as to costs in the lower Court shall stand.

R.M./R.K.

Order accordingly.

1. *Watson v. Ram Chand Dutt*, (1891) 18 Cal 10 = 17 I A 110 = 5 Sar 535 (P C).

A. I. R. 1938 Lahore 303

SKEMP J.

Ghulam Mohammad — Plaintiff — Appellant.

v.

Miraj Din and others — Defendants — Respondents.

Second Appeal No. 361 of 1937, Decided on 24th November 1937, from decree of Senior Sub-Judge, Gujranwala, D/- 13th February 1937.

Evidence — Hearsay — Family bard's evidence is inadmissible to prove family relationship and is unreliable.

The evidence of a family bard to prove the relationship of one family with another family is inadmissible as it relates to events long before the deponent's birth and is therefore hearsay. Further

even if it is admissible he is not a very reliable person. [P 304 C 1]

Shamair Chand — *for Appellant.*

D. N. Aggarawal — *for Respondent 3.*

Judgment. — This second appeal has arisen from a suit for pre-emption. Miraj Din son of Haku sold the land in dispute to Mohammad Din son of Nawab who subsequently sold it to Suba son of Jalal. The plaintiff sued for pre-emption and based his pre-emptive right on the ground that he was a cosharer in the patti. The Courts below found that Suba, son of Jalal the second vendee, was an agnate of the vendor, Miraj Din son of Haku. The sole point discussed before me is whether this finding is justified by evidence. The learned appellate Judge (Senior Subordinate Judge of Gujranwala) found that this relationship was proved by the pedigree table Ex. D.2. I have examined this pedigree table and it does not prove the relationship. The highest ancestor of Miraj Din's father Haku is one Mian Khan. The highest ancestor of Suba son of Jalal and Mohammad Din son of Nawab (who were first cousins) is one Rahmat. There is nothing to connect Rahmat with Mian Khan: in fact another family is shown in between. The learned Senior Subordinate Judge referred to Financial Commissioner's Standing Order No. 23 which is said to have been superseded. Counsel was unable to support this reference. Besides the pedigree table a family bard gave evidence. The Senior Subordinate Judge held:

The evidence of the family bard is not altogether valueless though if it stood alone probably the case for the second vendee could not be built conclusively upon the same.

In my opinion the evidence is *prima facie* inadmissible. It relates to events long before the defendant's birth and is therefore hearsay; and if S. 32 (5), Evidence Act applies, which was not considered, the witness said "I have not brought the pedigree table". In other words he had not brought the best evidence available. Even if the evidence is admissible the family bard is not a very reliable person as the Senior Subordinate Judge recognizes.

In my opinion the learned Senior Subordinate Judge's finding of fact is vitiated by an entire misapprehension of the pedigree table Ex. D.2; in other words it is a finding not based on any legal evidence. No other point was argued before me and I think I must accept this appeal. The

land was sold for Rs. 250. The plaintiff came into Court seeking pre-emption on payment of Rs. 50 or whatever amount the Court might find due. The trial Court found that it had been proved beyond doubt that Mohammad Din actually paid Rs. 250 to Miraj Din and that the price contained in the sale deed was bona fide. The Appellate Court gave no finding on this point. Technically, I ought to remand the case to the Appellate Court for a finding on this issue but Mr. Shamair Chand for the appellant has admitted before me that the decree ought to be made on payment of Rs. 250.

The question now arises as to costs. I think the defendant is entitled to costs in the first Court, and the successful plaintiff is entitled to costs before the Senior Subordinate Judge and in this Court and I order accordingly. My final order is that the plaintiff be granted a decree for possession by pre-emption of the land in suit on payment of Rs. 250 which sum is to be paid into the trial Court on or before 1st February 1938. The plaintiff is to pay the defendant's costs in the trial Court and the defendant is to pay the plaintiff-appellant's costs in the Appellate Court and in this Court.

V.B.B./R.K.

Order accordingly.

A. I. R. 1938 Lahore 304

SKEMP J.

Shahab-ud-Din — Plaintiff —

Appellant.

v.

Kalendar and another — Defendants — Respondents.

Second Appeal No. 373 of 1937, Decided on 7th July 1937, from decree of Addl. Dist. Judge, Delhi, D/- 22nd December 1936.

Transfer of Property Act (1908), S. 54 — Property in possession of tenants — Sale deed requires registration.

Sale deed of immovable property although for Rs. 99 will require registration if it is in possession of tenants as what is sold is only an intangible thing: *A I R 1916 Bom 229, Rel. on*

[P 305 C 1]

L. M. Datta — *for Appellant.*

Mohammad Amin — *for Respondents.*

Judgment. — The plaintiff sued for possession of a site on the allegation that he was owner of the site by virtue of a sale deed in his favour executed in the year 1928 by one Shujayat Ali. The plaintiff

recited that the defendants had a kutoha structure on the site, that they had refused to remove it and hence the plaintiff sued for possession. The trial Judge dismissed the suit and the learned District Judge dismissed the appeal. The property in suit is situate within the Delhi Province where the Transfer of Property Act is in force; and the District Judge held that by virtue of S. 54, T. P. Act, the deed of sale required registration. The deed of sale was for Rs. 99 and was un-registered. But the District Judge said,

it is not disputed that before this sale the site was in possession of the defendants and the sale-deed mentions that the defendants were in occupation of it as tenants under Shujayat Ali.

Therefore, he said, it was clear that delivery of possession could not be given to the plaintiff by his vendor.

Mr. L. M. Datta for the appellant has argued that possession means "symbolical possession" or "asking the tenants to attorn to the purchaser", and he cites a witness, not mentioned by the District Judge, who says that the vendor told Qalandar Ali, one of the defendants, to pay rent in future to the plaintiff and Qalandar Ali agreed to this.

Section 54, T. P. Act, says that a transfer by way of sale "in the case of tangible immovable property of the value of Rs 100 and upwards or in the case of a reversion or other intangible thing, can be made only by a registered instrument." As tenants were in possession, all that Shujayat Ali could actually transfer was a right to possession or a right to receive rent and this, in my opinion, is included in the expression 'intangible thing'. The judgments in 40 Bom 313¹ support this conclusion. I therefore think that the District Judge was right in holding that the plaintiff had failed to prove that he was the owner. It is unnecessary to go further into the grounds of appeal and I dismiss this second appeal with costs.

B.D./R.K. *Appeal dismissed.*

1. Bhaskar Gopal v. Padman Hira, (1916) 8 A I R Bom 223=83 I O 267=40 Bom 313=18 Bom L R 8.

A. I. R. 1938 Lahore 305

ADDISON AND DIN MOHAMMAD JJ.
Mohammad Malik — Defendant —
Appellant.

v.

Ali Mohammad and others, Plaintiffs
and others, Defendants — Respondents.

Second Appeal No. 324 of 1937, Decided on 7th December 1937, from decree of Dist. Judge, Gujranwala, D/- 7th January 1937.

Custom (Punjab)—Representative suit by M on behalf of reversioners to set aside alienation by father allowed to be dismissed as ground not strong — Purchase by M of suit property for valuable consideration — Other reversioners can claim no share in it—S. 90, Trusts Act does not apply.

Where M, after realizing the weakness of his position in a declaratory suit brought by him in a representative capacity on behalf of the reversioners to set aside an alienation by the father, allows the suit to be dismissed and after the dismissal of the suit acquires the property for himself for valuable consideration, it does not in any circumstances amount to a declaratory decree which would enure for the benefit of the other reversioners. The fact that M makes a profit by selling it subsequently does not alter his position in any manner. Nor is the case of M covered by S. 90, Trusts Act: *A I R 1932 Bom 240, Disting.* [P 306 C 2]

Shamair Chand — *for Appellant.*

Narotam Singh and D. N. Aggarwal
— *for Respondents.*

Din Mohammad J.—This appeal has arisen out of a suit instituted by Ali Mohammad, Ghulam Qadir and Rehmat, sons of Taleh Mand, against their brother Mohammad Malik and five others, for possession of certain land alleged to have been sold by their father in 1914 and acquired by Mohammad Malik in 1934. It was alleged in the plaint that in 1933 Mohammad Malik brought the usual declaratory suit contesting the alienation by their father and that that suit had been instituted with the consent of the plaintiffs and on an express understanding with them that they would be entitled to the benefit of the litigation. It was further averred that in any case Mohammad Malik had brought his suit in a representative capacity and that to any advantage that accrued to him all the plaintiffs were equally entitled. This suit was resisted by Mohammad Malik on various grounds. He contended, inter alia, that the suit did not result in a decree but was dismissed, that on the day the order of dismissal was made the land in suit was purchased by

him from the previous vendees for Rupees 3000 and that in these circumstances the plaintiffs had no right to bring the suit. He further traversed the allegation made in the plaint that he had entered into any sort of agreement with the plaintiffs prior to the institution of the suit.

On the pleadings of the parties, necessary issues were framed and although the Subordinate Judge came to the conclusion that the plaintiffs had failed to establish the oral agreement alleged by them, he decreed the claim holding that all the plaintiffs were entitled to succeed to the land in suit inasmuch as Mohammad Malik had instituted the suit in a representative capacity and that at any rate S. 90 Trusts Act, favoured the plaintiffs. Dissatisfied with this decision, Mohammad Malik presented an appeal to the District Judge, who endorsed the opinion of the Subordinate Judge as regards the inability of the plaintiffs to prove the alleged agreement and further held that inasmuch as no decree had been obtained in the previous suit instituted by Mohammad Malik, S. 8, Punjab Limitation (Custom) Act (1 of 1920) did not apply. Agreeing, however with the Subordinate Judge that the case was covered by S. 90, Trusts Act, he dismissed the appeal with costs. It is from this decision that the present appeal has been preferred.

After hearing counsel on both sides, we have come to the conclusion that this appeal must succeed. It is evident that Mohammad Malik's suit was dismissed and the case therefore does not come within the purview of S. 8 of Act 1 of 1920. No decree having been obtained in the case, nothing could enure for the benefit of the other reversioners. We are not impressed by the arguments advanced on behalf of the respondents that the dismissal of the suit was tantamount to a decree in so far as the dismissal had been made in terms of the compromise arrived at between Mohammad Malik and the then vendees and those terms provided for a sale in favour of Mohammad Malik by virtue of the relationship that he bore to Talehmand. It is admitted that the original sale had taken place for Rs. 2600 and it is not disputed that Mohammad Malik paid Rs. 400 over and above this sum for purchasing the land. This means that his plea that the sale had been effected without consideration and without necessity had failed and a failure of

this plea would even otherwise have entailed a dismissal of the suit, in which case a suit like the present would have been out of the question. If therefore Mohammad Malik after realizing the weakness of his position, allowed the suit to be dismissed and after the dismissal of the suit acquired the property for himself, it would not, in any circumstances, amount to a declaratory decree which would enure for the benefit of the other reversioners. No doubt he sold half of the land in suit and out of the sale proceeds, besides paying off the original vendees, he saved Rs. 1000 for himself, but that does not alter the position in any manner.

We are also not convinced that S. 90, Trusts Act has any application in this case. Mohammad Malik was neither a tenant for life nor a co-owner, nor a mortgagee, nor a qualified owner of the property and he does not therefore come within the letter of the law. Counsel for the respondents contends that Mohammad Malik can be treated as a quasitrustee and relies on A I R 1932 Bom 240¹ in this respect, but that case is distinguishable on facts and does not help the respondents in any manner. We accordingly accept the appeal and dismiss the suit of the plaintiffs with costs throughout.

V.B.B./R.K.

Suit dismissed.

1. Bahani v. Dulba, (1932) 19 A I R Bom 240 = 137 I C 355 = 34 Bom L R 357.

A. I. R. 1938 Lahore 306

TEK CHAND J.

Gopi Nath, owner of Firm Chhedi Lal.
Gopi Nath — Defendant — Petitioner.

v.

Kashi Ram — Plaintiff — Respondent.

Civil Revn. No. 609 of 1937, Decided on 11th November 1937, from decree of Senior Sub.Judge, Ferozepore, D/- 15th May 1937.

Legal Practitioner — Fee — Suit for munshiana — Client agreeing to pay munshiana over and above pleader's fees — Pleader is entitled to sue for munshiana.

Where it is one of the terms of the engagement of a pleader, that he would be paid a particular sum as his fees and also a certain sum as his munshi's remuneration, the pleader is entitled to sue the client for the munshiana. [P 307 C 1]

Shamair Chand — for Petitioner.

M. L. Puri — for Respondent.

Order. — On the findings of fact concurrently recorded by the Courts below

there is no ground for interference on the revision side. It has been found that the defendant had engaged the plaintiff on a daily fee of Rs. 70 for himself plus Rs. 7 as munshiana. It has also been found that the plaintiff worked for the defendant at Meerut on the five days in question. In these circumstances there is no doubt that the plaintiff was entitled to a decree for the amount claimed.

The only question that was argued before me in a faint-hearted manner by Mr. Shamair Chand was that the pleader could not sue for the munshiana. But it was one of the terms of the engagement of the plaintiff that he would be paid Rs. 70 for himself and Rs. 7 as his munshi's remuneration. The plaintiff therefore, was clearly entitled to sue for the munshiana. The petition for revision fails and is dismissed with costs.

R.M./R.K. *Petition dismissed.*

A. I. R. 1938 Lahore 307

TEK CHAND J.

Sayad Mahbub Hussain Shah and others — Judgment-debtors — Appellants.

v.

Punjab National Bank Ltd., Lahore, and others — Decree-holders — Respondents.

Exn. First Appeals Nos. 125, 126 and 241 of 1937, Decided on 17th November 1937, from order of Senior Sub.Judge, Lyallpur, D/. 10th March 1937.

Execution—Rateable distribution—Prayer refused—Order is not appealable.

Where a decree-holder in his application for execution prays only for rateable distribution and the application is rejected, the order of rejection comes under S. 73, Civil P. C., and no appeal lies against it. [P 808 C 1]

Ram Lal Anand I — for Appellants.

Ashru Ram —

for Respondents Nos. 1 and 3.

Judgment.—This judgment will dispose of Execution First Appeals Nos. 125, 126 and 241 of 1937, which arise from an order of the Senior Subordinate Judge, Lyallpur, dated 10th March 1937. The relevant facts are that the Punjab National Bank Limited obtained a money decree against the sons and grandsons of the late Sir Mehdi Shah, and in execution of the decree, they attached certain agricultural land which was the self-acquired property of the deceased, and applied for

its temporary alienation for a period not exceeding 20 years. A number of other persons, who held decrees against Sir Mehdi Shah or his sons, applied for rateable distribution. One of these persons is a Co-operative Society called the Anjuman Imdad Qarza of Chak No. 353 and it claimed rateable distribution with the Punjab National Bank on the basis of two awards for Rs. 6612.11.9 and Rupees 5726.9.0 respectively given by an arbitrator on 7th March 1929 in its favour against Altaf Hussain, son of Sir Mehdi Shah as principal and Sir Mehdi Shah as surety, which were executable as decrees under the Co-operative Societies' Act. In the course of the proceedings, it transpired that Sir Mehdi Shah had died in October 1927, about 18 months before the awards. It was accordingly objected that the awards were nullities so far as the deceased was concerned, and they could not be executed against his estate. Before this objection was decided, the Anjuman managed to obtain from the arbitrator two other awards on 21st May 1935 for the same amounts against Altaf Hussain as principal and the estate of Sir Mehdi Shah in the hands of his grandsons respondents 2 to 8, one of whom (Mahbub Hussain) is a major and the other six are minors. The arbitrator, before delivering these awards, did not hold any formal proceedings; he did not even give any notice to the grandsons of Sir Mehdi Shah, nor did he appoint any guardian ad litem to represent the minors. All that he appears to have done was to prepare copies of the former awards, substituting for Sir Mehdi Shah the names of his grandsons. Four days later, i. e. on 25th May 1935, these awards were filed in the execution Court and the prayer for rateable distribution repeated.

The respondents objected that these (so-called) subsequent awards had been obtained behind their back and without any notice to them and therefore they could not be executed in the Civil Court. The learned Judge upheld the objection and dismissed the Anjuman's application for rateable distribution. He then proceeded to consider the claims of the other decree-holders and held that the Punjab National Bank, Mt. Jiwan Bai, and firm Tulsei Das. Devi Ditta Mal were entitled to rateable distribution, and directed that the proceeds of the temporary alienation be divided among them.

Against this order, three appeals have been preferred in this Court, Execution First Appeals 125 and 126 of 1937 by the Anjuman Imdad Qarza of Chak No. 353 against the surviving son and grandsons of Sir Mehdi Shah and Execution First Appeal No. 241 of 1937 by the grandsons of Sir Mehdi Shah against the Punjab National Bank, Mt. Jiwan Bai and Firm Tulsī Das. Devī Dittā Mal. A preliminary objection is taken by counsel for the respondents that Appeals Nos. 125 and 126 are incompetent as the order of the Court below refusing rateable distribution to the Anjuman was passed under S. 73, Civil P. C., and is not appealable. In my opinion, this objection is well founded and must prevail. As already stated, the only prayer in the Anjuman's application for execution was for rateable distribution. An order refusing this prayer is one under S. 73, sub.s. (2) of that section gives the aggrieved party a right to bring a regular suit. No appeal is allowed from such order.

The order does not really fall under S. 47, as urged by counsel. I may say, however, that even if an appeal lay, the order of the Court below is correct. It is admitted by Mr. Abdul Majid on behalf of the appellants that the awards of 7th March 1929 were nullities so far as Sir Mehdi Shah was concerned, he having died long before the arbitration proceedings started. As regards the second set of awards, they were obtained against the seven grandsons of Sir Mehdi Shah, six of whom were minors. No guardian appears to have been formally appointed and the only adult grandson was not personally served. Further, as pointed out by counsel for respondents, it has not been shown on the record that Sir Mehdi Shah was a member of the Anjuman, and that any award could be validly made against him or, after his death, his legal representatives. I dismiss Appeals Nos. 125 and 126 with costs.

Appeal No. 241 is by the grandsons of Sir Mehdi Shah and the only prayer made by their counsel is that it be made clear that the decree of the Punjab National Bank, Mt. Jiwan Bai and Firm Tulsī Das. Devī Dittā Mal, who had been allowed rateable distribution, are executable against the "self-acquired property" of Sir Mehdi Shah only. It is admitted that the property which has been attached and of which temporary alienation was ordered in this case, had been acquired by Sir

Mehdi Shah himself. It is urged, however, that in its order the Court has not said that this is so and, he says, that his clients apprehend that the order of the lower Court may not be used in future proceedings as having directed that property, which Sir Mehdi Shah might have inherited from his father or other male ancestor, was also liable for these decrees. Mr. Achhru Ram for the decree-holder has no objection to it being stated that the decrees are not executable against the ancestral property (if any) of Sir Mehdi Shah. No other point was urged before me. This appeal is dismissed, parties being left to bear their own costs.

B.D./R.K.

Appeals dismissed.

A. I. R. 1938 Lahore 308

DALIP SINGH J.

Ramesh Chandra Joshi and others —
Petitioners.

v.

Murli Manohar Joshi and another —
Respondents.

Civil Revn. No. 1006 of 1937 Decided on 10th January 1938, from order of Dist. Judge, Delhi, D/. 29th October 1937.

Guardians and Wards Act (1890), S. 29—
There is no distinction between powers of permanent and temporary guardians appointed under the Act.

Temporary as well as permanent guardians and their powers are defined in S. 29. There is no distinction between the powers conferred on a permanent guardian by the Act and the powers of a temporary guardian. Both are appointed and declared by the Court. S. 29 refers to the powers of guardians appointed and declared by the Court.
[P 308 C 2; P 309 C 1]

Dina Nath Bhasin and Anand Mohan—
for Petitioners.

J. N. Aggarwal — *for Respondents.*

Judgment.—The counsel for the petitioners in this case contends only that the order of the trial Court directing the sale of the property by the temporary guardian is ultra vires because the temporary guardian has no power to sell land even under the direction of the Court. The contention is based, so far as I can see, on the absence of any specific permission in the Guardians and Wards Act as to the powers conferred on a temporary guardian, but it appears to me that temporary as well as permanent guardians and their powers are defined in S. 29 and I see no reason for drawing a distinction between the powers conferred

on a permanent guardian by the Act and the powers of a temporary guardian: both are appointed and declared by the Court and S. 29 refers to the powers of guardians appointed and declared by the Court.

On the merits the learned Counsel wishes to contend that certain other property should be sold rather than this property. No such point was urged in the Court below and I do not see how it can be taken up now. I therefore dismiss the petition for revision with costs.

R.M./R.K.

Petition dismissed.

A. I. R. 1938 Lahore 309

BHIDE J.

Sher Mohammad — Plaintiff — Appellant.

v.

Mt. Jawahar Khatun and another, Defendant and another, Pro forma Defendant—Respondents.

Second Appeal No. 40 of 1937, Decided on 12th November 1937, from decree of Addl. Dist. Judge, Shahpur at Mianwalli, D/. 14th November 1936.

(a) Custom (Punjab) — Succession — Awans of Khushab tahsil—Non-ancestral property—Daughters preferred to collaterals.

According to the custom governing awans of the Khushab tahsil in Shahpur District collaterals are not entitled to succeed to non-ancestral property in preference to a daughter. [P 309 C 2 ; P 310 C 1, 2]

(b) Custom (Punjab) — Riway-i-am — Presumption is rebuttable — Judicial finding arrived at after elaborate enquiry has equal value with entry in Riway-i-am.

Although an initial presumption of correctness attaches to an entry in the Riway-i-am, the presumption is a rebuttable one and that presumption can be held to be rebutted by a finding arrived at after an exhaustive enquiry : *A I R 1932 Lah 157, Ref.* [P 310 C 2]

And a finding arrived at by the Court after a thorough inquiry should not be placed on an inferior footing than the entry in the Riway-i-am. [P 310 C 2 ; P 311 C 1]

(c) Custom—Proof of—Custom repeatedly ascertained and acted upon judicially — Judgment is evidence of custom.

A judgment on a question of custom is relevant not merely as an instance under S. 13, Evidence Act but also under S. 42 of the Act as evidence of the custom. When a custom is repeatedly ascertained and acted upon judicially, the production of such judicial decisions is sufficient to prove the custom : *A I R 1918 P C 81, Ref.* [P 311 C 1]

Khurehaid Zaman — for Appellant.

Aohhru Ram and Inder Dev Dua — for Respondents 1 and 2.

Judgment. — The sole point for decision in this second appeal is, whether according to the custom governing Awans of the Khushab tehsil in Shahpur district collaterals are entitled to succeed to non-ancestral property in preference to a daughter. The learned Additional District Judge has held that the presumption in favour of the collaterals arising from the entry in the riway-i-am was rebutted by the evidence on the record and has held that the collaterals are not entitled to succeed to non-ancestral property in the presence of a daughter. From this decision the present appeal has been preferred by the plaintiff. The learned counsel for the appellant has urged that the entry in the riway-i-am raises a strong presumption in favour of the plaintiff and that the instances relied on by the learned District Judge are not sufficient to rebut that presumption.

It may be stated at the outset that the oral evidence produced by the parties was not relied on before me. So far as judicial instances are concerned, five were relied on by the respondents while three were relied on by the plaintiff-appellant. Out of the three instances relied on by the plaintiff-appellant, one was a decision by the Additional District Judge of Shahpur which came up on appeal to this Court and was set aside : vide *A I R 1937 Lah 641*.¹ We are thus left with only two instances in favour of the appellant, namely *A I R 1936 Lah 205*² and *A I R 1925 Lah 482*.³ In the latter ruling, there was apparently no evidence produced to rebut the entry in the riway-i-am and the decision was based practically on that entry alone. In the other ruling *A I R 1936 Lah 205*,² which does not relate to the tribe of the parties, the ruling on which main reliance has been placed before me on behalf of the respondents, viz., *13 Lah 276*⁴ in which an elaborate enquiry was made on the very question of custom which is involved in the present case, was not considered.

On behalf of the respondents the following rulings were relied on in the Courts

1. *Mt. Rajan v. Mt. Bano*, (1937) 21 *A I R Lah* 641=172 *I C* 963=89 *P L R* 276.
2. *Mt. Begum Bibi v. Raja*, (1936) 23 *A I R Lah* 205=161 *I C* 647=17 *Lah* 477=88 *P L R* 966.
3. *Jawaya Shah v. Mt. Fatima*, (1925) 12 *A I R Lah* 482=89 *I C* 656=6 *Lah* 356=26 *P L R* 590.
4. *Khan Beg v. Fateh Khatun*, (1932) 19 *A I R Lah* 157=135 *I C* 769=13 *Lah* 276=32 *P L R* 890.

below, namely 1 Lah 284,⁵ 13 Lah 276,⁴ A I R 1934 Lah 404⁶ and A I R 1936 Lah 809.⁷ In addition, the learned counsel for the respondents also cited two other recent rulings reported in A I R 1937 Lah 640⁸ and A I R 1937 Lah 641.¹ As regards these rulings, the learned counsel for the appellant contended that these rulings cannot now be taken to lay down good law in view of the principles laid down by a Full Bench of this Court in a recent decision reported in A I R 1937 Lah 451.⁹ It was pointed out that in 1 Lah 284⁵ the decision was influenced largely by a consideration of the general custom in the province and that in 13 Lah 276⁴ it was remarked that when the *riwaj-i-am* affects adversely the rights of females who had no opportunity whatever of appearing before the revenue authorities, the presumption is weak and a few instances might suffice to rebut it. It was urged that according to the Full Bench ruling, there is no justification for holding the presumption to be weak even when the *riwaj-i-am* entry affects adversely the rights of females. As regards the other decisions relied on, it is pointed out that they are based mainly on 13 Lah 276.⁴

The main question which therefore requires consideration in this case is whether the decision in 13 Lah 276⁴ should be held to prove a custom contrary to that laid down in the *riwaj-i-am*. In that case, an exhaustive enquiry was made after a remand into the question of custom which arises for decision in the present case. The parties to that case were also Awans of Tehsil Khushab in the Shahpur district. Voluminous, oral and documentary evidence was produced and after considering the same it was held that the daughter was entitled to succeed to self-acquired property in preference to collaterals. It is true that it is remarked in the judgment that the presumption raised by the *riwaj-i-am* entry is weak when the entry affects the rights of females adversely; but the

decision is mainly based on a consideration of the oral and documentary evidence and not on that remark. It was rightly pointed out by the learned counsel for the respondents that several of instances in favour of the daughter prior to the compilation of the *riwaj-i-am* were taken into consideration in arriving at the decision in that case, while no such instances were produced on behalf of the collaterals. In the circumstances, the decision in that case appears to me to be of great importance and sufficient to rebut the presumption arising from the *riwaj-i-am* entry.

It was urged that the judicial decision counts only as an instance, but a judgment on a point of custom is also relevant under S. 42, Evidence Act. Besides, the value of the decision depends upon the nature of the enquiry and the evidence produced. It may happen at times that the *riwaj-i-am* is held to be conclusive merely because no evidence has been produced to rebut it; as for instance was the case in A I R 1925 Lah 482.³ On the other hand, there was a very elaborate enquiry made in the case reported as 13 Lah 276.⁴ The two decisions therefore cannot obviously be placed on the same footing. Although an initial presumption of correctness attaches to an entry in the *riwaj-i-am*, the presumption is a rebuttable one and I do not see any good reason why that presumption should not be held to be rebutted by a finding arrived at after an exhaustive enquiry, as it was in 13 Lah 276.⁴ It is indeed difficult to see how the presumption attaching to the entry in the *riwaj-i-am* could be rebutted in any other way.

It was urged that the instances relied on are recent ones and cannot prove a custom contrary to what is stated in the *riwaj-i-am* as custom must be immemorial, as laid down in A I R 1937 Lah 451.⁹ But there is no question here of proving a new custom coming into existence after the compilation of the *riwaj-i-am*. The question is whether the entry in the *riwaj-i-am* itself records the custom correctly. In view of the evidence adduced in 13 Lah 276,⁴ which evidence included instances prior to the *riwaj-i-am* and, as opposed to which, no well ascertained instances to the contrary were proved, I think, the presumption attaching to the *riwaj-i-am* may be taken to be sufficiently rebutted. I see no good reason why a finding arrived at by the Court after a thorough inquiry such as was held in 13 Lah 276⁴ should be

5. Ghulam Muhammad v. Mt. Gauhar Bibi, (1920) 7 A I R Lah 9=54 I O 419=1 Lah 284.

6. Bhug Bhan v. Muhammad, (1934) 11 A I R Lah 404=150 I O 786=15 Lah 78=86 P L R 449.

7. Ahmad v. Muhammad, (1936) 23 A I R Lah 809=167 I O 195.

8. Alam Sher v. Mt. Satbharal, (1937) 24 A I R Lah 640=172 I O 966=89 P L R 252.

9. Bahadur v. Mt. Nihal Kaur, (1937) 24 A I R Lah 451=169 I O 909=39 P L R 849=1 L R (1937) Lah 594 (F B).

placed on an inferior footing than the entry in the *riwaj-i-am*. It was urged in the end that no evidence of the kind that was produced in 13 Lah 276⁴ has been produced in this case. But I do not think this was necessary. As pointed out above a judgment on a question of custom is relevant, not merely as an instance under S. 13 but also under S. 42, Evidence Act, as evidence of the custom. When a custom is repeatedly ascertained and acted upon judicially, the production of such judicial decisions is sufficient to prove the custom: *cf.* 41 Mad 778¹⁰ at p. 785. After carefully considering the matter, I see no good reason to differ from the finding of the learned Additional District Judge and dismiss this appeal with costs.

B.D./R.K.

Appeal dismissed.

10. Gangadhara Rama Rao v. Rajah of Pittapur, (1918) 5 A I R P C 81=47 I O 354=45 I A 148=41 Mad 778 (P O).

A. I. R. 1938 Lahore 311

DALIP SINGH J.

Sis Ram — Plaintiff — Petitioner.

v.

*Sohan Lal and others — Defendants—
Respondents.*

Civil Revn. No. 373 of 1937, Decided on 16th November 1937, from order of Senior Sub-Judge, Delhi, D/- 9th December 1936.

(a) Pre-emption — Suit for — Market value of property different from that alleged in plaint—Court must call plaintiff to pay proper court-fee before trial of suit — It is improper for Court to decide question of court-fees at end of suit and incorporate order in decree — Plaintiff, being misled by wrong procedure of Court, filing appeal on same court fees—Appellate Court should exercise its discretion in favour of extending time.

Where in a suit for pre-emption, the Court finds that the market value of the property is different from that alleged in the plaint, it should at once call upon the plaintiff to make up the proper court-fee as determined, before the trial of the suit takes place. It is improper for the Court to hold up the decision on the question of court-fees until the end of the suit and to incorporate it in the decree: *A I R 1935 Lah 75, Rel. on.*

[P 312 C 1]

Where the plaintiff having been misled by the wrong procedure adopted by the trial Court files the appeal with the same court-fees with which he had stamped his plaint, the Appellate Court should exercise its discretion in his favour and extend time to allow him to make up the deficiency.

[P 312 C 1]

(b) Pre-emption—Forum of appeal—Forum of appeal depends upon finding as to market value of property involved.

Once a Court determines the market value of the property involved in a pre-emption suit, the forum of appeal depends upon that finding, especially in a case where the plaintiff does not challenge the finding on the market value in the grounds of appeal at all. [P 312 C 1]

*Chiranjiva Lal — for Petitioner.**Mohammad Din Jan — for Respondents.*

Order.—This revision and this appeal (No. 514 of 1937) can be disposed of in one judgment. The plaintiff brought a suit for pre-emption of certain amlas. In one case he alleged various grounds of pre-emption and stated that the values put in the sale deeds of Rs. 300 and Rs. 99 respectively were fictitious and the real values were Rs. 25 and Rs. 5. He therefore sued to pre-empt these amlas on payment of Rs. 30 only. In the other case he sued to pre-empt one amla on various grounds alleging that though the sale price shown was Rs. 99 the actual value was only Rs. 15 and therefore he claimed pre-emption on payment of Rs. 15. The trial Court framed various issues referring to right of pre-emption and framed a special issue as to the value of the suits for purposes of court-fee, as objection had been taken that the value was not correct. It came to the conclusion on a trial of the issues regarding the right of pre-emption that the suits should be dismissed with costs. As regards the question of court-fee, it held that the market value of the property was best judged by the price actually paid, that the price entered in the sale deeds was actually paid and therefore the plaintiff was bound to pay a court-fee in addition to what he had already paid on the sums of Rs. 399 and Rs. 99 respectively. These orders were incorporated in the decree. The plaintiff went on appeal to the learned Senior Subordinate Judge who held in one case that the market value of the suit having been found to be Rs. 399, the proper forum of appeal was the learned District Judge and therefore returned the appeal for presentation to the learned District Judge. In the other case he held that the value of the appeal for purposes of court-fee and jurisdiction alike was Rs. 99 according to the finding of the trial Court and as the plaintiff had not stamped his appeal for Rs. 99 but for Rs. 15 as originally claimed by him, therefore the

appeal was not properly stamped. He refused to extend time for payment of additional court-fee and dismissed the appeal. From the first decision a revision has been taken and from the second decision an appeal has been taken to this Court.

It seems to me quite clear that once a Court had found that the market value of the property was different to that alleged in the plaint, the plaintiff should have at once been called upon to make up the proper court-fee as determined, before the trial of the suit should have taken place at all. It was obviously improper for the Court to hold up the decision on the question of court-fee until the end of the suit and incorporate the order passed in the decree which was perfectly useless (*see A I R 1935 Lah 75*¹). At the same time it seems to me that once a Court had determined the market value, the forum of appeal depended on that finding, especially in a case where the plaintiff did not challenge the finding on the market value in the grounds of appeal at all. This being so, the learned Senior Subordinate Judge was right in returning the appeal in the Rs. 399 suit, for presentation to the learned District Judge. I therefore uphold his order and dismiss the revision petition.

In the other case it appears to me that the plaintiff was misled by the wrong procedure adopted by the trial Court. It was for that reason probably that he filed his appeal with the same court fee as he had stamped his plaint. In the circumstances, I think the Court should have exercised its discretion in his favour and extended time to allow him to make up the deficiency.

I therefore accept the appeal and extend the time for the plaintiff to make up the proper court-fee before the Appellate Court. The plaintiff will appear before the learned Senior Subordinate Judge on 26th November and obtain a date within which he will pay the requisite court-fee and if he does so and pays the requisite court-fee, the learned Senior Subordinate Judge will proceed to dispose of the appeal on the merits. No order as to costs in either case.

R.M./R.K.

Appeal accepted.

1. *Walaito Ram v. Gopi Ram*, (1935) 22 A I R Lah 75=162 I O 799.

A. I. R. 1938 Lahore 312

DALIP SINGH AND BHIDE JJ.

*Sher Mohammad and others —**Plaintiffs — Appellants.*

v.

Zulfaqar — Defendant — Respondent.

First Appeal No. 446 of 1936, Decided on 10th December 1937, from decree of Senior Sub-Judge, Jhang, D/- 7th August 1936.

(a) Custom (Punjab)—*Riwaj-i-am* — Unsupported by instances—Effect.

Though a *riwaj-i-am* is unsupported by instances, its effect is to shift the onus on to a party who alleges a custom contrary to that entered therein, to prove the custom alleged by him. [P 312 C 2]

(b) Custom (Punjab)—Succession—Ancestral property—Sials of Jhang District—Father can by will favour one of his sons.

By the custom among the Sials of Jhang a proprietor of ancestral property can by will favour one of his sons as against others. And the custom in this respect is correctly recorded in *riwaj-i-am* of 1907 and not correctly recorded in that of 1929: *A I R 1927 Lah 340, Rel. on.* [P 312 C 2; P 313 C 1]

Shuja-ud-Din and Ganesh Datt —

for Appellants.

M. L. Puri and S. L. Puri —

for Respondent.

Dalip Singh J. — The plaintiffs in this case sued for a declaration to the effect that the sale executed by their father in favour of his remaining son, the defendant, was void as against the plaintiffs' right of inheritance. The property is admittedly ancestral property and the sole question in the present appeal before us is whether by the custom among the Sials of Jhang a proprietor can by will favour one of his sons as against the others. The relevant *riwaj-i-am* in the Answers to Questions 110 and 112 was conceded by the trial Court to support the plaintiffs' case. The trial Court held quite rightly that, though this *riwaj-i-am* was unsupported by instances, its effect, under the ruling of their Lordships of the Privy Council, was to shift the onus on to the defendant to prove the custom alleged by him. In this particular case the defendant produced the earlier *riwaj-i-am* of 1907 in which it was stated that a proprietor could make an unequal distribution of his property in favour of his heirs including his sons. This earlier *riwaj-i-am* was supported by four instances. The only instance cited in the present *riwaj-i-am* from the tribe of the parties, namely the Sials, would also tend to support the defendant's case. One of the plaintiffs' witnesses, P. W. 8, also men-

tions another instance, namely that of Raja Sultan who was the maternal uncle of the plaintiffs and gifted his ancestral property in the name of one son to the exclusion of the others. The trial Court has referred to other oral instances cited by the witnesses for the parties, but, on examining the instances, it does not appear that they are really in support of the defendant's case. It is nobody's case that the custom has changed from 1907 to 1929. The sole question before this Court is whether the trial Court was right in concluding that the custom of the Sials of Jhang was correctly recorded in the *riwaj-i-am* of 1907 and was not correctly recorded in the *riwaj-i-am* of 1929.

In my opinion the trial Court was correct on the ground that the earlier *riwaj-i-am* is supported by six instances at least and no instance supporting the present *riwaj-i-am* has been cited by the plaintiffs at all. There is also one judicial case reported in 101 I C 852¹ supporting the defendant's case. In the circumstances therefore I consider that there is no force in this appeal which is dismissed with costs.

Bhude J.—I agree.

K S / R K. *Appeal dismissed.*

1. Ahmad v Pahlwan, (1927) 14 A I R Lah 340 = 101 I C 852.

A. I. R. 1938 Lahore 313

ADDISON AND DIN MOHAMMAD JJ.

Mt. Nazir Begam — Appellant.

v.

Ghulam Qadir Khan and others —

Respondents.

Letters Patent Appeal No. 108 of 1917, Decided on 6th December 1937, against judgment of Coldstream J., D/. 7th July 1937, reported in *A I R 1938 Lah 84*.

(a) Guardians and Wards Act (1890), S. 12—Applicability of S. 12 is not barred till minor is actually made over.

So long as the custody of a minor is not actually made over to the guardian, the proceedings do not terminate and the applicability of S. 12 is not barred though the certificate of guardianship may have been issued: *A I R 1929 Lah 487, Dissent.*; *13 P R 1897* and *A I R 1915 All 199, Rel. on.* [P 315 C 1, 2]

(b) Guardians and Wards Act (1890), Ss. 4 (5) (b) (ii), 12 (1), 25—Appellant appointed guardian of person of her minor daughter on her husband's death—Application for her custody to Court at M, where minor ordinarily residing with her paternal family—At

time of application minor found to be made over to female relative of respondents residing in state—Minor's residence in state held temporary and incidental—Court at M held had jurisdiction to entertain application for custody: *A I R 1938 Lah 84, Reversed.*

To place a restricted meaning on the words "for the time being ordinarily resides" in S. 4 (5) (b) (ii) so as to interpret them to mean where the minor actually is at the time of the application, would be tantamount to rendering nugatory all the provisions of the Guardians and Wards Act and to making the law helpless against the machination of the recalcitrant persons who do not propose to part with the minor in favour of the appointed guardian. This is especially so in the Punjab where the British Indian States are so closely situated that any person would be able to flout the authority of the highest tribunal of the land by merely walking with the minor into a neighbouring state. Further if a minor is not present at the time of the order appointing the guardian and not physically handed over to the guardian at the time of his appointment, there would be no provision of law to enable the Court to do so afterwards. [P 316 C 2; P 317 C 1]

The appellant, after being appointed guardian of the person of her minor daughter on death of her husband applied under Ss. 12 (1) and 25 for her custody to the Court at M where the minor ordinarily resided with her paternal family. After the death of her father, the minor was made over to the custody of a female relative residing in a state with the consent and connivance of the respondents. It was argued for the respondents that the minor was residing for the time being in the state and so the Court at M had no jurisdiction to entertain the application:

Held that the custody of the child was with the respondents; the minor was still under the control of the respondents who could recall her at any time they liked. The minor's residence in the state was incidental and temporary only and the permanent residence was at M wherefrom she was removed by the respondents with the reprehensible object of evading the law and nullifying the orders of the British Courts. The Court M, therefore, had jurisdiction to entertain the application: *A I R 1938 Lah 84, Reversed*; *Case law referred.* [P 316 C 1; P 317 C 1, 2]

Muhammad Amin — *for Appellant.*

Mehr Chand Mahajan —

for Respondents.

Din Mohammad J.—The appellant, *Mt. Nazir Begam*, was married to one Khan Abdul Karim Khan of Multan. She had a daughter from him of the name of *Mt. Fahmida Khanam*. By another wife Khan Abdul Karim Khan had five sons. Some time ago he died and at the time of his death *Mt. Fahmida Khanam* was about three years of age. On 14th May 1935, *Mt. Nazir Begam* made an application to the Court of the Subordinate Judge, Multan, for appointment as guardian of her minor daughter mentioning all the five sons of the deceased as well as some others

as the persons related to the minor and thus interested in her. The five sons of the deceased resisted the application on various grounds. It was contended inter alia that the minor had, in accordance with the decision of all the members of the family, been made over to one Mt. Mehan Bibi, a female relative of the deceased, and was in her custody and inasmuch as Mt. Mehan Bibi was residing in Bahawalpur the Multan Court had no jurisdiction to entertain the application under S. 9, Guardians and Wards Act. Thereupon Mt. Mehan Bibi was also brought on the record and she too joined in the contest. The Subordinate Judge on the plea of jurisdiction as well as on the other pleas raised in the case found in favour of the contesting respondents and dismissed the application. On appeal to this Court, Skemp J., came to the conclusion that Mt. Mehan Bibi was merely a nominee of the contesting respondents and as she had taken the minor to Bahawalpur only with their permission, the minor could be taken to be residing ordinarily in Multan and that consequently the jurisdiction of the Multan Court was not ousted. Holding that it was for the welfare of the minor that she should be made over to her mother, he allowed the appeal and appointed Mt. Nazir Begam guardian of the person of the minor. Thereupon Ghulam Qadir Khan, one of the contesting respondents, appealed to this Court against the decision of Skemp J. but his appeal was dismissed in limine on 1st March 1937. In the meantime on 2nd February 1937 Mt. Nazir Begam made an application to the Court of the Subordinate Judge at Multan under S. 12, sub.s. (1) and S. 25, Guardians and Wards Act, asking for the custody of the child. In that application three out of the five sons of Khan Abdul Karim Khan only were impleaded presumably because they were the only major sons of the deceased. On 4th February 1937, Mt. Nazir Begam was also granted a guardianship certificate under the order of the Subordinate Judge.

The respondents once more resisted the application on the ground that the Court at Multan had no jurisdiction as the minor had throughout been residing in Bahawalpur and had never returned to Multan. This plea found favour with the Court below and Mt. Nazir Begam's application was dismissed. She presented an appeal to this Court which came on for hearing

before Coldstream J. The learned Judge also agreed with the Subordinate Judge in holding that the Multan Court had no jurisdiction and dismissed the appeal. Hence this Letters Patent appeal. The only question that falls for determination in this case is whether in view of the definition of the words "the Court" given in sub.s. 5 (b) (ii) of S. 4, Guardians and Wards Act, the Court at Multan had jurisdiction to make an order contemplated by Ss. 12 (1) and 25, Guardians and Wards Act, assuming that the minor was at that time actually leaving in Bahawalpur. The material portion of S. 12 (1) is as follows :

The Court may direct that the person, if any, having the custody of the minor, shall produce him

The marginal note to this section is as follows :

Power to make interlocutory order for production of minor and interim protection of person and property.

The relevant portion of S. 25, sub.s. (1) runs as follows :

If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward . . . may make an order for his return, and, for the purpose of enforcing the order, may cause the ward to be arrested and to be delivered into the custody of the guardian.

Section 4 (5) (b) (ii) defines "the Court" in the following terms :

Where a guardian has been appointed or declared in pursuance of any such application: (i) the Court which . . . appointed or declared the guardian . . . ; or (ii) in any matter relating to the person of the ward, the District Court having jurisdiction in the place where the ward for the time being ordinarily resides.

It is urged on behalf the respondents that reading all these provisions of law together the only conclusion that follows is that after the order of appointment is made, the only Court which can entertain any application in any matter relating to the person of the ward is the Court where the minor actually is at the time and that no other Court can issue any order in that respect. It is further urged that S. 12 comes into play only when the proceedings are pending and that it has no application after the final order appointing a guardian has been made. In support of the first proposition, reliance is placed on A I R 1929 Rang 129¹ and 38 Mad 807² and in sup-

1. Maung Ba Thein v. Ma Than Kin, (1929) 16 A I R Rang 129=118 I O 415.

2. Annie Besant v. Narayaniah, (1914) 1 A I R P O 41=24 I O 290=41 I A 314=38 Mad 807 (P O).

port of the second proposition reference is made to 119 I C 423.³ In A I R 1929 Rang 129,¹ in a case in which a minor had been living with her mother at *M* or *S* and the application under S. 25, Guardians and Wards Act had been made by the father at *H*, a single Judge of the Rangoon High Court held that the District Court of *H* had no jurisdiction to make any order under S. 25 in view of the definition of the words "the Court" given in S. 4 (5) (b) (ii). The minor in that case had been living with her mother for about seven years at *S* or *M* and had never come to *H* to reside with her father during that period. This case therefore is distinguishable on facts. In 38 Mad 807² a regular suit was being tried by the High Court, Madras, on its Original Side for the custody of the minors who had long before the institution of the suit been taken to England by the defendant. Their Lordships of the Privy Council held that the suit was not maintainable and in connexion with the jurisdiction of the Court observed as follows:

The District Court in which the suit was instituted had no jurisdiction over the infants except such jurisdiction as was conferred by the Guardians and Wards Act, 1890. By S. 9 of that Act the jurisdiction of the Court is confined to infants ordinarily resident in the District. It is in their Lordships' opinion impossible to hold that infants who had months previously left India with a view to being educated in England and going to the University of Oxford were ordinarily resident in the District of Chingleput.

That judgment does not help the respondents inasmuch as in this case it has once been found with reference to S. 9 of the Act by a learned Judge of this Court that the minor in spite of her sojourn in Bahawalpur ordinarily resided in Multan for the purposes of S. 9, Guardians and Wards Act. That judgment is binding on this Court so far as it goes and we cannot go behind it in any manner. Moreover, in the case before their Lordships of the Privy Council the minors were of an age when they could exercise a volition of their own, while in the case before us the minor is less than four years of age and cannot be said to reside anywhere of her own accord. In 119 I C 423³ it was held by Dalip Singh J., that S. 12 did not apply after the appointment had been made inasmuch as it only contemplates interlocutory orders but with all respect we are inclined to hold that so long as the custody of a minor is not actually made over to

the guardian the proceedings do not terminate and the applicability of S. 12 is not barred. A similar view of S. 12 was taken by a Division Bench of the Chief Court, Punjab, composed of Stogdon and Reid JJ. in a case reported as 13 P R 1897.⁴ Reid J. who delivered the judgment observed :

It cannot be the intention of the Legislature that the Court should have no power to make the minor over to the guardian appointed by it, and there is no reason why the provisions of S. 12 (1) should not be applicable after, as well as before, a guardian is appointed.

A Division Bench of the Allahabad High Court consisting of Chamier and Pig-gott JJ. in a case reported in 37 All 515⁵ put a similar construction on S. 12. The learned Judges remarked :

We are satisfied that the minor became a ward of the Court from the date of the order appointing Mt. U. K. to be her guardian and on general principles the District Judge became thereby empowered to enforce, for the benefit of the minor, all the provisions contained in the Guardians and Wards Act.

On the whole if the matter is to be dealt with as a technical question with reference strictly to the wording of Act 8 of 1890, the preferable view seems to us to be that the Court below could have taken action, and was bound to take action, under S. 12 of the Act. In view of the provisions of S. 24 of the Act to which we have already referred, the appointment of Mt. U. K. to the guardianship of the person of this minor ward, could not be regarded as complete until she had obtained effective possession of the person of the ward, so as to enable her to discharge the duties laid upon her by that section. It is quite true that S. 12 of the Act provides for the temporary custody of a minor in the interim between application being made to the Court and the final conclusion of the necessary proceedings for the appointment of a guardian of the person of the minor ; but as we have already pointed out those proceedings are really not complete until the guardian of the ward has obtained the custody of the minor. We think, therefore, that it was still open to the Court below to take action under S. 12 of the Act.

On the question of residence we are disposed to hold that the minor for purposes of the application made to the Subordinate Judge at Multan should be taken to have been residing for the time being in Multan. It is not denied that the paternal family house of the minor is in Multan and it is also not disputed that it was with the consent or connivance of the respondents that she was made over to Mt. Mehan Bibi after the death of the minor's father. In fact it was found by Skemp J. that

4. *Dewan Chand v. Ghulam Hossain*, (1897) 13 P R 1897.

5. *Utma Kuar v. Bhagwanta Kuar*, (1915) 2 A I R All 199=29 I C 416=37 All 515=13 A L J 742.

3. *Indar Singh v. Kartar Kaur*, (1929) 16 A I R Lah 487=119 I C 423.

Mt. Mehan Bibi was only a nominee of the respondents. It follows therefore that the custody of the minor was with the respondents; and although for their own convenience or to serve their own purpose they had made her over to a female relative of theirs who resides in Bahawalpur, the minor is still under the control of the respondents and can be recalled at any time they like. As long ago as 1889, it was held by a Division Bench of the Allahabad High Court composed of Straight and Mahmood JJ. in 12 All 213⁶ that when a minor had been removed by the respondents from Allahabad to Lahore, the jurisdiction of the Allahabad Court had not been ousted. Straight J. in the course of his judgment observed, and very rightly too, if we may say so, with all respect:

I do not think that the fact that at the time of the trial in the Judge's Court the minor was out of the jurisdiction is of any material importance if upon the facts stated in the petition it appeared that the defendants were responsible for his removal. As I pointed out at the hearing, to place so narrow a construction upon the statute would render it practically inoperative and enable persons bent upon defeating it by successive removals of the person of a minor from one place to another to deprive any Court of jurisdiction. Apart from the terms of S. 17, Civil P. O., if the exigencies of the case required it I should have no hesitation in holding that the minor having been in the custody and guardianship of a person within the jurisdiction of the Judge of Allahabad, that officer under Act 9 of 1851 had full power to entertain and deal with the application of the appellant.

Similarly in a case reported in 17 W R 275⁷ Loch J. as a member of a Division Bench of the Calcutta High Court held that the word 'residence' used in S. 5, Act 40 of 1858, is not the place where the minor may be dwelling at or about the time when the application for a certificate under the Act is made, but the paternal family house or the family residence of the minor in which every member of the family has an interest and in which they usually reside.

The other member of the Bench, Ainslie J. was of the opinion that though ordinarily that might be taken to be the meaning of the word, yet circumstances might arise in which it might be taken to mean otherwise. "Residence," as remarked in several English judgments which have been followed by the High Courts in India on several occasions, is an elastic word, of which an exhaustive definition cannot be given; it is differently construed

according to the purpose for which enquiry is made into the meaning of the term; the sense in which it should be used is controlled by reference to the object. (*See 48 Cal 577⁸ at p. 586.*)

To place a restricted meaning in cases like the present on the words "for the time being ordinarily resides" so as to interpret them to mean where the minor actually is at the time of the application, would be tantamount to rendering nugatory all the provisions of the Guardians and Wards Act and to making the law helpless against the machination of recalcitrant persons who do not propose to part with the minor in favour of the appointed guardian. This is especially so in the Punjab where the British Indian States are so closely situated that any person would be able to flout the authority of the highest Tribunal of the land by merely walking with the minor into a neighbouring state. Any interpretation that leads to these results should therefore be tried to be avoided. As remarked in Maxwell on the Interpretation of Statutes at p. 198:

Where the language of a Statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence.

Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskillfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used. The rules of grammar yield readily in such cases to those of commonsense.

The interpretation that we propose to place on the words of S. 4 (5) (b) (ii) is the only interpretation that can save this piece of legislation from palpable absurdity. The Statute was intended to protect minors from those persons who could not properly safeguard their interests and if they are permitted to avoid the orders passed by a competent Court by conveniently removing the minor out of the jurisdiction of the Court, the Statute would remain a dead letter and it could never have been the intention of the Legislature that this should be so. Orders of Courts of law must be enforced and if they can be enforced reasonably against persons who reside within the jurisdiction of the Courts, they should be so enforced

6. Sarat Chandra v. Forman, (1889) 12 All 218=1890 A W N 80.

7. Sheikh Mahomed Hossein v. Akbar Hossein, (1872) 17 W R 275.

8. Anilabala Chowdhurani v. Dharendra Nath, (1921) 8 A I R Cal 809=65 I O 57=48 Cal 577=25 C W N 178.

and the offenders should not be allowed to escape merely on the ground of an unreasonable technicality. Apart from this construction being equitable it is supported by authority. In 53 P L R 1902⁹ a minor born at Khan Koda where her mother was living then was brought by her to Delhi. After a few weeks the mother died and a relative of the minor with whom she was then residing applied to the Court at Delhi for appointment as guardian of the minor. Robertson J. remarked that treating the matter from an ordinary commonsense point of view, it must be held that the minor ordinarily resided in Khan Koda and that her presence in the petitioner's house was incidental and temporary only. We can similarly treat the minor's residence in Bahawalpur incidental and temporary and find that her permanent residence is at the house wherefrom she was removed by the respondents with the reprehensible object of evading the law and nullifying the orders of the Courts in British India.

There is another way of looking at the matter. A minor who is not delivered to the guardian after he has been appointed by a competent Court, can be treated as having left or been removed from the custody of the guardian under S. 25 (1), Guardians and Wards Act. As remarked by a Division Bench of the Allahabad High Court in 49 All 773¹⁰ at p. 777:

The judicial interpretation has taken a merciful view of the matter so as to prevent the Courts being rendered powerless and has treated the custody mentioned in S. 25 as constructive custody.

We are in respectful agreement with the view expressed by the Allahabad High Court and consider that that is the only reasonable construction that can be put upon S. 25; otherwise there would be a lacuna in the Act which would tend to render useless and ineffective all the provisions of the Guardians and Wards Act relating to the person of the minor. If a minor is not present at the time of the order appointing the guardian and not physically handed over to the guardian at the time of his appointment, there would be no provision of law to enable the Court to do so afterwards.

We, therefore, hold that the Court at Multan had jurisdiction to entertain the

application made to it under S. 12 (1) and S. 25, Guardians and Wards Act and should have called upon the respondents to produce the minor before it so that she could be made over to her mother who had been appointed guardian by this Court. S. 45 (1) (a), Guardians and Wards Act, provides ample means for enforcing an order under S. 12 and if the respondents refuse to produce the minor in Court in compliance with its order, they can even be sent to the civil jail and detained there so long as they do not obey the order of the Court; a disregard of an order under S. 25 also entails the same consequences.

We accordingly allow the appeal and direct the Subordinate Judge at Multan to make an order calling upon the respondents to produce the minor in Court in order to deliver her to the appellant, to fix a convenient date for that purpose and to visit the respondents after due inquiry with all the penalties provided by law if they fail to comply with his order. The appellant will get her costs from the respondents in all the Courts.

V.B.B./R.K.

Appeal allowed.

A. I. R. 1938 Lahore 317

TEK CHAND J.

Asa Singh — Plaintiff — Appellant.

v.

Hira Singh and others — Defendants — Respondents.

Second Appeal No. 1202 of 1936, Decided on 12th November 1937, from decree of Dist. Judge, Amritsar, D/. 19th June 1936.

Limitation Act (1908), S. 12 — Appeal — Limitation expiring when Court closed — Application for copies made on re-opening day — Time requisite for copies can be deducted.

Where the period prescribed for the presentation of appeal expires on a day on which the Court is closed and the appellant has not obtained copies of the decree and the judgment before the closing of the Court and applies for such copies on the date of the re-opening of the Court while his right of appeal still subsists he is entitled to the benefit of the time requisite for obtaining the copies, and if his appeal be presented before the expiry of that time, it is not barred by limitation: *A I R 1930 Lah 216; A I R 1926 Lah 111; A I R 1926 Lah 121 and A I R 1928 Lah 655, Ref.* [P 318 C 1]

Jawahar Singh Dhillon — *for Appellant.*

Judgment. — This is a second appeal from the decree of the District Judge, Amritsar, dismissing as time-barred an appeal presented by the present appellant in his Court against the decree of a Sub.

9. Mubarak Shah Khan v. Mt. Wagehulnisa, (1902) 53 P L R 1902.

10. Ulfat Bibi v. Bafati, (1927) 14 A I R All 581 = 102 I C 103 = 49 All 773 = 25 A L J 585.

ordinate Judge. The judgment and decree of the trial Court are dated 30th April 1936. The appeal was presented in the District Court on 4th June 1936, that is on the 35th day from the date of the decree. The period of limitation prescribed for such appeals is 30 days. This expired on 30th May 1936, which being the last Saturday was a holiday. The 31st May was a Sunday. On the day of re-opening, i. e. 1st June, the appellant made an application for copies of the judgment and decree. These copies were delivered to him on the 2nd. The 3rd June again was a holiday on account of the King's Birthday. The appeal was presented on 4th. The learned District Judge has held the appeal to be time-barred as the application for copies was put in "after expiry of the period of limitation," and therefore the time spent in obtaining these copies could not be allowed under S. 12.

This view of the learned Judge is clearly erroneous. It is settled law that where the period prescribed for the presentation of an appeal expires on a day on which the Court is closed and the appellant has not obtained copies of the decree and the judgment before the closing of the Court and applies for such copies on the date of the re-opening of the Court while his right of appeal still subsists, he is entitled to the benefit of time requisite for obtaining the copies, and if his appeal be presented before the expiry of that time, it is not barred by limitation: *See* 11 Lah 111;¹ 89 I C 437;² 89 I C 956³ and 112 I C 670.⁴ The learned Judge appears to have overlooked the provisions of S. 4, Lim. Act, which lays down that where the period of limitation prescribed for a suit or appeal expires on a day when the Court is closed, the suit or appeal may be instituted or preferred on the day that the Court re-opens. In this case therefore the appeal could have been filed on 1st June 1936 and on that day the appellant applied for copies of the judgment and decree of the Court below. The application was made when the right to appeal subsisted; therefore the appellant is en-

titled to deduct two days as "time requisite" for obtaining the copies. These two days expired on 3rd June which was a holiday. The appeal presented on the 4th was therefore within time.

I accept the appeal, set aside the judgment and decree of the learned District Judge and holding that the appeal presented by the appellant in his Court was within time, direct him to dispose of it on the merits in accordance with law. Court-fee on this appeal will be refunded, other costs will be costs in the cause. Counsel for the appellant has been directed to cause his client to appear before the District Judge, Amritsar on 20th December 1937 when a date for further proceedings in the appeal will be fixed.

B.D./R.K.

Appeal allowed.

A. I. R. 1938 Lahore 318

ADDISON AND DIN MOHAMMAD JJ.
Dasondhi Khan and others—Plaintiffs
—Appellants.

v.

Jan Mohammad and others—Defendants—Respondents.

Second Appeal No. 139 of 1937, Decided on 10th November 1937, from decree of Dist. Judge, Lyallpur at Sheikhpura, D/- 9th December 1936.

(a) Limitation Act (1908), Art. 120—Partition proceedings of shamilat land — Mode of partition sanctioned in accordance with areas of khewat holdings — Final order of partition made after several years — Suit by plaintiff in possession for declaration that partition should have been according to revenue assessed on holding—Final order for partition held gave plaintiff fresh cause of action—Suit within six years from that date held in time.

Proceedings for partition of shamilat land of certain village started in 1922. In that year a mutation was entered to the effect that the partition should be in accordance with the land revenue but this mutation was rejected by the revenue authorities in 1923. Thereafter the mode of partition was sanctioned in accordance with areas of khewat holdings but the proceedings then dragged on and the final order for partition was made in 1932. The revenue officer did not refer either party under S. 117, Punjab Land Revenue Act, to the Civil Courts for the decision of the question of title. The plaintiff who had all along been in possession brought a suit within six years of the final order for declaration that the partition should have been made according to the revenue assessed on the holdings :

Held that the final order for partition of 1932 threatened the possession of the plaintiff and thus gave him a fresh cause of action. The suit

1. *Mt. Attril v. Ram Kishan*, (1930) 17 A I R Lah 216=120 I C 169=11 Lah 111=31 P L R 356.

2. *Naman v. Gurditta*, (1926) 13 A I R Lah 121=89 I C 437.

3. *Megh Baran Singh v. Rama Das*, (1926) 13 A I R All 111=89 I C 956.

4. *Ram Chand v. Ram Rattan*, (1928) 15 A I R Lah 655=112 I C 670.

brought within six years of that date was within time: *A I R 1933 Lah 53 and 122 P L R 1910, Rel. on.* [P 319 C 2]

(b) Words and Phrases — "Hasab rasad khewat" — Phrase when used in revenue records in reference to partition of shamilat area means "according to revenue assessed."

The phrase "hasab rasad khewat" when used in a revenue record in reference to a partition of the shamilat area, and when revenue was not fluctuating but fixed, means "according to the revenue assessed on the holding" and not "according to the area of the khewat holding": *A I R 1935 Lah 446, Rel. on.* [P 319 C 2; P 320 C 1]

Mohammad Amin Khan —

for Appellants.

Diwan Mehr Chand—*for Respondents.*

Addison J.— The shamilat land of village Goil has been partitioned by the revenue authorities in accordance with the areas of khewat holdings. The plaintiffs sued for a declaration that the partition should have been made according to the revenue assessed on the holdings at the settlement of 1911-12. The trial Court held that partition should be according to areas and not according to land revenue and also that the suit was barred by time. On appeal the District Judge held that the shamilat land should be divided in accordance with the land revenue which was being paid by the co-sharers at the time of the last settlement of 1911-12, but as he agreed with the trial Court that the suit was barred by time, he dismissed the appeal. Against this decision the plaintiffs have preferred this second appeal while the defendants have put in cross-objections with respect to the decision of the District Judge on the first point.

Proceedings for partition started as early as 1922. In that year a mutation was entered to the effect that the partition should be in accordance with the land revenue but this mutation was rejected by the revenue authorities on 27th May 1923. Thereafter the mode of partition was sanctioned in accordance with areas on 21st September 1923 but the proceedings then dragged on and the final partition order was not made till 26th July 1932. It has not been shown that after this order, which is a final one so far as the revenue authorities are concerned, possession has been given to the various parties in accordance with the order. It may be pointed out that this is not a case where the Revenue Officer referred either party under the provisions of S. 117, Land Revenue Act to the Civil Courts for the decision of this question of title. If he had

done so, it would probably be correct that this suit would be barred.

The case for the defendants is that the contention of the plaintiff was rejected by the revenue authorities on 27th May 1923 when the first mutation was rejected and also on 21st December 1923 when the mode of partition was sanctioned by the revenue authorities in accordance with areas held. The Article applicable is 120 of Soh. 1, Lim. Act, which gives six years to sue from the date when the right to sue accrues; if six years are counted from 21st September 1923, the suit is time-barred.

On the other hand, the argument on behalf of the plaintiff appellants is that they remained all along in possession and that it was not necessary for them to sue till their possession was threatened or disturbed. Apparently their possession has not even yet been disturbed but it was certainly threatened when the final order of partition was made on 26th July 1932. The suit is well within time if that date be taken and in fact it would seem that they could have waited even longer till their possession was actually disturbed; in any case the immediate threat to their possession afforded by the final order of 26th July 1932 gave them a cause of action. This contention of the plaintiffs must prevail. It was held in *A I R 1933 Lah 53¹* that

the plaintiff need not bring his declaratory suit from the time of the first denial of his title, especially where the plaintiff is in possession of the property. . . . A fresh cause of action accrues to the plaintiff when he has his possession of the property disturbed.

Again a Division Bench of the Punjab Chief Court held in *122 P L R 1910²* that a suit for a declaration of his title to immovable property by a person in possession as proprietor is not barred if brought within six years from the time when the defendant attempts to oust him from the lands, although a right to sue the defendant, who had been recorded as owner of the Settlement Record, had already accrued and become barred.

The case before us is even more simple than this case and obviously the suit was not barred by limitation.

As regards the other question involved in the appeal, namely, the interpretation of the words 'hasab rasad khewat,' we would refer to *A I R 1935 Lah 446,³*

1. *Shankar Das v. Mt. Dhan Devi*, (1933) 20 *A I R Lah 53*=145 *I C 241*.

2. *Khem Singh v. Kesar Singh*, (1910) 122 *P L R 1910*=7 *I C 528*.

3. *Sunder v. Inder Singh*, (1935) 22 *A I R Lah 446*=159 *I C 366*.

a decision of a Division Bench of this Court, where the subject was discussed at length. It was held that the phrase 'hasab rasad khewat,' when used in a revenue record in reference to a partition of the shamilat area, always meant 'according to the revenue assessed on the holding' and not 'according to the area of the khewat holding' but that this rule was subject to an exception in favour of villages of a peculiar type, where it would be unfair and inequitable to interpret it differently, as for example in riverain villages where the land revenue was fluctuating and the areas held by the various proprietors might or might not be under the river. This is not a riverain village, but it is true that the revenue has been fluctuating since after the Settlement of 1911-12. Up to the Settlement of 1911-12 the land revenue was fixed. It would obviously be unfair to interpret the phrase 'hasab rasad khewat' as meaning 'according to the revenue assessed on the holdings, at the present day; but that argument does not apply to the Settlement Record of 1911-12 when the land revenue was fixed. The entry as regards the shamilat land in the village at that Settlement was 'hasab rasad khewat'. It is true that after this Settlement when the revenue became fluctuating the same term was retained and the shamilat continued to be shown as held 'hasab rasad khewat', but in our judgment it should be held that in the circumstances what was meant was that the shamilat should be partitioned according to the revenue assessed on the holdings in the Settlement of 1911-12 as was held by the District Judge. There is no reason in this case to depart from the proper meaning of the phrase which is 'according to the revenue assessed on the holdings.'

We therefore accept the appeal, set aside the decrees of the Courts below and decree the plaintiffs' suit to the effect that the shamilat of village Goil should be partitioned according to the revenue assessed at the Settlement of 1911-12. The other portion of the relief claimed in the plaint was negatived by the Courts below and the finding was not attacked before us. In the circumstances of this case, we direct that the parties should bear their own costs throughout. The cross objections are dismissed but without costs.

D.S./R.K.

Appeal accepted.

A. I. R. 1938 Lahore 320

COLDSTREAM J.

Kartara and others
Accused — Petitioners.

v.

Emperor.

Criminal Revn. No. 1066 of 1937, Decided on 21st October 1937, reported by Sess. Judge, Ludhiana, D/. 20th July 1937.

Opium Act (1878), S. 9 — Joint criminal possession is possible and depends upon evidence of each case — Opium found in house occupied by three brothers living jointly — Eldest brother alone held should be convicted.

There may be a joint criminal possession of an excisable article by several persons. Each case must be decided on the evidence; *A I R 1932 All 441 and A I R 1933 Lah 148, Rel. on.*

[P 321 C 1]

Certain quantity of opium was discovered in a house occupied by three brothers living jointly:

Held that in the circumstances of the case the eldest brother alone should be convicted.

[P 321 C 1]

V. N. Sethi for Advocate-General —

for the Crown.

Report. — The case against the petitioners was that on the search of their house, 13 tolas of opium were recovered from a wooden almirah standing along the southern wall of the house. The three petitioners are real brothers, and they jointly live in that house. Kartar Singh is the eldest brother. Under the circumstances, only Kartar Singh could have been convicted, as it is he who can be called the house master. The convictions of Sardara and Bhajna cannot therefore be upheld. On the other hand, if it be assumed that all the three brothers, who are grown-up young men, are jointly the house-masters, the joint recovery against them could not be used against any of them. I would consequently recommend the case to the High Court for setting aside the conviction of Sardara and Bhajna and for the setting aside of the conviction of Kartara as well, if found necessary. The fine has been paid.

Order of the High Court

Having regard to the circumstances of this particular case, I accept the recommendation of the learned Sessions Judge, set aside the conviction of Sardara and Bhajna and acquit them. I do not interfere as regards Kartara. Fines if paid by Sardara and Bhajna to be refunded. The referring note of the learned Sessions Judge appears to indicate that he is under

the impression that there can in no case be joint criminal possession where an excisable article or article the possession of which is an offence is recovered from a house or place jointly possessed by several persons. If this is his view I point out that it is not correct. Each case must be decided on the evidence and it is obvious that as a fact several persons may be in joint criminal possession of an article. For instance, if an illicit still or a quantity of Iahan, the smell of which cannot be disguised, is found in a room it is obvious that all the persons occupying that room must be presumed to know of its presence. On the other hand, if a small article is discovered hidden in the thatch of a roof, there might be no such presumption. In 54 All 411¹ it was held by the Allahabad Court that where an unlicensed gun had been found in the house of a joint Hindu family there would be a presumption that the gun was in possession and control of all the adult members of the family and it would be for those persons to show that they were not in possession of the gun. That there may be joint criminal possession was pointed out by a Division Bench of this Court in A I R 1933 Lah 148,² a case in which two men found driving stolen animals were both presumed to have been in possession of them.

D.S./R.K.

Order accordingly.

1. Emperor v. Sukhdas, (1932) 19 A I R All 441 = 1932 Cr C 561 = 139 I C 153 = 33 Cr L J 719 = 54 All 411 = 1932 A L J 570.
2. Emperor v. Diwan Singh, (1933) 20 A I R Lah 148 = 1933 Cr C 270 = 143 I C 463 = 34 Cr L J 604 = 34 P L R 576.

A. I. R. 1938 Lahore 321

TEK CHAND J.

Ram Narain Kaul — Plaintiff —
Petitioner.

v.

Mt. Bishan Rani and others —
Defendants — Respondents.

Civil Revision Petn. No. 565 of 1937,
Decided on 16th November 1937, from
order of the Senior Sub-Judge, Delhi, D/-
21st June 1937.

(a) Hindu Law — Partition — Court-fee —
Parties in joint possession of joint properties —
Court-fee, held, should be Rs. 10 only and not
ad valorem.

Where the suit was one for partition of properties, alleged to belong to a joint Hindu family, of which the parties were stated to be members and
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it was stated that the properties in dispute were in joint possession of the parties :

Held that the court-fee payable on such a plaint was Rs. 10 only and not ad valorem on the share of the plaintiff in the properties in question : A I R 1934 Lah 563 (F B), Rel. on. [P 322 C 1]

(b) Partition — Decree for — Stamp paper necessary.

A decree for partition is an instrument of partition and as such has to be engrossed on stamp-paper. [P 322 C 2]

Indar Dev and R. C. Soni —

for Petitioner.

Bishan Narain and Shiv Narain —

for Respondents.

Order.—This is a petition for revision of the order of the Senior Subordinate Judge, Delhi, dated 21st June 1937, passed in a suit which has been pending since 2nd January 1924. The parties to this litigation are related to each other as brothers or their descendants. One of the brothers, Raj Narain Kaul, instituted the suit on 2nd January 1924 alleging that he and the defendants jointly owned and possessed the properties in dispute and that he wanted his share to be separated. He accordingly brought a suit for partition. A prayer for accounts was also made but was subsequently withdrawn. The plaint, in so far as it related to the prayer for partition, was valued for purposes of jurisdiction at Rs. 5100 on which a court-fee of Rs. 10 only was paid. Soon after the institution of the suit, the Subordinate Judge held that the proper court-fee payable was on Rupees 5100. Accordingly the plaintiff was directed to make good the deficiency, which he did within the time fixed by the Court. The suit proceeded and on 24th December 1925 a preliminary decree was passed. On appeal the matter was compromised and in accordance with the compromise the preliminary decree passed by the lower Court was modified and the case sent back to the trial Court for taking proceedings for passing a final decree. The Subordinate Judge appointed a local Commissioner to suggest the mode of partition. The local Commissioner made a lengthy enquiry and submitted his suggestions for partition. These were accepted, with certain modifications, by Sayed Nasir Ali Shah, Senior Subordinate Judge on 28th June 1935, and he directed that a decree be prepared accordingly. Nothing further appears to have been done till 20th March 1937, when the plaintiff presented an application under O. 20, R. 18 and S. 151, Civil P. C., praying that the decree be drawn up in accordance

with the operative portion of the local Commissioner's report as modified by the order of the Court dated 28th June 1935. He also stated that as in the final decree the shares of the parties have to be specified and it is to be an instrument of title between the parties and as such required to be stamped under Art. 45, Stamp Act, he attached with the application a non-judicial stamp of the value of Rs. 300. Subsequently, on 21st June 1937 the plaintiff filed another non-judicial stamp of the value of Rs. 15 to make up the deficiency in the stamp duty. The defendant-judgment-debtor objected that the decree could not be prepared until the plaintiff had first paid ad valorem court-fee on Rs. 19,943, which was the value of his share as fixed by Syed Nasir Ali Shah in his order of 28th June 1935. The learned Senior Subordinate Judge, Mr. Shaukat Husain, has upheld this objection and has held that the proper court-fee payable on the plaint was Rs. 1162 and as the plaintiff had already paid (in 1935) court-fee of the value of Rs. 438-12-0 he must make good the deficiency to the extent of Rs. 724-8-0 and that until this was done no decree-sheet could be prepared.

After hearing counsel and examining the record, I have no doubt that this order is erroneous and must be set aside. The suit was one for partition of properties, alleged to belong to a joint family, of which the plaintiff and the defendants were stated to be members. In the plaint, it was stated that the properties in dispute were in joint possession of the parties. It has now been held authoritatively by a Full Bench of this Court that the court-fee payable on such a plaint is Rs. 10 only and not ad valorem on the share of the plaintiff in the properties in question: see 15 Lah 531.¹ It is no doubt true that before the Full Bench decision was given in 1934, there was a conflict of rulings on this point, and it appears that following some of the earlier rulings, the Subordinate Judge, who was dealing with this case in 1925, had ordered that ad valorem court-fee be paid on Rs. 5100, at which the claim had been valued by the plaintiff himself for purposes of jurisdiction, and in accordance with that order the plaintiff had paid a court-fee of Rs. 438-12-0. This view of the law however has since been declared to be erroneous and the proper court-fee

payable on such suits has been held to be Rs. 10 only. In these circumstances the plaintiff, who has already paid much more than he was legally required to do, could not be ordered to pay ad valorem court-fee on the value of his share which has since been determined to be over Rs. 19,000. The order of the learned Judge is clearly erroneous and cannot be maintained.

I therefore accept the petition for revision, set aside the order of the Senior Subordinate Judge dated 21st June 1937, and direct him to prepare a decree in accordance with the order of his predecessor, Syed Nasir Ali Shah, dated 28th June 1935. A decree for partition is an instrument of partition (S. 2 (15), Stamp Act) and as such has to be engrossed on stamp-paper. The plaintiff has already filed in Court stamp of the value of Rs. 315. The Senior Subordinate Judge will see if this is sufficient according to Art. 45, Stamp Act. Parties shall bear their own costs of this revision petition. Both counsel have been directed to cause their clients to appear before the Senior Subordinate Judge, Delhi, on 20th December 1937, when a date for further proceedings will be fixed.

B.D./R.K.

*Order accordingly.***A. I. R. 1938 Lahore 322**

BHIDE J.

Badri Pershad and another—Plaintiffs—Appellants.

v.

Banwari Lal, Owner and Proprietor of firm Ram Sukh Dass-Banwari Lal—Defendants—Respondents.

Second Appeal No. 581 of 1937, Decided on 25th October 1937, from decree of Addl. Dist. Judge, Hissar, D/- 6th April 1937.

Punjab Regulation of Accounts Act (1 of 1930), S. 2 (9)—Money-lender is not trader.

A money-lender does not fall within the definition of a "trader" as given in Act 1 of 1930.

[P 322 C 2 ; P 323 C 1]

Shamair Chand—for Appellants.

J. R. Agnihotri for Pt. Nanak Chand and Pt. Prem Chand—for Respondents.

Judgment.—The only point for consideration in this second appeal is whether a "money-lender" can be said to fall within the definition of a "trader" as given in Act 1 of 1930. The appellants' contention was that he does, but on looking at the definition, it seems to my mind clear that

1. *Asa Ram v. Jagan Nath*, (1934) 21 A I R Lah 563=150 I C 994=15 Lah 531=36 P L R 48 (F B).

he does not. No authority in point is cited. I consider the lower Court's decision on this point to be correct.

As regards cross-objections, the points raised are questions of fact which cannot be agitated in the second appeal. I dismiss the appeal and cross-objections with costs.

V.B.B./R.K.

Appeal dismissed.

A. I. R. 1938 Lahore 323

BLACKER J.

Umrao Singh and another
Accused — Petitioners.

v.

Kanwar Lal — Respondent.

Criminal Revn. Case No. 1443 of 1937, Decided on 20th December 1937, from order of Addl. Dist. Magistrate, Delhi, D/- 30th September 1937.

Criminal P. C. (1898), S. 133 — Magistrate ordering party to remove obstruction or appear before him to have order set aside or modified — Party appearing before him — Magistrate must decide case himself — He cannot send it to other Magistrate for disposal.

Where a Magistrate orders under S. 133 a person causing obstruction or nuisance either to remove the nuisance or to appear before him, and to move to have the order set aside or modified, and the parties so appear before him, it is incumbent on him to proceed with the case himself and he has no power to send it at that stage for disposal to another Magistrate. [P 324 C 1]

Bishan Narain — *for Petitioners.*

Shamair Chand — *for Respondent.*

Facts. — Kanwar Lal, Jat of Shahpur, made an application under S. 133, Criminal P. C. His allegation was that Umrao Singh and Bhuru Mal, respondents, had made a platform in the village encroaching on the public way. He therefore asked for the removal of the platform. The application was presented to the Resident Magistrate, New Delhi, being the ilaqa Magistrate. He dealt with the application and after recording some evidence ordered the respondent to remove the platform by 27th October 1936 or to appear before him and show cause why the platform should not be removed. Acting in accordance with these instructions, the two respondents appeared before the Court and put in their objections. The Resident Magistrate did not hear the objections but ordered that the case be forwarded for final disposal to the Tahsildar, Delhi, who exercises the powers of a Magistrate of the second class. The Tahsildar then heard the case, record-

ed evidence and passed final orders on 11th June 1937. His finding was that the platform was an old one and that it would serve the purpose if the width of the platform be decreased by two feet. He ordered accordingly. Against that order an appeal was filed to me. I accepted the appeal and held that the Tahsildar had acted without jurisdiction and that his function was to hold an enquiry and make a report to the ilaqa Magistrate. I accordingly directed him to send the papers back to the Resident Magistrate with his report. He did so. But when the papers went before the Resident Magistrate the respondents challenged his jurisdiction to proceed further in these proceedings. The Resident Magistrate has therefore forwarded the papers to me and pointed out that the Tahsildar disposed of the case according to the directions that were given to him by his predecessor.

It was not originally brought to my notice that the case had been sent for final disposal to the Tahsildar and hence my order of 6th August was passed under a misapprehension. But even if it was, the order was wrong for the reason that the Tahsildar's order purported to be one passed under S. 133, Criminal P. C., and, as such no appeal lay. The only course open was a revision. Under the Code of 1861, an order under this section could direct a person against whom an order was issued to appear only before the Magistrate who issued the order. But under the present Code the order may direct such person to appear before the Magistrate who issues the order or any other Magistrate of the 1st or 2nd class, except where the parties demand a jury under S. 135, in which case the matter can be disposed of only by the Magistrate issuing the conditional order and not by any other Magistrate. In this case actually there was no definite order passed by the ilaqa Magistrate. His order only amounts to the fact that the parties should either demolish the chabutra by a certain date or appear and show cause against the demolition. They did appear but apart from their objections being received no further orders were passed that actual demolition should take place and, unless such an order was given, it was impossible for the respondents "to move to have the order set aside or modified". There was no existing order and in these circumstances the Tahsildar acted irregularly. I therefore

recommend that my order of 6th August 1937 as well as the order of the Tahsildar of 11th June 1937 be set aside and the file returned to the Resident Magistrate to dispose of the case according to law.

Order. — Section 133, Criminal P. C. empowers a competent Magistrate on receiving information of an unlawful obstruction or nuisance to order the person causing such obstruction or nuisance to appear before himself or some other Magistrate of the 1st or 2nd class and move to have the order set aside or modified. In this case the learned first class Magistrate after hearing some evidence ordered the respondents to appear before him. On their appearance before him, he did not hear the case but sent it for final disposal to the Tahsildar of Delhi. This procedure appears to me to be illegal. According to the section, the original order to the respondents should have been to appear before himself or the second class Magistrate. After the order to appear before himself was given, he should have proceeded with the case, and as far as I can see from the Code he had no power at that stage to send it for disposal to another Magistrate. I therefore accept the recommendation of the learned Additional District Magistrate, Delhi, set aside his own order of 6th August and also the order of the Tahsildar dated 11th June 1937 and direct that the papers be returned to the 1st class Resident Magistrate to dispose of them according to law.

R.M./R.K.

*Order accordingly.***A. I. R. 1938 Lahore 324**

BHIDE J.

Shah Niwaz and another — Plaintiffs —
Appellants.

v.

Ghulam Shah and others — Defendants
— Respondents.

Second Appeal No. 403 of 1937, Decided on 25th October 1937, from decree of Dist. Judge, Attock at Campbellpur, D/- 5th January 1937.

Adverse Possession—Waste land—Construction of temporary chhappar surrounded by ordinary enclosure of bushes on land lying waste does not amount to adverse possession.

Mere construction of a temporary chhappar surrounded by an ordinary enclosure of bushes, on land lying waste is not sufficient in law to establish adverse possession: *16 Bom 338, Foll.; A I R 1934 Lah 684; A I R 1927 Lah 416; A I R 1929 Lah 34 and A I R 1929 Lah 526, Disting.* [P 324 O 2]

M. L. Puri — *for Appellants.*M. C. Mahajan and Qabul Chand —
for Respondents.

Judgment. — The plaintiff sued in this case for possession of six marlas of land forming part of a large khasra No. 1188. The trial Court dismissed the suit and the decision was confirmed on appeal by the learned District Judge. From this decision plaintiff has preferred a second appeal. The learned District Judge found that the plaintiff was the owner of the land in suit but held that the defendants had acquired title by adverse possession over 12 years.

The learned counsel for the plaintiff has challenged this finding on the ground that the defendant had only constructed some temporary chhappars on the land which was lying waste and that such structures are not sufficient in law to establish adverse possession. In support of this contention he relied on *16 Bom 338*.¹ The learned counsel for the respondent did not dispute the correctness of the principle laid down in the latter ruling but he contended that in the present case the chhappars had been surrounded by an enclosure and in the circumstances adverse possession was rightly held to be established. In support of this contention he relied on *A I R 1934 Lah 684*,² *102 I C 9*,³ *A I R 1929 Lah 34*⁴ and *A I R 1929 Lah 526*.⁵ But in two of these cases, the enclosure was of a permanent character in the shape of a wall. In the other two cases the nature of the enclosure is not clear from the reports. In the present case the enclosure was an ordinary one consisting of bushes: one of the chhappars was inside the enclosure while the other was outside the enclosure: one of the enclosures was used by the defendant himself while the other enclosure was used for keeping his sheep.

In my opinion, in the circumstances of the case there was no evidence showing that the defendant intended to appropriate the land permanently to his own use. The land in dispute is close to the field of the defendants and is in the midst of a large

1. *Framji Cursetji v. Goculdas Madhowaji*, (1892) *16 Bom 338*.

2. *Mt. Aisha Bibi v. Allah Baksh*, (1934) *21 A I R Lah 684=154 I C 919=37 P L R 351*.

3. *Kunj Lal v. Ramji Lal*, (1927) *14 A I R Lah 416=102 I C 9=28 P L R 217*.

4. *Nand Lal v. Lahri*, (1929) *16 A I R Lah 34=111 I C 533*.

5. *Devi Ditta Ram v. Waryam*, (1929) *16 A I R Lah 526=117 I C 81*.

khasra number which was lying waste. I therefore hold that the case comes within the rule laid down in 16 Bom 338.¹ I accordingly accept the appeal and grant the plaintiff a decree for the land in dispute. In view of all the circumstances I leave the parties to bear their own costs throughout.

R.M./R.K.

*Appeal allowed.***A. I. R. 1938 Lahore 325**

YOUNG C. J. AND MONROE J.

Rameshwar Das—Creditor—Appellant.
v.*Official Receiver, Delhi, and another,*
Debtors and others — Respondents.

Letters Patent Appeal No. 60 of 1937,
Decided on 16th December 1937, from
Judgment of Din Mohammad J., D/- 5th
March 1937.

(a) **Lahore High Court Rules and Orders —**
Vol. 5, Chap. 1-A, R. 4 — Judges sitting in Let-
ters Patent appeal have no jurisdiction to grant
extension under R. 4 in case of appeal barred
by limitation.

Extension of time in case of a Letters Patent
appeal filed after the period of limitation under
R. 4 of Chap. 1-A, Vol. 5 of the Rules and Orders
of the Lahore High Court, can only be granted
by Bench admitting the appeal. Judges sitting
in Letters Patent appeal are not the "the admit-
ting Bench" within the meaning of R. 4 and they
have no jurisdiction to grant an extension in an
appeal before them fixed for hearing: *L. P. A.*
Nos. 99 of 1936 and 137 of 1936, Foll. [P 325 C 2]

(b) **Civil P. C. (1908), O. 41, R. 20—Appeal**
against respondent barred by time — He is not
"person interested in result of appeal" — His
name cannot be added under O. 41, R. 20.

Where an appeal against a respondent has be-
come barred by time he ceases to be "a person who
is interested in the result of the appeal" within
the meaning of O. 41, R. 20 and his name cannot
be subsequently added as a respondent under O. 41,
R. 20: *A I R 1927 P C 252, Rel. on. [P 326 C 1]*

(c) **Appeal — Memorandum of appeal — No**
memorandum of appeal, whether in Letters
Patent or in any other appeal is complete un-
less it mentions names of all parties against
whom relief is sought.

No memorandum of appeal, whether in a Let-
ters Patent appeal or in any other appeal can be
considered to be complete unless it mentions the
names of all the parties against whom relief is
sought. There is no reason for distinction in this
respect between a Letters Patent appeal or any
other appeal. [P 326 C 1]

J. L. Kapur and M. C. Sud —

*for Appellant.*J. N. Aggarwal — *for Respondent No. 2.*Bhagwat Dayal — *for Respondent No. 1*
*(Official Receiver).*Mela Ram — *for Respondents Nos. 8,*
*10 and 11.*Shamair Chand — *for Respondent No. 43*
(Bhondu Mal).

Young C. J. — This is an appeal filed
under Cl. 10 of the Letters Patent against
the decision of a single Judge of this Court.
The facts shortly are that Lala Ganga
Sahai, an insolvent, filed a proposal for
composition in satisfaction of his debts.
After notice to the creditors who did not
agree to the suggested composition, the
learned District Judge decided that the
composition was good and he annulled the
insolvency. Against this an appeal was
filed in this Court against the order of the
learned District Judge. The learned Single
Judge of this Court dismissed that appeal
and against that decision this appeal is filed.
A preliminary objection was taken by
counsel for the respondents that the name
of Lala Ganga Sahai, the insolvent, had
been omitted from the memorandum of
appeal to the Letters Patent Bench, and
that the period of limitation had run
against the appellants for lodging an appeal
against him. Counsel for the appellant
first contended that under R. 4 of Ch. 1-A,
Vol. 5, of the Rules and Orders of this
Court we can extend the time. The Rule
runs as follows :

No memorandum of appeal preferred under
Cl. 10 of the Letters Patent shall be entertained
if presented after the expiration of thirty days from
the date of the judgment appealed from, unless the
admitting Bench in its discretion, for good cause
shown, grants further time for the presentation.

The answer to that point is clear. Such
an extension can only be granted by the
Bench admitting the appeal, and according
to the decisions of this Court in Letters
Patent Appeals Nos. 99 of 1936 and 137
of 1936 it is clear that we are not "the
admitting Bench" within the meaning of
R. 4 and have no jurisdiction to grant an
extension.

The second alternative point was that
the application was under O. 41, R. 20,
Civil P. C., which reads as follows :

Where it appears to the Court at the hearing
that any person who was a party to the suit
in the Court from whose decree the appeal is
preferred, but who has not been made a party
to the appeal, is interested in the result of the
appeal, the Court may adjourn the hearing to
a future day to be fixed by the Court and direct
that such person be made a respondent.

Counsel therefore contends that he is
entitled to have the name of Lala Ganga
Sahai now added as a respondent. This

point has been, in our opinion, conclusively dealt with by their Lordships of the Privy Council in 6 Rang 29.¹ Their Lordships said as follows:

That rule empowers the Court to make such party a respondent when it appears to the Court that "he is interested in the result of the appeal". Giving these words their natural meaning — and they cannot be disregarded — it seems impossible to say that in this case the defendants against whom these suits have been dismissed, and as against whom the right of appeal has become barred, are interested in the result of the appeal filed by the plaintiff against the other defendants.

Giving effect to the wordings of their Lordships, it is clear that the appeal as against Lala Ganga Sahai has become time-barred: he therefore is not interested in the result of the appeal and therefore O. 41, R. 20, Civil P. C., is inapplicable, and his name cannot now be added as a respondent.

Counsel lastly contended that the ordinary rules of law do not apply to Letters Patent appeals for which the law is self-contained: that the appeal in a Letters Patent appeal is an appeal in the High Court itself—a domestic affair—and that when an appeal was filed before a single Judge of this Court and the name of Lala Ganga Sahai was in that memorandum of appeal, it was unnecessary thereafter in a Letters Patent appeal to set out the names of the respondents again in a new memorandum of appeal, and that therefore there is before the Court a proper memorandum of appeal in which Lala Ganga Sahai must be treated as a respondent. We cannot accept this argument. In AIR 1925 Lah 392² it was decided that a Letters Patent appeal cannot be proceeded with if the necessary parties to the appeal are not impleaded. It is argued that in this case the point taken now was not taken or discussed. Be that as it may, we are of opinion that no memorandum of appeal, whether in a Letters Patent appeal or any other appeal can be considered to be complete unless it mentions the names of the parties against whom relief is sought. There is no real reason, in our opinion, for making any distinction between a Letters Patent appeal and any other appeal. We therefore must come to the conclusion that the name of the party who is most vitally

interested having been omitted from the memorandum of appeal, and it being impossible for us to give any relief in this appeal without affecting the accrued rights of Lala Ganga Sahai, this appeal must be dismissed with costs.

R.M./R.K.

Appeal dismissed.

* A. I. R. 1938 Lahore 326

DALIP SINGH J.

Messrs. Uttar Chand Kapur and Sons
— *Judgment-debtors* — Appellants.

v.

Messrs. Sayad Hamid Ali and Syed Imtiaz Ali, Proprietors of Firm known as S. Mumtaz Ali and Sons — Decree-holders — Respondents.

Exn. First Appeal No. 197 of 1937, Decided on 28th October 1937, from order of Dist. Judge, Lahore, D/- 20th February 1937.

* (a) **Execution — Step-in-aid—Application for execution is not necessary.**

There can be a step-in-aid of execution without any application for execution having ever been made at all: 17 Cal 53, held no longer good law. [P 327 C 2]

* (b) **Court-fees Act (1870), S. 11—Court-fee ordered to be paid by decree not paid—Decree although not executable, yet application for execution is maintainable.**

The mere fact that court-fee had not been paid on a decree granted does not prevent the decree-holder from making an application for execution and all that S. 11 provides is that the decree should not be executed: 34 Bom 189 and A I R 1930 Nag 241, Rel. on. [P 327 C 2]

Bishan Nath — *for Appellants.*

Ghulam Mohy-ud-din —

for Respondents.

Judgment.—In this case the firm known as S. Mumtaz Ali and Sons, Publishers, sued the firm known as Messrs. Uttar Chand Kapur and Sons claiming an injunction against the defendant firm for infringing copyright; secondly, for an account of the profits derived by sale of books in which the copyright had been infringed, and thirdly for damages. The Court granted the plaintiff a decree for an injunction restraining the defendant from infringing copyright in certain portions of the book. On the second relief a decree for "damages" amounting to Rs. 259-12-10 was granted subject to the plaintiff's making up the necessary court-fee, namely on the difference between Rs. 250 and Rupees 259-12-10. It also ordered the defendant

1. Chockaligam Chetty v. Seethai Ache, (1927) 14 A I R P C 252=107 I C 237=55 I A 7=6 Rang 29 (P C).

2. Ohajju Ram v. Singh Ram, (1925) 12 A I R Lah 392=89 I C 298=26 P L R 150.

to extract from such copies of the books as it had in its possession those portions which infringed the copyright and hand them over to the plaintiff. No decree was given for damages as such. This decree was passed on 29th March 1933.

On 11th April 1933, the defendant firm applied to the Court that it had extracted the offending portions from the books in its possession and asked for leave to deposit the same in Court for handing over to the decree-holder. On 16th June 1933, the decree-holder applied that the defendant should make a proper list of the number of books from which it had extracted the offending portions so that the decree-holder might check the same and give a proper receipt. The final order on this application was dated 12th October 1933. On 23rd September 1936 the decree-holder firm applied for execution of the money decree that it had obtained and two questions arose for decision before the executing Court; one was that the decree-holder had not made up the deficiency in court-fee and the connected question as to whether he should be allowed to do so now. The second question, which is raised in the present appeal, was whether the present application for execution was barred by reason of having been made more than three years after the passing of the decree. On the question of the court-fee, the Court allowed the decree-holder to make up the deficiency holding that the decree-holder had been misled by the use of the word "damages" and that this was a proper case for extending time and allowing the decree-holder to make up the deficiency in court-fee. This point has not been argued before me. On the question of limitation, the Court held that a step-in-aid of execution of the decree had been taken on 16th June 1933 and the final order thereon was not passed till 12th October 1933 and therefore under Art. 182 (5), Limitation Act, the present execution application was within time.

The judgment-debtor has come in appeal and his counsel has contended firstly that there can be no step-in-aid of execution without at least one application to execute having been previously made. For this proposition he cites 17 Cal 53.¹ That ruling however only lays down that there cannot be a step-in-aid of execution unless there is an application for execution already

pending. This proposition has been overruled in all the High Courts, so far as I am aware, and is no longer good law. The ruling does not uphold the contention urged namely that there cannot be a step-in-aid of execution without any application for execution having ever been made at all. I see no force in this contention.

The next contention urged was that as court-fee had not been paid, there was really no decree for Rs. 259-12-10 until the court-fee was paid and that therefore any step-in-aid of execution of the executable portion of the decree could not be a step-in-aid of execution of that portion of the decree which was not executable at the time when the step-in-aid in question was taken and consequently could not aid in extending limitation for that portion of the decree. This contention however assumes two propositions, namely that until the court-fee was paid, there could be no application for execution of the decree or that there could be no step-in-aid of execution of that decree. The learned counsel for the respondent has cited 34 Bom 189,² where it is laid down that the mere fact that court-fee had not been paid on a decree granted did not prevent the decree-holder from making an application for execution and that all that S. 11, Court-fees Act, provided was that the decree should not be executed. This ruling was followed in 122 I C 438³ and appears to me to lay down the law correctly. While it is correct enough that the decree for Rs. 259-12-10 could not be executed on the date in question namely 16th June 1933, yet the decree was one and an application for execution could have been made not only of the executable portion of the decree but also of the non-executable portion of the decree. I am unable to hold therefore that a step-in-aid of execution could not have been taken or to limit the step-in-aid of execution to that portion of the decree which was executable on that date. I would therefore hold that the learned District Judge was correct in holding that the present application for execution was not barred by limitation and I would dismiss the appeal with costs.

B.D./R.K.

Appeal dismissed.

2. Nathubhai Kusandas v. Pranjivan Lalchand, (1910) 34 Bom 189=5 I C 601=12 Bom L R 13.

3. Bhuribi v. Rahmatbi, (1930) 17 A I R Nag 241=122 I C 438.

1. Paroosh Ram Das v. Kali Paddo Banerjee, (1890) 17 Cal 53.

A. I. R. 1938 Lahore 328

ADDISON AND DIN MOHAMMAD JJ.

Shankar Das and others — Plaintiffs —
Appellants.

v.

Official Receiver and others —
Defendants — Respondents.

First Appeals Nos. 172 and 622 of 1930, Decided on 22nd October 1937, from decree of the Senior Sub-Judge, Lahore, D/- 21st October 1929.

(a) Hindu Law—Joint family—Income received by coparcener after date of disruption but for period prior to it—Income becomes accretion to joint property—Coparcener is liable to account for it.

If the income received by a coparcener after the date of disruption relates to a period prior to that date, it would be treated as an accumulation for accretion to the joint family property and he would be liable to account for it: *A I R 1916 Cal 500, Rel. on.* [P 330 C 2]

(b) Civil P. C. (1908), O. 40, Rr. 1, 4—Non- rendition of accounts by third party during Receiver's administration is not appealable.

Neither Rule 1 nor R. 4 of O. 40 has any application to accounts from a third party relating to the period of a receiver's administration and the non- rendition of accounts by third party during that period is not appealable under any of these provisions of law. [P 330 C 2]

(c) Partnership—Suit for accounts and dissolution—Interest should be from date of final decree and not from date of plaint.

A decree in a suit for dissolution of partnership and accounts should provide for payment of interest upon the amount due only from the date of the final decree by which the amount (if any) is found due and not from the date of the plaint: *A I R 1930 P C 185, Foll.* [P 330 C 2]

J. N. Aggarwal and Barkat Ali — *for Appellants.*

Mehr Chand Mahajan, Vishnu Datta and Durga Das Jain for Radha Kishan — *for Respondents.*

Din Mohammad J. — This judgment will dispose of Civil Appeals Nos. 172 and 622 of 1930. The suit out of which these appeals have arisen was instituted as far back as 1916. It was for partition of joint family property and rendition of accounts. The dispute related to the property of the late Rai Bahadur Buta Mal who died on 16th June 1914 and all his sons and grandsons were involved in it, in addition to his widow. On 21st January 1924, a preliminary decree was made. Five appeals were presented against it, which were disposed of by a Division Bench of this Court on 12th January 1928. The learned Judges issued certain directions for partition of

the property and rendition of accounts in consequence of which a commissioner was appointed who submitted his report to the trial Court in January 1929. Multifarious objections to the report were raised by the various parties concerned in the litigation, and they were finally disposed of by the trial Court on 4th November 1929, on which date a final decree was passed. The present appeals are by Rai Sahib Shankar Das and Bihari Lal, respectively against that decree.

It may be remarked that by the preliminary decree the property in suit was directed to be partitioned among five persons, viz. the four sons of Rai Bahadur Buta Mal and his widow; and the date of disruption was to be taken as 31st October 1915. Some of these persons were already in possession of some items of the property in suit and instructions were accordingly issued to take accounts from them and to apportion the share of each claimant accordingly. The commissioner went thoroughly into the matter and made a detailed report as to the mode to be adopted in adjusting the shares. The Senior Subordinate Judge interfered only in a few particulars but in the main agreed with that report. His conclusions, which are material for the purposes of the present appeals, were as under :

(1) Rai Sahib Shankar Das had from 1913 to 1918 realized Rs. 18,125 from the lands at Lyallpur, out of which he had paid Rs. 1800 only to Bihari Lal and he was consequently bound to account for the balance and was further liable to pay interest on that amount at the rate of six per cent. per annum. This sum amounted in all to Rs. 23,325, i. e. Rs. 16,325 principal and Rs. 7000 interest. (2) Bihari Lal could not be called upon to render accounts at that stage for the period of eight months during which he did not surrender possession of the property in his possession, inasmuch as the matter in issue had already been decided by competent authorities. (3) The income from agricultural lands should be assessed at Rs. 5125 per harvest and the income from urban property should be calculated at the rate of Rs. 1257 per mensem. No rebate should be allowed to Bihari Lal on account of the alleged damage to the cotton crop of 1917-18. (4) The income earned from the factory should be calculated at Rs. 6000 per season. (5) Bihari Lal should be allowed to deduct Rs. 18,750 paid by him

as income-tax in 1920. Similarly he should be allowed to deduct Rs. 30,000 proved to have been paid to the various creditors of the joint family. (6) Rs. 300 per mensem only should be allowed to Bihari Lal for household expenses and not Rs. 500 as suggested by the Commissioner. (7) In the absence of any definite proof as to which of the cosharers had received income from the urban property situated at Amritsar, no co-sharer could be burdened with that amount. (8) The allowance paid to Mrs. Buta Mal could not be reduced. (9) Bihari Lal should pay four per cent. interest on the sums payable by him to the various cosharers. (10) Rai Sahib Shankar Das would get his costs of the proceedings subsequent to the preliminary decree from Bihari Lal alone.

It may also be observed that a receiver of the property was appointed in January 1919 and several persons have held that office since. Further, Bihari Lal was adjudicated an insolvent on 21st March 1933 and is now represented by the Official Receiver. Mrs. Buta Mal died on 23rd March 1933 and is represented on the record by her sons or their descendants. On 1st October 1935, Rai Sahib Shankar Das died and his sons and grandsons who were already on the record represent his interest. Lala Mul Chand also died and is now represented by his sons and grandsons. For the sake of convenience, we will take up the two appeals separately. The objections taken by Rai Sahib Shankar Das and argued on his behalf before us may be summarized as follows :

(1) Mrs. Buta Mal having died in the meantime, the share allotted to her should be thrown into the hotchpot and the property should now be divided equally among the four sons of Rai Bahadur Buta Mal, inasmuch as a widow is not entitled to a definite share before actual partition takes place by metes and bounds and that has not been done so far. (2) Rai Sahib Shankar Das could not be called upon to account for the period prior to 1st November 1915 which date was fixed by this Court as the starting point for accounting. At any rate, no interest should be charged on the sums retained by Rai Sahib Shankar Das in this account. (3) Bihari Lal should have further been called upon to account for the period ranging from January 1919 to August 1919 on which date he surrendered possession to the receiver. (4) The estimate arrived at by the Senior Subordinate Judge in relation to the income of the

family derived from agricultural lands is very low and so is the estimate in relation to the income of urban property. (5) The income in regard to the factory controlled by Bihari Lal has been under-estimated. Moreover, as the possession of the factory was not delivered by Bihari Lal until 1927 he should have been called upon to account for the income derived from the factory during the years 1920 to 1927 less the income for the years 1925 and 1926 when the factory had been leased to him under the orders of the Court and the lease money was recovered from him in due course of law. (6) Bihari Lal should not have been allowed a rebate of Rs. 18,750 which he had paid as income-tax in 1920. (7) It was wrong on the part of the Senior Subordinate Judge to have allowed Bihari Lal a deduction of Rs. 30,000 alleged to have been paid to the various creditors of the joint family. (8) Although the Senior Subordinate Judge reduced the sum claimed by Bihari Lal on account of household expenses from Rs. 6000 to Rs. 3600 a year, he made a mistake in not giving effect to this reduction in his final calculations. (9) The income derived from the urban property situated at Amritsar should have been debited to Bihari Lal. (10) Mrs. Buta Mal was wrongly paid one-fifth of the income prior to actual partition by metes and bounds and the sum so paid to her should have been deducted from her share and divided among the brothers equally. (11) The rate of interest charged on amounts outstanding in the hands of Bihari Lal is low. (12) The heirs of Mul Chand were liable to pay interest on all amounts received by Mul Chand on behalf of the joint family and retained by him. (13) The share of Rai Sahib Shankar Das has been wrongly calculated inasmuch as certain items which were recoverable from the various co-sharers have not been brought into account. (14) The burden of costs allowed to Rai Sahib Shankar Das should have been thrown on all the co-sharers and not on Bihari Lal alone.

We propose to take up the contentions raised by the appellants' counsel in the order in which they have been stated above. We will, however, deal with each item under discussion very briefly as both the commissioner and the Senior Subordinate Judge have entered into minute details and dealt with every item at great length :

1. In support of the contention that Mrs. Buta Mal's share should now be divi-

ded equally among her four sons as she has died before the actual partition could be effected, counsel for the appellants has relied on Para. 332 of Mulla's Hindu Law (1936 Edition) and 42 Bom 535,¹ his argument being that the death of a female pending a suit for partition disentitles her to a share in the joint family property. The rule enunciated by Mulla in Para. 332 is that if a female dies before the final decree, though after the preliminary decree, her share remains an integral part of the estate available for partition among the male members of the family. To a similar effect is 42 Bom 535,¹ where a widow had died before the passing of a final decree. It is obvious therefore that the authorities relied on by the appellants' counsel are distinguishable inasmuch as in the present case Mrs. Buta Mal did not die before the final decree but after and at a time when partition by metes and bounds had actually started. This contention therefore has no force.

2. It is true that while disposing of the appeals against the preliminary decree, this Court fixed 31st October 1915 as the date of disruption and made the various co-sharers liable to account for the subsequent period during which they were holding possession of the joint family property; but in the first instance there is nothing on the record to show that Rai Sahib Shankar Das had not received the income relating to the lands at Lyallpur after 31st October 1915 and secondly he is estopped now from contending that he should not have been burdened with the income received for the period prior to 31st October 1915. It is on the record that he had admitted his liability to the extent of the whole amount and further, although he was taking a very active interest in the proceedings before the commissioner and had further submitted about two dozen objections on the report made by the commissioner, he nowhere challenged the liability imposed on him by the Commissioner for the full period of five years from 1913 to 1918. He has not contested his liability even in the memorandum of appeal submitted to this Court. Not having raised any objection at the proper time, he cannot now be allowed to reagitate the matter especially as we have remarked above, there is no material on the record to show that he had received this income prior to

the date of disruption and not after. Counsel for Bihari Lal has rightly contended that if the income received by Rai Sahib Shankar Das after 31st October 1915 related to a period prior to that date, it would be treated as an accumulation or accretion to the joint family property and that Rai Sahib Shankar Das would be liable to account for it: see 43 Cal 459.² We overrule this objection too accordingly.

Similarly the objection that no interest could be charged on the amount retained by Rai Sahib Shankar Das on this account has no force. This was a liquidated sum in his hand and he cannot escape liability for interest on any ground. His plea that no interest should be charged from him inasmuch as none has been charged from Bihari Lal on the factory income for which he has been made liable, cannot hold good, because the two cases stand clearly apart. While Rai Sahib Shankar Das had realised in cash the sums retained by him, Bihari Lal's liability is only notional. Besides, the factory was run on partnership basis so to say, and the principle laid down by their Lordships of the Privy Council in 58 Cal 208³ that the decree in a suit for dissolution of partnership and accounts should provide for payment of interest upon the amount due only from the date of the final decree by which the amount (if any) is found due and not from the date of the plaint goes a long way to justify Bihari Lal's immunity. We decline to interfere therefore with the order of the Senior Subordinate Judge in this respect. (Their Lordships after dealing with the evidence on further points continued.) Counsel for the appellants contends that he is at liberty to reagitate these matters under O. 40, Rr. 1 and 4 read with S. 105, Civil P. C.; but we are not disposed to agree with him. Neither R. 1 nor R. 4 of O. 40 has any application to accounts from a third party relating to the period of a receiver's administration and it cannot be argued therefore that the non-rendition of accounts by Bihari Lal during that period was appealable under any of these provisions of law. This being so, S. 105 is ruled out of consideration. We consequently hold that Bihari Lal cannot be called upon at this late stage

2. Pormeshwar Dubey v. Gobind Dubey, (1916) 3 A I R Cal 500=33 I C 190=43 Cal 459=20 C W N 25.

3. Suleman v. Abdul Latif, (1930) 17 A I R P C 185=124 I C 891=57 I A 245=24 S L R 328=58 Cal 208 (P C).

1. Raoji Bhikaji v. Anant Laxman, (1918) 5 AIR Bom 175=46 I C 750=42 Bom 535=20 Bom L R 671.

to render accounts for those periods for which a receiver had been appointed and in connexion with which the decisions of competent Courts had been obtained at the proper time. (Their Lordships after deciding further points against the appellant continued.) The net result is that we uphold the judgment of the Senior Subordinate Judge and dismiss this appeal.

We now take up the appeal of Bihari Lal. It is not necessary to deal with all the contentions raised by counsel for Bihari Lal in this appeal inasmuch as they have already been directly or indirectly dealt with while disposing of the appeal of Rai Sahib Shankar Das. (After considering the points raised by appellant, Bihari Lal, their Lordships proceeded.) We accordingly dismiss this appeal too. In the peculiar circumstances of the case, we leave the parties to bear their own costs before us.

B.D./R.K.

*Appeals dismissed.***A. I. R. 1938 Lahore 331**

DALIP SINGH J.

Abdul Sattar and others — Plaintiffs
— Appellants.

v.

Fazal-ul-Rahman and others —
Defendants — Respondents.

Second Appeal No. 628 of 1937, Decided on 22nd November 1937, from decree of Dist. Judge, Delhi, D/- 18th January 1937.

(a) Appeal — Appeal lies from amended decree.

An appeal lies from an amended decree though not from the order amending the decree.

[P 332 C 1]

(b) Civil P. C. (1908), S. 152—*M* selling portion of property to *Z* reserving certain portion to himself — Suit by *Z* for portion of property left after excluding *M*'s portion — *Z* asserting that area to be partitioned was 100 square yards and that defendants were in wrongful possession of it — Defendants not denying this assertion — Preliminary decree giving *Z* 50 square yards passed — Final order confirming preliminary decree made—Appeal against final order dismissed — Application by defendants for amendment of preliminary decree on ground that *Z* was wrongly given 50 square yards—Amendment held could not be made at that late stage.

M sold a portion of the property to *Z* reserving to himself certain portion. *Z* brought a suit against the heirs of *M* for portion of the property left after excluding the portion reserved by *M* to himself. In that suit *Z* made an assertion that the property left after excluding the portion reserved by *M* to himself amounted to some

100 square yards and that the defendants were in wrongful possession of that area. The defendants did not deny that the area amounted to 100 square yards. A preliminary decree was passed giving 50 square yards to *Z*. A final order confirming the preliminary decree was made but even then the defendants did not object that the preliminary decree was wrong in form. After their appeal against the final order had been dismissed, they applied for amendment of the preliminary decree on the ground that *Z* was wrongly given 50 square yards:

Held that there was no accidental slip or error or omission on the part of the Courts concerned; nor was there an accidental error or omission in the plaint which intended one thing and owing to an accidental slip stated another which led to the incorporation of the mistake in the decree. It was too late for the defendants to apply for amendment of the decree as they ought to have moved in this matter at the time of the passing of preliminary decree.

[P 332 C 2; P 333 C 1]

Shamair Chand — *for Appellants.*Bishen Narain — *for Respondents.*

Judgment.—The facts of this case are as follows: One Ramji Das owned certain property. This property was sold to Abdul Shakur on 7th January 1908. On 24th March 1920, Abdul Shakur sold the property to Mohammad Ishaq. On 1st April 1920, Mohammad Ishaq sold a portion of the property to Zahir-ud-Din reserving to himself a certain portion of the property. Zahir-ud-Din brought a partition suit against Mohammad Ishaq's heirs on the basis of his title deed. Zahir-ud-Din died and the present appellants are his legal representatives. On 11th February 1933 a preliminary decree was passed holding that Zahir-ud-Din was entitled to 50 square yards out of the property in dispute on partition and it was further ordered that the defendants be ejected from the amla on the land which fell within 50 square yards and Rs. 65-4-0 was fixed as damages against the defendants for contumaciously holding on to the property. The appeal from this decree was dismissed by the learned District Judge on 25th January 1934 except as to the damages and ejection from the amla which was accepted. The decree consequently became a decree declaring Zahir-ud-Din entitled to 50 square yards of land and to partition of the property on that basis. A Commissioner was appointed and a final decree for possession by partition was drawn up on 26th April 1934, and plot "A" shown in the plan attached as pink, an area shown as 50 square yards was given to Zahir-ud-Din. On 8th April 1935 an appeal to the learned District Judge was dismissed on the ground that the area was in accordance with the

decree and the defendants had shown no reason to upset the partition proposed.

On appeal to this Court on 6th November 1935 the Court ordered that certain objections put in which had not been allowed to be heard by the trial Court should be heard. On 10th March 1936 the appeal was dismissed by this Court and there it appears for the first time the point now arising was raised but was not decided. The judgment-debtor then applied to the District Judge for amendment of the preliminary decree and consequential amendment of the final decree on 2nd May 1936. The learned District Judge has passed an order amending the decree holding that according to the plaint all that was claimed was the share in the property excluding the share which had been reserved by Mohammad Ishaq for himself in the sale to Zahir-ud-Din on 1st April 1920. This area amounted not to 50 square yards but to 38 square yards 7 square feet, and the learned District Judge appears to have amended the preliminary decree. It is not very clear whether he also amended the final decree but in the view of the case that I take the point is not of any importance now. A preliminary objection has been raised that no appeal lies from the order of the learned District Judge amending the decree. The point however was noticed by the office and the learned counsel for the appellant pointed out that he was appealing not from the order but from the amended decree. I see no reason why an appeal should not lie from the amended decree though not from the order amending the decree and I therefore overrule the preliminary objection.

On the merits the real point is whether it is now open to the learned District Judge to order amendment of the preliminary decree and consequential amendment of the final decree. The difficulty has arisen from the fact that Zahir-ud-Din undoubtedly applied for possession by partition of the share of the property left after excluding the area that had been reserved by Mohammad Ishaq. At that time it seems the parties were under the impression that, excluding the property reserved by Mohammad Ishaq which amounted to 49 square yards, the rest of the property amounted to 100 square yards and Zahir-ud-Din's half share therefore came to 50 square yards. In paras. 5 and 9 of the plaint, Zahir-ud-Din had asserted that the defendants

were wrongfully in possession of property amounting to 100 square yards. This allegation as to the area of which the defendants were in possession was not expressly denied. It was merely stated that the defendants had no knowledge and the present objector merely made a vague statement that he did not admit paras. 1 to 13 of the plaint. It is obvious that he must have known or should have known the area of which admittedly he himself was in possession, whether that possession was rightful or wrongful. However, be that as it may, on these facts, the Court could have passed no doubt a decree giving Zahir-ud-Din a half share in the remainder of the property excluding the 49 square yards reserved by Mohammad Ishaq. The Court however evidently accepting the statement of Zahir-ud-Din, not expressly denied by the defendants, that the remainder of the property was 100 square yards in area, passed a decree in the form of giving Zahir-ud-Din 50 square yards of the property. It was now open to defendants either to apply to the Court to amend the form of the decree or to raise the matter in the appeal which they took before the learned District Judge. They adopted neither of these courses and the learned counsel for the respondents concedes that the reason for this was that nobody doubted at the time that the area was 100 square yards. That appeal was dismissed and no further action was taken by the defendants.

In the final decree where 50 square yards had been duly allotted by the Commissioner to Zahir-ud-Din certain objections were taken but this objection that the preliminary decree was wrong in form was not taken even then and the parties fought on other grounds. The final decree affirmed the preliminary decree. The appeals from that final decree have been duly dismissed up to this Court. In this Court's judgment it was pointed out that the remedy, if any, of the debtors of the judgment-debtors was to apply to amend the preliminary decree but the Court did not hold and expressly refrained from expressing any opinion as to whether that remedy was or was not open to them in the circumstances of the present case. It appears to me after considering the matter that the remedy was no longer open to the judgment-debtors. There was no accidental slip or error or omission on the part of the Courts concerned : nor was there an accidental error or omission or slip in the

plaint which intended one thing and owing to an accidental slip stated another which led to the incorporation of the mistake in the decree. Such cases no doubt have been held in some rulings to fall within the purview of Ss. 151 and 152, Civil P. C. In this case however the facts must have been or should have been within the knowledge of the defendants, the judgment-debtors. There was a positive assertion made which was not expressly denied. It is unfortunate that the form of the decree embodied this mistake but it appears that this was due to mistake as to the area under which both the parties were labouring at the time. Steps have been taken to incorporate the preliminary decree in a final decree. It would be altogether too much to hold that all those steps and the expenses connected therewith should be held to be void and of no effect because now the judgment-debtors have discovered that there was a mistake in the area given to the plaintiff in the preliminary decree. That point, as stated already, must have been or should have been known to them at the time of the preliminary decree and the remedy was obviously open to them at that time. It seems to me that it is now too late to disturb the preliminary decree on the ground that the defendants have for the first time discovered this mistake.

I would therefore accept the appeal, set aside the order of the learned District Judge and restore the original preliminary decree and consequently also the final decree. I leave the parties to bear their own costs of this application to amend throughout.

D.S./R.K.

*Appeal accepted.***A. I. R. 1938 Lahore 333**

BHIDE J.

Mt. Chandravati — Defendant —
Appellant.

v.

Pandit Janti Parshad and another —
Plaintiffs — Respondents.

Second Appeal No. 304 of 1937, Decided on 19th November 1937, from decree of Addl. Dist. Judge, Delhi, D/- 25th February 1937.

Contract Act (1872), S. 16—Undue influence—Proof—Merely raising atmosphere of suspicion is not sufficient—There must be clear and definite evidence of case propounded.

To establish a case of undue influence it is not sufficient to raise an atmosphere of suspicion but there must be clear and definite evidence of the case propounded. [P 334 C 2]

The plaintiffs sought to set aside an assignment of an insurance policy by their deceased father in favour of the defendant. It was found that the defendant, although engaged originally as a servant was practically treated as a mistress and was kept in his house by the plaintiffs' father for about three or four years before his death. The policy assigned to the defendant was worth only Rs. 2000 while the plaintiffs' father had left to them other policies worth Rs. 4000 and also other immovable property and cash :

Held that under the circumstances the assignment of the policy in favour of the defendant could not be considered to be a transaction of "unconscionable nature" sufficient to raise a presumption of exercise of undue influence and in absence of other evidence sufficient enough to prove their case the plaintiffs could not succeed : *A I R 1934 P C 130, Rel. on; A I R 1937 P C 50, Disting.* [P 334 C 1]

Vishnu Datta — *for Appellant.*

Inder Dev Dua for Tasadduq Hussain—
for Respondents.

Judgment.—The plaintiffs in this case sued for a declaration to the effect that the assignment of an insurance policy by their deceased father in favour of the defendant, Mt. Chandrawati, was void and for the issue of a permanent injunction restraining the defendant from receiving the amount payable on the policy. The trial Court dismissed the suit, but on appeal the learned Additional District Judge of Delhi has decreed it. From this decision, the present appeal has been preferred by the defendant, Mt. Chandrawati. The plaintiffs' case was that the assignment of the policy had been made by their father under undue influence. It was alleged that the appellant had been engaged at first as a servant to look after the minor children of the father of the plaintiffs but had subsequently acquired great influence over him and had succeeded in obtaining the assignment of a policy for Rs. 2000 in her favour. The learned Additional District Judge has found that it was proved that the assignment had been made by the deceased father of the plaintiffs under undue influence. This finding is one of fact. But the learned counsel for the appellant has argued that the learned Additional District Judge has omitted to consider the fact that the evidence led by the plaintiffs was different from the allegations made in the plaint itself and that he had also not taken into consideration the material points which ought to have been considered in a case of this kind where undue influence is alleged,

according to the principles laid down by their Lordships of the Privy Council in 15 Cal 634.¹ It was also contended that there was no evidence on the record to show that the assignment was in fact the result of the exercise of any undue influence by the appellant, and it is not sufficient to show that there were some suspicious circumstances: 9 Luck 178.²

As regards the first point, it appears from the plaint that it was alleged that the appellant had some relations in the police department and that it was due to their threats of criminal prosecution that the assignment had been made. There is no evidence, worth the name on the record to substantiate this allegation. The evidence produced by the plaintiffs was to the effect that the appellant sometimes pretended that she was possessed by the spirit of the deceased wife of the plaintiffs' father and sometimes by Guru Bhagwan and induced the plaintiffs' father to act according to her wishes, and to turn out the plaintiffs. These facts were however nowhere alleged in the plaint as they should have been according to the provisions of O. 6, R. 4, Civil P. C. There is also no evidence on the record to show that the appellant ever asked the plaintiffs' father to make an assignment of a policy in her favour.

There is no doubt that the appellant, although she was engaged originally as a servant, was practically treated as a mistress and was kept by the plaintiffs' father in his house for about three or four years at any rate before his death. In the circumstances it was not unnatural for him to make some provision for her. The policy which was assigned by the plaintiffs' father in favour of the appellant was worth only Rs. 2000. It was admitted that the plaintiffs' father had left to them other policies worth Rs. 4000 and also immovable property and cash. In the circumstances the assignment of a policy in favour of the appellant cannot, I think, be considered to be a transaction of 'unconscionable' nature, sufficient to raise a presumption of the exercise of undue influence.

The learned counsel for the respondents urged that the onus had been shifted to the appellant by the evidence led by the plaintiffs and that it was for her to prove that

the assignment had not been secured by her by the exercise of undue influence. Reliance was placed in support of this argument on A I R 1937 P C 50,³ but the facts of that case appear to be very different. In the present case, I think, it cannot be said that the appellant, who was engaged first as a servant, stood in 'a position of active confidence' within the meaning of S. 111, Evidence Act. It was held by their Lordships of the Privy Council in 9 Luck 178² that to establish a case of undue influence, it is not sufficient to raise an atmosphere of suspicion, but that there must be clear and definite evidence of the case propounded. In the present instance, the evidence adduced differed from the case propounded in the plaint and even that evidence was hardly sufficient to raise more than a suspicion about the transaction attacked. I accordingly hold that the evidence produced by the plaintiffs was not sufficient to establish that the assignment of the policy had been procured by the exercise of undue influence. On this finding, it is not necessary to consider the other points raised by the learned counsel for the appellant. I accept the appeal and setting aside the decree of the learned Additional District Judge restore that of the trial Court with costs throughout.

R.M./R.K.

Appeal allowed.

3. Palanivelu Mudaliar v. Neelavathi Ammal, (1937) 24 A I R P C 50=167 I C 5 (P C).

A. I. R. 1938 Lahore 334

MONROE J.

Mohd. Din and others — Plaintiffs — Appellants.

v.

Sant Ram — Defendant — Respondent.

Second Appeal No. 1012 of 1937, Decided on 3rd January 1938, from decree of Dist. Judge, Sialkot, D/- 23rd April 1937.

Malicious Prosecution—Wrongful attachment — Damages— Suit for — Suit for recovery of damages for wrongful attachment of property — Plaintiff is not entitled to costs incurred by him as objector or to damages for personal worry — Claim for damages for personal worry is too vague except if considered to be based on slander of title — In that case plaintiff must prove actual damage — If no actual damages are proved, plaintiff is entitled only to nominal damages.

In a suit for recovery of damages for wrongful attachment of property, the plaintiff is not entitled to recover the costs incurred by him as objector in the execution proceedings or damages

1. Mahomed Buksh Khan v. Hossain Bibi, (1888) 15 Cal 684=15 I A 81=5 Sar 175 (P C).

2. Someshwar Dutt v. Tirbhawan Dutt, (1934) 21 A I R P C 180=149 I C 480=61 I A 224=9 Luck 178 (P C).

for personal worry. The Judge hearing the objection having power to grant costs to the successful objector, must be deemed to have exercised a judicial discretion in the matter of costs, and his judgment finally determines the costs to which the objector is entitled. The claim for damages under the head of personal worry is of a very vague character and is not maintainable except if considered to be based on slander of title. An infringement of the plaintiff's right namely of the absolute right to the property attached, having taken place, he has a cause of action. If however such an action is held to lie, the injury for which compensation is to be given must be one which has caused actual damage—slander of title not being actionable per se—and if the plaintiff is unable to prove that he has suffered actual damage apart from the costs incurred by him in establishing his right, he is only entitled to nominal damages: 2 *Lord Raymound 938, Rel. on.* [P 335 C 1, 2; P 336 C 1]

Shamair Chand — *for Appellant.*

Amar Nath Mehta — *for Respondent.*

Judgment.—Three second appeals arise from three suits in which the plaintiffs sought to recover damages for the wrongful attachment of their property. Sant Ram was a creditor of Ahmad Din and after the death of Ahmad Din sued the plaintiffs as his personal representatives; he obtained a decree, and caused certain property to be attached as property of Ahmad Din; on objections by the plaintiffs the property was released from attachment. The attachment was held to be wrongful and the learned trial Judge granted a decree in each case and awarded damages as follows: (a) to Muhammad Din Rs. 40 on account of loss in business through attending the Court and Rs. 60 as damages for loss of "reputation, mental worries etc.", (b) to Ghulam Mudammad Rs. 10 for loss of business in attending Court and Rs. 50 for mental worry and loss of reputation; (c) to Rehm Din, Ismail and Hakam Rs. 25 for loss of business and Rs. 75 "for mental worry, loss in reputation, etc".

On appeal the learned District Judge held (i) that the costs of the legal proceedings could not be recovered in a separate action for damages, (ii) that damages could not be recovered for personal worry; and he further held that no decree could be made in the suit in favour of the plaintiffs, which I take to mean that in the absence of proof of loss, arising from the wrongful seizure, no action lay.

Before me, Mr. Shamair Chand for the appellants was unable to support either claim to damages by the citation of an authority. In my opinion, the view of the learned District Judge on both points is

correct in principle. The Judge who heard the objection and allowed it had power to award costs to the successful objector; in awarding or withholding costs he exercised a judicial discretion and his judgment determined finally the amount of costs to which the objector was entitled. The claim for damages under the second head is of a very vague character. Every one who is forced to take legal proceedings to establish his rights is subjected to personal worry, but this is not a ground for awarding compensation. This claim does not seem to me to be maintainable in any respect, but if it were to be considered at all, the cause of action would be slander of title; the learned trial Judge specified the ground for awarding damages as "mental worry and loss of reputation"; and I understand him to mean that, by casting a doubt on the appellants' title, the respondent had made himself responsible for damages arising as the natural cause of the appellants' false statement, if such an action lies in the circumstances of this case, the injury for which compensation is given must be one which had caused actual damage—slander of title is not actionable per se. In the present case, the appellants have not shown that they have suffered actual damage, apart from the costs incurred by them in establishing their right.

There has however been an infringement of the rights of the appellants, that is of their absolute right to the property attached; they have causes of action; this right is now well established, having been recognized on at least two occasions by the Judicial Committee of the Privy Council, when judgments awarding substantial damages were upheld; in these cases the question of nominal damages did not arise and was not discussed. No authority on this question has been cited to me and I have been unable to find any. The ground on which damages were awarded in the cases which I have mentioned was that an absolute right in property had been infringed. The principle which applies was stated by Holt C. J. in 2 *Ld Raym 938*¹ at p. 955 (quoted by Sir Fredrick Pollock, *Law of Torts*) as follows:

A damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right So a man shall have an action against another for riding over his

1. *Ashby v. White*, 2 *Ld Raym 938*=92 *E R 126*=14 *How St. Tr. 695*=1 *Sm LC (11th Ed.) 240.*

ground, though it do him no damage, for it is an invasion of his property, and the other has no right to come there.

I hold therefore that the appellants are entitled to nominal damages and I allow the appeal and grant a decree for one rupee in each case. I do not think that, in the circumstances costs ought to be awarded to the appellants. They had already established their rights before these proceedings were instituted. They suffered no actual damage (for which they could recover) but only an injury, importing damage; the only result of these proceedings, the rights of the appellants having been already established, was to harass and cause expense to the respondents. The parties will bear their own costs throughout. As this question of nominal damages seemed to me to be one of first impression, I suggested that it might be referred to a Division Bench, but both counsel preferred that I should decide the case the amount involved not justifying further expense.

R.M./R.K.

Order accordingly.

A. I. R. 1938 Lahore 336

TEK CHAND J.

Brij Kumar — Petitioner.

v.

Naurangi Lal, Decree-holder and another, Judgment-debtor—Respondents.

Civil Revn. No. 263 of 1937, Decided on 16th November 1937, from order of Judge, Small Cause Court, Delhi, D/- 13th March 1937.

Civil P. C. (1908), S. 60 — “Debt” means perfected and absolute debt.

A debt is an obligation to pay a liquidated (or specified) sum of money. The word “debt” in S. 60 therefore means an actually existing debt, that is, a perfected and absolute debt. A sum of money which might, or might not, become due, or the payment of which depends upon contingencies which may or may not happen is not a debt.

[P 336 C 2; P 337 C 1]

Shamair Chand—*for Petitioner.*

Order.—Naurangi Lal respondent had a decree against Mohammad Bakhsh, who is a building contractor in Delhi. The amount outstanding on this decree in May 1936 was Rs. 143-15-0. At that time Mohammad Bakhsh had taken out a contract for construction of a house belonging to Brij Kumar, petitioner. On 26th May 1936, Naurangi Lal applied to the executing Court stating about Rs. 200 was due by Brij Kumar to Mohammad Bakhsh for the contract work done by the latter for him, and

that a prohibitory order be issued to Brij Kumar not to pay this amount to him. This order was duly served on Brij Kumar. Subsequently, on 31st August 1936, Brij Kumar was directed to deposit Rs. 143-15-0 in Court out of the amount which was stated to be due by him to Mohammad Bakhsh. Brij Kumar did not comply with this order, and he was summoned to appear in Court with his account-books. In accordance with this order he appeared and filed a written statement stating that no “debt” was due by him to Mohammad Bakhsh. He admitted that Mohammad Bakhsh had done work for him worth Rs. 6671 according to rates fixed, out of which he had been paid Rs. 6400 in all till 24th May 1936. He however alleged that the construction of the building was inspected and several defects were discovered, for which Brij Kumar claimed a deduction from Mohammad Bakhsh. The matter was settled on 3rd June 1936 when Mohammad Bakhsh agreed to forgo Rs. 271 as compensation for the defective work done by him. Accordingly he executed a receipt accepting the sum of Rs. 6400 which he had received in account up to 24th May 1936 in full and final satisfaction of his bill and stated that nothing more was due. Brij Kumar made a statement on oath in Court supporting the allegations in the written statement and produced the receipt above-mentioned. The learned Judge of the Small Cause Court however passed an order holding that Brij Kumar was liable to pay Rs. 143-15-0 to Naurangi Lal, on the ground that he had appropriated this amount, subsequent to the service of the prohibitory order on him, out of the amount which was due by him to Mohammad Bakhsh.

Brij Kumar has come in revision and it is urged on his behalf that the order of the lower Court is erroneous as no “debt” was due by him to Mohammad Bakhsh at the time when the prohibitory order was issued. After examining the record, I am of opinion that this contention is well founded and must succeed. It is clear that the account between Mohammad Bakhsh and Brij Kumar had not been made up on 26th May 1936, when the prohibitory order was issued and served. Under S. 60, Civil P. C., a “debt” is liable to attachment and sale. But, as pointed out by Mulla at page 220 of his Commentary on the Code of Civil Procedure :

A debt is an obligation to pay a liquidated (or specified) sum of money. Money that has not yet

become due does not constitute a "debt", for there is no obligation to pay that which has not yet become due. The word "debt" in this section means an actually existing debt, that is, a perfected and absolute debt. * * * A sum of money which might, or might not, become due, or the payment of which depends upon contingencies which may or may not happen, is not a debt.

In this case, the accounts between Brij Kumar and Muhammad Bakhsh had not been made up finally on 26th May 1936, and it could not be said that there was a "debt" due by the former to the latter, which could have been attached. Brij Kumar was therefore held liable erroneously to pay Rs. 143-15-0 to Naurangi Lal, respondent. I accept the petition for revision and set aside the order of the lower Court. As the respondent has not appeared to oppose this petition, there will be no order as to costs.

D.S./R.K.

Petition accepted.

*** A. I. R. 1938 Lahore 337**

BLACKER J.

Tara Singh — Accused — Petitioner.

v.

Emperor.

Criminal Revn. No. 1276 of 1937, Decided on 30th November 1937, from order of Sess. Judge, Jhelum, D/. 31st August 1937.

*** Criminal Trial — Transfer application — Security bond demanded — Transfer application actually made but not properly prosecuted and dismissed — Security bond cannot be forfeited for want of prosecution of transfer application.**

A person asked a Magistrate to stay the proceedings before him in order to enable him to file a transfer application. He was asked to execute security bonds, which he did. The transfer application was also made but on being asked for depositing cash money in order to issue notice to District Magistrate, the applicant failed and his transfer application without being further prosecuted was dismissed. The person appeared before the Magistrate before whom the proceedings were stayed and the Magistrate finding that the transfer application was not properly prosecuted forfeited the bond :

Held that if the intention of the law was that bonds should be furnished with the undertaking that not only application should be filed but also that final orders should be obtained thereon, this should be more clearly expressed in the section itself and should also be clearly set out in the terms of the bonds themselves. And as such order forfeiting the bond was illegal.

[P 338 C 1]

Nand Lal Slooja — *for Petitioner.*

M. Monir, Asst. Advocate-General —

for the Crown.

Facts.—This order will deal with two connected revision applications. The facts are that Tara Singh, petitioner, was concerned in two cross cases which were pending in the Court of the District Magistrate at Gujrat, being the complainant in one of the cases and the accused in the other. On 4th December 1936 he filed applications in both the cases for the staying of proceedings under S. 526, Cl. 8, Criminal P. C., as he intended to apply to the High Court for the transfer of both the cases to another Court. The learned District Magistrate ordered him to execute bonds in each of the cases in a sum of Rs. 200 as provided by the recent amendment to S. 526, Criminal P. C., and then adjourned the two cases in order to enable Tara Singh to file an application in the High Court and obtain orders thereon. Applications were in fact filed by Tara Singh in the High Court for the transfer of the two cases, and on 7th January 1937 he was ordered by the High Court to deposit a sum of Rs. 50 before notice could be issued to the District Magistrate, one deposit being held to be sufficient for both cases. Tara Singh, however, failed to make the required deposit and his transfer applications were dismissed by the High Court on 5th February 1937, Tara Singh himself having appeared in the meantime in the Court of the District Magistrate on 18th January and asked the Court to proceed with the trial of the cases. On receipt of the order of the High Court notice was issued to Tara Singh to show cause why his bonds should not be forfeited in both the cases, as he had failed to prosecute his transfer applications and finally the learned District Magistrate ordered that the bonds should be forfeited in each case.

The proceedings are forwarded for revision on the following grounds : On behalf of the petitioner it is contended that the amended sub-s. 8 only lays down that if required the person should execute a bond in a sum of not more than Rs. 200 that he will make such an application within a reasonable time fixed by the Court, and it is pointed out that in the bonds themselves all that the petitioner undertook to do was to file an application in the High Court for the transfer of the cases, and it is thus argued that by filing the applications the petitioner carried out the terms of the bond and that he was not bound by the law as it stands to prosecute these applications. On the other side, however, it is argued that although the section does not state

this explicitly, its intention is clear that an application must not only be filed but must be pursued, as is shown by the closing words of sub.s. 8 which are: the Court shall adjourn the case or postpone the appeal for such a period as will afford a reasonable time for the application to be made and an order to be obtained thereon.

There is no doubt that the intention of the recently added provisions regarding the furnishing of security bonds is to prevent persons from obtaining adjournments in cases on the pretext of filing transfer applications where there is no real intention of making such applications, and it is equally clear that this intention is frustrated if an adjournment is obtained by a person who actually files an application in the High Court but fails to prosecute it. At the same time, in the present case it cannot be denied that the petitioner did carry out the letter of the terms of his bonds by filing applications in the High Court, and his excuse for failing to prosecute the applications there is that he could not raise the fifty rupees which he was ordered to deposit before notice could be issued to the District Magistrate. This, it is argued, shows that he did at least obtain some sort of an order on his applications, and, if he was unable or unwilling to carry out this order, he at least did more than merely file applications and abandon them to their fate altogether.

On the whole I am of the opinion that if the intention of the law was that bonds should be furnished with the undertaking that not only applications should be filed but also that final orders should be obtained thereon, this should be more clearly expressed in the section itself and should also be clearly set out in the terms of the bonds themselves, and I thus consider that the orders of the lower Court ordering the forfeiture of the petitioner's two bonds are incorrect. I accordingly forward the cases to the High Court with the recommendation that the orders in question be set aside.

Order.—I concur in the reasons given by the learned Sessions Judge for holding that there has been no forfeiture of the bonds in this case, and actually the Assistant to the Advocate-General who appears for the Crown is also of the same view. I accordingly accept the reference and the petition and set aside the order of the learned District Magistrate.

B.D./R.K.

Reference accepted.

*** A. I. R. 1938 Lahore 338**

DALIP SINGH J.

Firm Attar Singh-Sant Singh —
Defendant — Appellant.
v.

Municipal Committee, Amritsar —
Plaintiff — Respondent.

Second Appeal No. 1043 of 1937, Decided on 11th January 1938, from decree of Addl. Dist. Judge, Amritsar, D/- 14th June 1937.

*** Limitation Act (1908), Arts. 52 and 96—**
Supplier of electric current, owing to defective meter, issuing instructions to his employee to double the reading of meter before sending bill to person supplied with electricity—Employee by mistake sending bill only for single reading—On discovery of mistake suit by supplier for balance of bill not charged owing to mistake of employee—Case held governed not by Art. 96 but by Art. 52.

A municipal committee supplied electric current to the defendant. The voltage of the current supplied was 440 volts but the meter was one that reported only 220 volts. In order therefore to get a correct reading of the current supplied the reading indicated by the meter should have been doubled and the committee issued instructions to their employees to double the reading of the meter by their Inspector before sending in the bill to the defendant. By some mistake or negligence on the part of the employees of the committee actual bills sent were only for the single reading without doubling the "reading". When the mistake was discovered the committee sued for the balance of the bill not charged for or paid by the defendant:

Held that the mistake was not the mistake of the parties in contractual relation or any money paid or property handed over because of a mistake but was due to the mistake of the employees in not following the instructions of the committee, if such existed about doubling the reading of the meter. This sort of mistake was not covered by Art. 96 at all. The case was therefore covered by Art. 52 and Art. 96 had no application.

[P 339 C 1, 2]

Dina Nath Bhasin — for Appellant.

D. R. Sawhney — for Respondent.

Judgment. — The facts of this case are that the plaintiff, the Municipal Committee, Amritsar, supplied electric current to the defendant. The voltage of the current supplied was 440 volts but the meter was one that reported only 220 volts. In order therefore to get a correct reading of the current supplied the reading indicated by the meter should have been doubled and according to the learned counsel for the respondent the plaintiff issued instructions to their employees to double the reading of the meter by their Inspector before sending in the bill to the defendant. By some mistake or negligence on the part of the employees of the plaintiff actual bills sent were only

for the single reading without doubling the reading. When the mistake was discovered the plaintiff committee sued for the balance of Rs. 1757.15.3 not charged for or paid by the defendant. The defendant took various pleas which do not now concern us, but the main plea was that the suit was barred by limitation beyond three years from the date that the suit was brought because the Article applicable was Art. 52 and Art. 96 which the plaintiff sought to apply had no application to the facts of the case. The learned trial Court held that Art. 52 did apply and Art. 96, Lim. Act, did not apply and on that finding he decreed the plaintiff's suit for Rs. 340 only leaving the parties to bear their own costs. On appeal the learned District Judge held that Art. 96 applied and not Art. 52 and therefore decreed the entire claim of the plaintiffs with costs throughout.

The defendant has come in second appeal and the only question arising is whether Art. 52 or Art. 96 applied to the facts of this case. No ruling directly in point has been cited but the ruling coming nearest to the facts is A I R 1933 Sind 32¹ where it was held that Art. 52 applied and not Art. 96. The following other rulings were cited by the learned counsel for the appellant, 48 Mad 925² and A I R 1927 Cal 117.³ These rulings however were cited as showing that the learned District Judge has erred in relying on them. They do not appear to me to have any bearing on the present case. The learned counsel for the respondent cited 4 Pat 448,⁴ 14 M L J 443⁵ and 87 I C 1017⁶ and Mitra's Limitation and Prescription, pp. 1346 and 1347. The rulings do not throw any light on the question and the commentary also does not afford any great help.

The scope of Art. 96 has never been very clearly defined but I am quite clear that it

1. Narumal Hirachand v. Nanumal Benarsidas, (1938) 20 A I R Sind 32=142 I C 470=27 S L R 81.

2. Ramiah & Co., v. Sadasiva Mudaliar & Bros., (1925) 12 A I R Mad 1255=91 I C 151=48 Mad 925=49 M L J 229.

3. Panna Lal Ghose v. Adjai Coal Co. Ltd., (1927) 14 A I R Cal 117=101 I C 62=31 C W N 82.

4. Tofa Lal Das v. Moinuddin Mirza, (1925) 12 A I R Pat 765=98 I C 129=4 Pat 448=7 P L T 431.

5. Madras Consolidated Sugar & Spirit Factories Ltd. v. William Sissmore Shaw, (1904) 14 M L J 448.

6. Ganesh Prasad v. Jot Singh, (1925) 12 A I R Oudh 719=87 I C 1017.

cannot apply to a case like the present where the mistake was not the mistake of the parties in contractual relation or any money paid or property handed over because of a mistake but was due to the mistake of the employees in not following the instructions of the plaintiff, if such existed, about doubling the reading of the meter. This sort of mistake does not seem to me to be covered by Art. 96 at all. Were this so, it will be open for the plaintiff to sue for the price of goods sold on the ground that he had instructed his clerk to send a demand and by mistake the clerk had credited a sum received to the wrong payee and therefore he was entitled to sue for the price of goods sold the right person on discovery of the mistake. In A I R 1933 Sind 32¹ however a similar pleading was not allowed to prevail. I would therefore hold that the case is covered by Art. 52, that Art. 96 has no application and I would accept the appeal and restore the decree of the trial Court for Rs. 340 only. In the circumstances, the parties will bear their own costs throughout.

D.S./R.K.

Appeal accepted.

A. I. R. 1938 Lahore 339

YOUNG C. J. AND MONROE J.

Mt. Kushalia, w/o Anant Ram
Convict — Appellant.

v.

Emperor.

Criminal Appeal No. 706 of 1937, Decided on 25th October 1937, from order of Sess. Judge, Lahore, D/- 31st May 1937.

(a) Criminal Trial — Approver — Corroborative statement of accused himself is most powerful form of corroboration, provided it definitely commits him to be present at murder.

The statement of an accused himself is the most powerful form of corroboration of an approver that one can have, provided such statement definitely commits the accused to be present at the time of the murder. [P 340 C 2]

(b) Criminal Trial — Approver — Corroboration — Corroborative evidence need not be evidence connecting accused with every detail of crime — It is sufficient if it tends to connect accused with crime.

Corroborative evidence tending to connect the accused with the crime described by an approver does not need to be evidence connecting the accused in every detail with the particular crime. Evidence is only required which tends to connect the accused with the crime. [P 341 C 1]

(c) Criminal Trial — Revision — Interference against acquittal.

The High Court has no power to interfere in revision against an acquittal. [P 341 C 2]

B. R. Puri and Nazar Mohammad —
for Appellant.

Ralli for Advocate-General —
for the Crown.

Young C. J.—Mt. Kushalia was charged along with her lover Hans Raj with the murder of Kushalia's husband Anant Ram. The learned Sessions Judge of Lahore acquitted Hans Raj but convicted Kushalia and sentenced her to death. It is alleged that on the night of 7th December 1936, Anant Ram was murdered by Hans Raj, one Khera, who has been admitted as an approver, and Kushalia. It appears that the relations between Kushalia and Anant Ram had been strained. On 5th December 1936, the husband had published a notice in a Lahore vernacular paper declaring that he would have nothing to do with his wife any more. He had received information about her relations with Hans Raj. There is also evidence that the woman was of an immoral nature. Anant Ram had also given Hans Raj cause of enmity by turning him out of a shop of which he was his tenant. The woman Mt. Kushalia got her husband shortly before he disappeared, or, as the prosecution says, was murdered, to make a will of his property in her favour. Shortly after that Anant Ram certainly disappeared from Lahore and has not been seen by anyone for nearly a year now.

The nephew of the deceased man reported his absence to the police and inquiries were made. Certain parts of a human body were discovered in a nallah in Lahore but we cannot say that these remains had anything to do with Anant Ram. They have not been identified and the prosecution does not maintain that those portions found in the nallah have been identified as the remains of Anant Ram. Suspicion however was clearly directed against Hans Raj and Kushalia. They were both arrested and Mt. Kushalia took a Magistrate to her house and pointed out a place in the floor. That place was dug up and pieces of human flesh and bones and hair were found in a pit which was there discovered. A bottle containing some kerosene oil was also discovered at the woman's instance. In addition to the evidence of the approver and certain evidence corroborating his evidence tending to connect Kushalia with the crime, there was the evidence of various persons as to her illicit intimacy with Hans Raj and her immoral character. The will is admitted by counsel who appears

for the defence and there can be no doubt that a motive has been established in this case as powerful a motive as ever exists in a murder case. The woman got rid of her husband in order that she might enjoy her lover and her husband's property with him.

The main evidence however is that of the approver and the question will arise whether his evidence is corroborated in a manner which tends to connect the accused with the crime. We have been carefully taken through the approver's evidence by counsel appearing for the appellant and we think on the whole that it is a statement of the truth. The approver was a man who had relationship with Hans Raj and was indebted to him for advances of money. As things are in this Province, this was quite enough reason for him to assist in the murder of the husband of Hans Raj's mistress. The approver describes how the woman persuaded Hans Raj to take part in the murder of her husband and how he, the approver, assisted in the murder. He says that they came into the house of the deceased when the woman said he was asleep or unconscious from having taken opium and that Hans Raj proceeded to strangle the deceased while the approver held his arms. After Anant Ram had died, a pit was dug in the floor and the body was there buried. The next day Kushalia and Hans Raj went to a village where the appellant's husband had property and endeavoured to collect it. In this they failed. On their return to the house the body was emitting a foul odour and the pit was dug up and Hans Raj burnt the body in the pit, the woman being present at the time. The approver received six or seven rupees as a reward and certain of the clothing of the deceased and then left. We are satisfied that the approver is detailing a story which is not invented but that he was certainly a participator in this crime.

The only point remaining is whether there is sufficient corroboration of the approver's statement tending to connect Kushalia with the crime. In the first place there is her own statement made before a Magistrate. This is the most powerful form of corroboration of an approver that one could have, provided that the statement, as in this case, definitely commits the accused to have been present at the murder of the deceased. It is quite true that the woman in her statement seeks to

minimize her part in the murder of her husband. She however in her statement admits being present when Hans Raj and Khera murdered her husband. She also admits that she put sand in her husband's mouth while he was being strangled. She admits that, on her return from the village to which she had gone on the day following the murder to collect her husband's property, she took part in the burning of the corpse and eventually burnt the remains still smelling. She admits taking part in again digging up the remains, such as they were and throwing them into a nallah close to the house.

It has been frequently pointed out by this Court that corroborative evidence tending to connect the accused with the crime described by an approver does not need to be evidence connecting the accused in every detail with the particular crime. Evidence is only required which tends to connect the accused with the crime. In this case such evidence is ample. It cannot be disputed for a minute that the woman's statement certainly connects her with the crime described by the approver. In addition to her own statement, there is also the fact that she endeavoured shortly after the murder to collect her husband's property and that she pointed out the place in her own house from which the human remains were discovered. There is also evidence that when arrested by the police, she produced a document purporting to come from her husband in Cawnpore and giving reasons for his absence. The learned Judge finds that this document is a false one and we agree with him; and it is quite clear from her own statement that she at any rate knew that her husband was dead and so it is perfectly obvious that the document she produced could not possibly have come from her husband. The fact that the woman gave a false reason for her husband's absence is another strong piece of circumstantial evidence against her.

There is therefore in this case as against this woman the evidence of the approver, the evidence of her own statement, the evidence that she gave a false reason for her husband's absence and produced a letter fabricated for this purpose and that shortly after the murder she endeavoured to collect her husband's property. It must also not be forgotten that she persuaded her husband shortly before his death to make a will in her favour.

While it is true that the body of Anant Ram has not been found or identified, there can be no doubt from the medical evidence that the remains of a human being were burnt and buried in the house in which Kushalia lived. We have her own statement that those remains belonged to her husband Anant Ram. We have therefore no doubt that Anant Ram — although his body has not been recovered — was murdered on the night of 7th December 1936.

We therefore are satisfied that Kushalia has been properly convicted in this case. With regard to sentence, we see no reason to interfere. The woman is not a young woman and according to the evidence has taken a leading and decisive part in the murder of her husband. We therefore confirm the sentence of death. In this case there is also an application filed in revision against the acquittal of Hans Raj. We have no power to interfere in this matter in revision and the application is dismissed.

R.M./R.K. *Order accordingly.*

A. I. R. 1938 Lahore 341

ADDISON AND DIN MOHAMMAD JJ.

Rao Girdhari Lal — Defendant —
Appellant.

v.

Societe Belge de Banque S. A. —
Plaintiff — Respondent.

First Appeal No. 89 of 1937, Decided on 1st November 1937, from decree of Sub-Judge, First Class, Delhi, D/- 22nd December 1936.

(a) Company — Chairman receiving money on behalf of company — Money actually spent on matters connected with company — Chairman is not personally liable for money so received.

Where certain sums are received by the chairman on behalf of a company and in the capacity of the chairman of the company and the sums are actually expended on matters connected with the company, the chairman cannot be made personally liable for the sums so received. [P 344 C 1]

(b) Contract — Counter offer amounts to rejection of offer.

Where an offer containing certain conditions has been made to a party and that party by adding to the conditions makes a counter offer, the counter offer amounts to rejection of the offer made to him: *A I R 1926 Lah 645 and 52 R R 144, Rel. on.* [P 344 C 1]

J. N. Aggarwal and Shamsheer Bahadur
— *for Appellant.*

Amin Chand Mehta and Manohar Lal
Sachdeva — *for Respondent.*

Din Mohammad J. — The suit out of which this appeal has arisen was instituted by Societe Belge de Banque S. A. of 61, Avenue, Louise, Bruxelles, Belgium, (hereinafter called the Society) through its constituted attorney Robert Palante against Rao Girdhari Lal Chaudhary of New Delhi. It was for recovery of Rupees 23,465-6-9. The Society alleged that a company incorporated under the Companies Act in the name of Delhi Sugar Mills Limited (hereinafter called the Company) approached it for a loan of Rupees 25,000 in the month of December 1933 but as the financial position of the Company was not sound, the Society was unwilling to accede to its request. On this, the defendant who was chairman of the Company offered to transfer by way of security 250 fully paid shares standing in his name in the registers of the Company. This offer however was subject to certain conditions, some of which were set forth in the plaint. On the same day, the Society paid Rs. 4000 to the Company at the request of the defendant. In January 1934, the Society called upon the defendant to execute the deed of transfer referred to above, but the defendant evaded it on some pretext or another. On 11th February 1934, the Society further spent Rs. 17,908-4-9 in connexion with the securing of the lease of a site for the Company's factory and again on 20th February 1934, a further sum of Rs. 2618-12-0 was spent in the interests of the Company. These sums were also expended at the request of the defendant as also a sum of Rs. 187-8-0 which was spent on purchasing the requisite stamp for the deed of transfer mentioned above. The Society later learnt that on the day when the defendant offered the security referred to above, he did not hold 250 fully paid shares of the Company and as the defendant had made default and the mortgage deed mentioned above had not been executed, the Society obtained a refund of Rs. 2454-12-0 on the stamps purchased for the purpose. After giving credit for the sum thus obtained, the Society claimed Rs. 22,259-12-9 as principal and Rupees 1205-12-0 as interest, aggregating Rupees 23,465-6-9 in all.

The defendant while admitting that he was chairman of the Company denied the allegations as set forth in the plaint and offered his own version of what had happened. He stated that the Society was

itself anxious to secure a mortgage from the Company and that as a result of certain negotiations that took place between the attorney of the Society and himself, the letter of 27th December came into existence incorporating certain conditions on which a loan of Rs. 25,000 was to be advanced by the Society but as the proposals made therein were subject to the consent of Messrs. J. J. Gillains, which consent was never obtained, the negotiations did not culminate in the shape of a completed contract. The defendant further repudiated all responsibility for not transferring the shares as arranged and threw the whole blame on Palante, who was then a representative of Messrs. J. J. Gillains and who was said to have scored out his signatures on the share script. It was further denied that the sums expended by the Company were expended at the defendant's request. In addition, it was pleaded that although the defendant was not bound in law to transfer his shares on account of the non-fulfilment of the conditions on which the transfer was to be carried out, and although the transfer had been made impossible by the conduct of Palante, he was willing to abide by his undertaking if and when all the conditions were satisfied and he was placed in a position to carry out his proposals. As regards the plea that the defendant did not own fully paid shares, it was observed that he had acquired five hundred fully paid shares within a short time of the drafting of the letter referred to above. Put in a nutshell, the position taken up by the defendant was that as the Society had advanced money to the Company before his offer was duly accepted and that as his offer never assumed the dignity of contract in the eye of the law, no cause of action arose as against him.

The Society put in a replication traversing all the pleas of the defendant and reiterating its original position as adumbrated in the plaint. On the pleadings of the parties, the Subordinate Judge struck the following issues :

1. Was there a concluded agreement between the parties in terms of the defendant's offer contained in his letter dated 27th December 1933?
2. Is the defendant estopped by reason of his receipt dated 11th February 1934, from pleading that there was no concluded contract?
3. Did defendant request the plaintiff Company to advance to the Delhi Sugar Mills the following sums, namely: (a) Rs. 4000 on 27th December 1933, (b) Rs. 17,908-4-9 on 11th February 1934, (c) Rs. 2618-12-0 on 20th February 1934, (d) Rupees 187-8-0?
4. Did the plaintiff Company request the

defendant to transfer 250 shares to them? 5. Did Mr. Palante, a Director of the Delhi Sugar Mills, as representative of J. J. Gillains, prevent the transfer by the defendant of 250 shares? 6. How many shares did the defendant hold in the Delhi Sugar Mills on 27th December 1933? 7. Has defendant received the sum of Rs. 21,440-12-9 from the Delhi Sugar Mills for payment to the plaintiff Company? 8. If so, whether defendant is not liable to pay the amount to the plaintiff? 9. To what relief is the plaintiff entitled?

The Society examined Delait, its own attorney, who besides other things stated that the Society had confirmed all arrangements mentioned in the letter of 27th December. In addition, Ram Kishen Das Khanna, a clerk of the National Bank of India Ltd., produced the two cheques of Rs. 4000 and Rs. 17,908-4-9 respectively which had been drawn on the Bank by Palante on behalf of the Society and Vaid Nath Ayer, Official Liquidator of the Company, placed on the record a cash book incorporating the defendant's account with the company which showed a credit of these two sums in the defendant's account on 28th December 1933 and 11th February 1934, respectively. No other evidence was led in the case.

The Subordinate Judge came to the conclusion that the acceptance of the defendant's offer by the Society not being absolute and unqualified inasmuch as its letter accepting the defendant's proposals added a new condition which was never accepted by the defendant, there was no completed contract between the parties. He further found that the letter dated 11th February 1934 did not constitute estoppel and that the moneys advanced by the Society were not advanced at the defendant's request. He however held that the Society had made several requests to the defendant for transferring his shares in its favour, that Palante was not responsible for the non-performance of this part of the proposals and that the defendant did not hold 250 fully paid shares on 27th December 1933. On issue 7 he decided that the company's accounts had not been legally proved but on the general issue as framed as No. 9 he held that the defendant was bound in equity to reimburse the Society the sums he had actually received and accordingly passed a decree for Rs. 22,542-12-9 and proportionate costs against the defendant. From this decision the present appeal has been preferred.

It may be remarked at the outset that the appeal has been argued on the judg-

ment as it stands. In other words, neither party has challenged those findings of the Court below which were against it; on the other hand, both parties have assumed the correctness of those findings while presenting their case to us. On behalf of the appellant it has been contended that having arrived at the conclusion that there was no completed contract between the parties, that the money was not advanced to the company at the defendant's request and that the defendant had not received the sum of Rs. 21,440-12-9 from the company, the Subordinate Judge could not make a decree against the defendant 'independent of contract' and merely on the ground of 'equity' as stated by him. Counsel for the respondent on the other hand has tried to support the decree of the trial Court mainly on the ground that for the sums advanced by the Society, the defendant had given receipts over his own signatures and having done so, he could not escape liability for the amounts thus received.

The question that falls for determination therefore is very simple. Could the defendant be called upon to repay the Society the amounts he received from the Society on behalf of the company in his capacity as chairman of the company, especially when it is admitted by the society itself that those amounts were advanced to the company or actually expended on matters connected with the company? To us it appears that to this question the answer cannot but be in the negative. In the letter Ex. P-6 which the defendant addressed to the attorney of the Society asking for an advance of Rs. 4000 to the company, no reference was made to the contract of guarantee now relied upon by the society nor had that contract been confirmed till then by the Society. Similarly in the receipt, Ex. P-7, all that was stated by the defendant was that the amount of Rs. 17,440-12-9 only was to be paid to the Delhi Cloth and General Mills Co. Ltd., in terms of the deed of transfer, dated 11th February 1934. No attempt has been made on the record to explain what the significance of these words is, what deed of transfer is referred to here and why this money was to be paid to the Delhi Cloth and General Mills Co. Ltd. All that has been said in this connection in para. 7 of the plaint is that various sums of money aggregating Rs. 17,908-4-9 were expended on 'securing of the lease of the factory

site'. It is obvious that the defendant had not pledged his own security in receiving either of those sums. The defendant was admittedly chairman of the company and all sums paid to the company were to be received by him as such. No significance attaches therefore to these receipts and the defendant cannot be held personally liable for the amounts thus received.

Moreover, the Society by inserting condition No. 8 in reply to the offer of the defendant which contained only 7 conditions had definitely made a counter-offer which amounted to a rejection of the defendant's offer: see A I R 1926 Lah 645¹ and 52 R R 144.² Unless therefore it was proved that that condition was accepted by the defendant or that the events envisaged in that paragraph had materialized before payments were made, it cannot be said that the moneys advanced by the Society were being advanced on the basis of the contract of guarantee into which the defendant had entered with the Society. For the sums advanced to the company, the Society would in all justification have obtained a decree against the company but not having impleaded the company as a defendant in this action, their suit brought against the present defendant alone must fail, as he could be made liable only on the alleged contract of guarantee and that contract the Society has hopelessly failed to establish. On these grounds we allow the appeal, set aside the decree of the Court below and dismiss the plaintiff's suit with costs throughout.

D.S./R.K.

Appeal allowed.

1. Nihal Chand v. Amar Nath, (1926) 13 A I R Lah 645=98 I C 272.

2. Hyde v. Wrench, (1840) 52 R R 144=3 Beav 334=4 Jur 1106=49 E R 132.

* A. I. R 1938 Lahore 344

ADDISON AND DIN MOHAMMAD JJ.

Jai Ram — Plaintiff — Appellant.

v.

Mt. Shiv Devi — Defendant —

Respondent.

Second Appeal No. 635 of 1937, Decided on 14 December 1937, from decree of Dist. Judge, Attock at Campbellpur, D/- 2nd February 1937.

* Maintenance—Decree for—Widow starting earning after decree—Decree cannot be reduced.

After a decree has been passed in favour of a widow for maintenance, the amount so decreed

cannot be reduced if the widow happens to make her own living by personal exertions, because her income by personal exertions cannot be taken as her 'means': A I R 1934 Pat 99, Rel. on.

[P 344 C 2; P 345 C 1]

M. L. Puri — *for Appellant.*

Bishen Nath — *for Respondent.*

Din Mohammad J.—The sole question involved in this appeal is whether after a decree has been passed in favour of a widow for maintenance, the amount so decreed can be reduced if the widow happens to make her own living by personal exertions. Counsel for the appellant has referred us to certain authorities which lay down that the amount of maintenance may even after the passing of the decree be increased or decreased whenever there is such change of circumstances as would justify a change in the rate. For instance, if the income of the estate has materially increased it may be enhanced and if the income of the estate has diminished it may be reduced. But these authorities are not applicable to the present case. Nor are those authorities in point which lay down that in calculating the amount of maintenance the widow's stridhan should be taken into account, unless it is of an unproductive character such as clothes and jewels, inasmuch as no such property is involved in the present case. Here the main reason for the father-in-law's suit for the reduction of maintenance is that the widow is employed as a mistress in a Municipal Girls' School and that she is earning more than Rs. 50 a month. In our view, this cannot be treated as permanent income of the widow so as to justify any interference with the previous decree obtained by her. In fact, counsel for the respondent has produced a certified copy of the proceedings of the Municipal Committee showing that the widow was only recently served with a notice to relinquish her appointment in view of the financial stringency of the Municipal Committee and that faced with this situation she had consented to work on a reduced salary. It cannot be denied that this income is liable to be stopped at any time when her employers choose to do so and it is obvious that she cannot be forced to work for her own living if she does not wish to do so. Such income therefore cannot and should not be taken into account. In 12 Pat 869¹ at p. 875, the

1. Saraswati Kuer v. Sheoratan Kuer, (1934) 21 A I R Pat 99=149 I C 738=12 Pat 869=15 P L T 372.

learned Judge who delivered the judgment has observed :

There is no doubt that under the general Hindu law a widow claiming maintenance claims it on the basis of her position in life and the position of the estate, having regard also to her means. But, in my judgment, a voluntary payment of a sum of Rs. 250 (by her brother) quite clearly cannot be taken into consideration in fixing the amount which she is entitled to from her husband's estate. A sum which is paid voluntarily cannot strictly be described as her 'means', by which term I apprehend is meant the sum to which she is either legally entitled or can lay claim to or the income of her stridhan estate.

We entirely agree with the interpretation put on the word 'means' in this judgment and conclude on that basis that the widow's present earnings cannot be utilized for reducing the maintenance allowed to her. Before concluding we may remark that the father-in-law had in a way misappropriated Rs. 1200, which was the separate property of the widow's husband, and the maintenance was fixed for the widow mainly on account of her having been deprived of this sum. The father-in-law has all along been in possession of this amount and has been using it for his own purposes and now that he is said to have lost it, he cannot be allowed to urge that the maintenance should be reduced as the estate has diminished in value. Counsel for the widow was prepared to forego her claim for maintenance for ever if the father-in-law was prepared to disgorge the sum so misappropriated by him, but counsel for the father-in-law refused to accept this proposal. Taking all the circumstances of the case into consideration, we uphold the decision of the District Judge and dismiss this appeal with costs.

B.D./R.K.

Appeal dismissed.

A. I. R. 1938 Lahore 345

ADDISON J.

Chanan Singh and others
Accused — Petitioners.

v.

Emperor.

Criminal Revn. No. 1011 of 1937, Decided on 12th November 1937, reported by Sess. Judge, Gurdaspur, D/- 10th July 1937.

Criminal P. C. (1898), Ss. 107 and 145 — Complaint under Ss. 107/145 — Magistrate omitting to draw up original order under S. 145 (1) and to affix its copy at the spot under

S. 145 (3)—All proceedings are vitiated—Final order is liable to be set aside.

Omission by a Magistrate in a complaint under Ss. 107/145, to draw up the necessary original order under S. 145 (1) and to affix its copy at the spot under S. 145 (3) vitiates all the proceedings and the final order passed therein is liable to be set aside : *A I R 1915 Lah 232 ; A I R 1916 Lah 378 ; A I R 1925 Lah 368 ; A I R 1930 Lah 895 and A I R 1924 Lah 91, Rel. on.* [P 346 C 2]

R. P. Khosla — *for Petitioners.*

Bashir Ahmad for Dr. Mohammad Alam
— *for Respondent (Complainant).*

Facts.—The respondents to this petition, Ibrahim and another, brought a complaint in the Court of Malak Ata Mohammad, Magistrate, First Class, Gurdaspur, under Ss. 107/145, Criminal P. C., against the eight petitioners who are Sikhs. The parties both reside in village Kotli Surat-mali. According to the complaint the petitioners were in imminent danger of being victims of a breach of the peace at the hands of the other party who were preventing them from using khasra No. 2283 as a burial ground although it had always been used as such by them. The Magistrate took some preliminary evidence and then without recording any separate formal order under S. 145 (1), Criminal P. C., issued a notice to the opposite party mentioning that he had been moved under Ss. 107/145, Criminal P. C. and directing them to appear and show cause why they should not be called to execute bonds. It appears that no copy of any order was placed near field No. 2283. Four of these eight persons did appear and filed a written statement while it was reported the other four had refused service. The written statement is headed "written statement under S. 107, Criminal P. C." S. 145, Criminal P. C. is not mentioned. In the contents of the written statement they set out that they were in 'danger from the original petitioners and a reference is made to the field of which they say they always had possession. The Magistrate framed two issues : (1) Have the petitioners held possession of the disputed place within two months before filing the present petition ? Onus on the petitioners. (2) Is there any danger of the breach of the peace ? Onus on both sides. Evidence was led and the Magistrate recorded an order that the field was a graveyard and must remain in undisturbed possession of the petitioners before him, the other party being referred to the Civil Court for remedy. No order was passed directing the parties to execute bonds.

The proceedings are forwarded for revision on the following grounds:—Counsel has appeared for the original respondents and argued that the learned Magistrate had no jurisdiction in this case because he failed to record an order in writing under S. 145 (1), Criminal P. C., stating the ground on which he was satisfied the danger of breach of the peace existed concerning field No. 2283, and the learned Public Prosecutor has drawn my attention to a further irregularity in that the provision of S. 145 (3), Criminal P. C., about placing at least one copy in a conspicuous place near the subject of dispute has not been complied with. Various rulings were cited. According to 169 P L R 1915,¹ 22 P R 1916,² A I R 1925 Lah 368³ and A I R 1930 Lah 895,⁴ the view of the Lahore High Court appears to involve the conclusion that the Magistrate's final order in this case must be set aside as without jurisdiction from the start. In A I R 1924 Lah 91,⁵ the same initial error was held to vitiate proceedings unless a subsequent order substantially remedied it, as had apparently occurred in 15 P W R 1914 Cr⁶ cited by the counsel for the respondents before me. The only possible order on the record of this case which might be supposed to remedy the defect would be the frame of issues struck by the learned Magistrate coupled with the mention of S. 145, Criminal P. C., along with S. 107, Criminal P. C., in the notice issued and the fact that in the written statement the four respondents who contested in the lower Court did refer to possession of the field which is the cause of trouble. Evidence was in fact led in extenso by both parties about the field.

The learned counsel for the present respondents also quoted A I R 1932 All 446,⁷

1. Mt. Budhan v. Ram Rakha Mal, (1915) 2 A I R Lah 232=30 I C 452=16 Cr L J 628=169 P L R 1915.
2. Tara Chand v. Bihari Lal, (1916) 3 A I R Lah 378=36 I C 868=18 Cr L J 36=22 P R 1916.
3. Sher Khan v. Fazal Illahi, (1925) 12 A I R Lah 368=88 I C 601=26 Cr L J 1177=26 P L R 187.
4. Emperor v. Sis Ram, (1930) 17 A I R Lah 895=1930 Cr C 991=128 I C 313=32 Cr L J 139.
5. Hakam v. Ralia Ram, (1924) 11 A I R Lah 91=74 I C 79=24 Cr L J 751=4 Lah 66.
6. Mohammad Sharif v. Dhanpat Rai, (1914) 1 A I R Lah 295=23 I C 487=68 P L R 1914=15 P W R 1914 Cr=15 Cr L J 279.
7. Madan Mohan Lal v. Mt. Sheoraj Kunwar, (1932) 19 A I R All 446=1932 Cr C 558=141 I C 131=34 Cr L J 156=1932 A L J 503.

A I R 1933 All 264⁸ (a judgment by a Full Bench, one member of which was the present Hon'ble Chief Justice of the Lahore High Court) and the remarks in the commentary of Mr. Chitaley's Criminal Procedure Code, Vol. 1, p. 676. He argues that since both parties in this case led evidence about the field, it must be held that in spite of the lack of the initial order of the Magistrate there would be no case for setting aside the order on revision. I would especially point out that as in this case the respondents in the lower Court were unsuccessful, it is arguable that other persons on their side might also have appeared to contest the original petitioners' claim but for the omission of the Magistrate to affix the necessary notice which, I take it, is meant as general notice to the public at the spot. I accordingly forward the records of this case to the Hon'ble Judges of the High Court with a recommendation that if it be held that in this case the Magistrate's omission to draw up the necessary original order under S. 145 (1), Criminal P. C., and affix its copy at the spot under S. 145 (3), Criminal P. C., vitiates all the proceedings, the final order passed may be set aside.

Order.—For reasons given in the referring order, I accept the petition, set aside the orders of the Magistrate, First Class, and direct that the matter be proceeded with ab initio according to law by another Magistrate, First Class, to be nominated by the District Magistrate.

R.M/R.K.

Petition accepted.

8. Kapoor Chand v. Suraj Prasad, (1933) 20 A I R All 264=1933 Cr C 434=142 I C 537=34 Cr L J 414=55 All 301 (F B).

A. I. R. 1938 Lahore 346

BLACKER J.

*Pran Nath, Pleader, Ruper
Accused — Petitioner.*

v.

Emperor.

Criminal Misc. No. 234 of 1937, Decided on 6th December 1937, for transfer of case from Dist. Magistrate, Ambala.

Criminal Trial—Transfer of case—Magistrate trying case shown to have had private interview with one of the parties and heard his version of case—That is sufficient ground for transfer of case to another Magistrate.

Where it is clear that the Magistrate trying a case has had an interview with one of the parties

to the litigation privately and out of Court and has heard from that party his version of the facts, this fact is sufficient to disqualify the Magistrate from subsequently trying the case in his magisterial capacity, even though there may be no reasons for ascribing any prejudice or undue interest in the case to him. [P 347 C 1, 2]

Sham Lal — *for Petitioner.*

Hem Raj Mahajan *for Advocate-General*
— *for the Crown.*

Order.—The petitioner Mr. Pran Nath, pleader, Rupar, applies for the transfer of certain criminal litigation, in which he is a party, from the Court of the learned District Magistrate, Ambala. There are three main allegations in his petition: One is that the learned District Magistrate has dealt executively with the case by calling for a report of the facts from the Sub-divisional Officer. The second is that according to the affidavit of a gentleman of the name of Mr. Ganga Ram Sharma, the learned District Magistrate told Mr. Sharma that the opposite party in this litigation, Mr. N. Sen, a member of the Indian Civil Service, and an Assistant Commissioner in the District had told him that the petitioner had openly and badly abused him. According to Mr. Sharma, the learned District Magistrate was greatly impressed by Mr. Sen's version. The third ground is that in the cross-case against Mr. Sen, the learned District Magistrate has already passed an order adverse to the petitioner.

There is no substance in the third ground as obviously the learned District Magistrate has to decide these matters one way or the other and no prejudice can be inferred from this fact itself. With regard to the first ground, the learned District Magistrate has given an adequate explanation. I think that until this explanation was on the record, the petitioner had a reasonable apprehension on this ground, but now that the learned District Magistrate's report is before him, he should not have any such further apprehension. The second ground however appears to me to be more serious. There are no reasons for ascribing any prejudice or undue interest in this case to the learned District Magistrate; but the mere fact that he is unable to deny that he has had an interview with the opposite party in this litigation privately and out of Court and has heard from that party his version of the facts, is sufficient to disqualify him from subsequently trying the case in his magisterial capacity. I therefore accept this petition and direct that

the case be transferred to the Court of the learned District Magistrate at Ludhiana, which is conveniently situated in relation to Rupar where the incidents are alleged to have taken place.

R.M./R.K.

Petition accepted.

A. I. R. 1938 Lahore 347

TEK CHAND J.

Jawahir Singh — Plaintiff —

Petitioner.

v.

Ghulam Hassan and another —

Defendants — Respondents.

Civil Revn. No. 614 of 1937, Decided on 30th November 1937, from Senior Sub-Judge, Rawalpindi, D/- 29th April 1937.

Limitation Act (1908), S. 20—Debtor paying sum of money towards payment of amount due in bond and making endorsement to that effect on his handwriting on back—Payment not made towards interest as such nor appropriated by creditor towards interest — Such payment is sufficient to give fresh start for limitation.

Where a debtor pays a sum of money towards payment of the amount due from him on a bond and makes an endorsement to that effect in his own handwriting on the back of the bond and the payment is not made towards interest as such nor is it appropriated by the creditor towards interest, such payment gives the creditor a fresh period of three years from the date of payment within which to sue for the debt. Under the latter part of S. 20, it is not necessary that the writing should specify that the amount was paid in part payment of the principal as such: *A I R 1937 Sind 95; A I R 1933 Lah 341 and A I R 1935 Mad 101, Foll.; A I R 1935 All 946 and A I R 1915 Lah 275, Disting.*

[P 348 C 2]

Nihal Singh — *for Petitioner.*

Gulzari Lal Sehgal — *for Respondents.*

Order.—The plaintiff brought a suit for recovery of Rs. 270 on the basis of a bond dated 4th August 1930, which had been executed by defendant 1 in favour of defendant 2 and which the latter has subsequently assigned to the plaintiff. The suit was instituted on 1st August 1936, and in order to bring it within limitation, it was stated in the plaint that on 3rd August 1933 the defendant had paid Rs. 3 and had made an endorsement to that effect in his own hand on the back of the bond and had got it attested by a witness. Defendant 1 admitted the execution of the bond, but urged that it was without consideration. He denied that the endorsement was in his hand and further pleaded that the suit was barred by limitation. He also averred that the plaintiff was a money-lender and

as he had not complied with the provisions of the Regulation of Accounts Act, he was not entitled to interest and costs. The trial Judge found for the plaintiff on all these points and decreed the suit against defendant 1. On appeal before the Senior Subordinate Judge, the only point argued on behalf of defendant 1 was that of limitation. The learned Judge agreed with the trial Court that the writing on the back of the promissory note evidencing the payment of Rs. 3 on 3rd August 1933, was in the handwriting of defendant 1, but he held that this was not sufficient to save limitation under S. 20, Lim. Act. On this finding he accepted the appeal of defendant 1 and dismissed the plaintiff's suit.

In support of his conclusion the learned Judge relied upon a Full Bench ruling of the Allahabad High Court reported in A I R 1935 All 946=58 All 261¹ and a decision of the Punjab Chief Court in A I R 1915 Lah 275.² It is clear that neither of these rulings has any application to this case. In the Allahabad case, it was held by majority, that where money is paid by a debtor without specifying whether the payment is towards interest or towards principal, leaving it to the option of the creditor to appropriate it as he likes, and the creditor appropriates it wholly towards interest, there is neither a payment of interest as such, nor a part payment of principal within the meaning of S. 20, Lim. Act, and therefore time is not extended. In that case the creditor had, soon after the payment, actually appropriated in his books the amount as having been paid towards interest. He could not therefore be allowed to urge subsequently that the payment had been made in part payment of the principal so as to save limitation. In the case before us, no appropriation towards interest had been made by the plaintiff. The ruling is therefore inapplicable. The facts of the Lahore case², and the point decided in it, were also different. There, the debtors owed the plaintiff a certain sum of money on a mortgage and they also had other dealings with him. In his books the plaintiff had a general account of the defendants, in which items due on the mortgage and also those relating to the other transactions were entered. It appears

that the defendants had made certain payments in reduction of the general balance of account against them, but without intimating that any of such payments was to be appropriated in satisfaction of the interest due on the mortgage debt. It was held that such payments could not be treated as having been made in payment of interest as such so as to save the bar of limitation for recovery of the mortgage debt. This decision (if I may say so with respect) was correctly decided according to the law then in force. The payment not having been made towards interest as such it did not fall within the first part of S. 20. The second part of the section as it stood before its amendment in 1927, was also inapplicable, as the fact of the payment did not appear in the handwriting of the person making the same, and therefore it could not be treated as part payment of the principal, such as could have saved limitation. This case also is therefore of no assistance for the decision of the question before us.

In the present case, the acknowledgment of the payment of Rs. 3 has been proved to be in the handwriting of the defendant. It was not made towards interest as such, nor was it appropriated by the plaintiff towards interest. The payment was obviously made towards the principal, and under the latter part of S. 20, it is not necessary that the writing should specify that the amount was paid in part payment of the principal as such : see A I R 1937 Sind 95;³ cf. 14 Lah 580⁴ and 58 Mad 418⁵ at p. 526. Therefore, the plaintiff had a fresh period of three years from 3rd August 1933 within which to sue. I hold accordingly that the suit was instituted within limitation. All other points had been decided against the defendant in the trial Court; they were not raised before the Appellate Court, nor were they referred before me by counsel for the respondent. I accept the petition for revision, set aside the judgment of the Senior Subordinate Judge and restore that of the Court of first instance with costs throughout.

R.M./R.K.

Petition allowed.

1. Udeypal Singh v. Lakshmi Chand, (1935) 22 A I R All 946=159 I C 387=1935 A L J 1029=58 All 261 (F B).

2. Muin-ud-din v. Mahomed Ahmad, (1915) 2 A I R Lah 275=31 I C 782=68 P L R 1916.

3. Hari Ram Dowlat Ram v. Ram Singh Gopal Singh, (1937) 24 A I R Sind 95=168 I C 820=31 S L R 68.

4. Jagtu Mal-Sada Sukh Rai v. Charanji Lal-Fakir Chand, (1933) 20 A I R Lah 341=141 I C 611=14 Lah 580=34 P L R 514.

5. Lakshmi Naidu v. Gunnamma, (1935) 22 A I R Mad 101=154 I C 1053=58 Mad 418=68 M L J 470.

* A. I. R. 1938 Lahore 349

MONROE J.

Ram Lal — Appellant.

v.

Chanan Dass and another —

Respondents.

First Appeal No. 160 of 1937, Decided on 7th December 1937, from order of Dist. Judge, Shahpur at Sargodha, D/- 29th June 1937.

* (a) Succession Act (1925), S. 228—S. 228 dispenses with production of original will — But Court should consider validity of will if it is questioned.

The real object of S. 228 is to dispense with the production of the original will owing to its having been deposited in some other Court. The section is merely an enabling section and if the Court considers that there is a question to be decided relating to the validity of the will, such as the power of the testator to make a will, etc., the Court is bound to try that question before enabling the executor to act under the will.

[P 350 C 1]

(b) Succession Act (1925), Ss. 228 and 276 — Will deposited in foreign Court—Application for probate with copy of will — Letters of administration held could be granted or at least petition should be allowed to be amended.

When an application for probate has been made under S. 276 of a will of which a copy has been obtained, the true one being deposited in a foreign Court, and from the petition it is found that the application should have been for letters of administration under S. 228:

Held that the Court could grant letters of administration with a copy of the copy of the will annexed or at least could allow the petition to be amended: *A I R 1917 Pat 209, Disting.*

[P 350 C 1]

M. C. Sud — *for Appellant.*Inder Dev — *for Respondents.*

Judgment.—An application was brought in the Court of the District Judge, Shahpur at Sargodha, by Ram Lal for probate of the will of Guranditta Mal Sapra, his father, under S. 276, Succession Act. The prayer in the petition was that "the probate of the will (copy annexed) be granted to him". The testator died on 8th June 1934. These proceedings were instituted early in 1935 and as yet there has been no final decision of the matter. The case has now come before me on appeal from the order of the District Judge, Shahpur at Sargodha, who decided that the applicant must apply for letters of administration under S. 228, Succession Act, if so advised. The ground of the learned Judge's judgment was based on the barest technicality; but in order to understand the position it is necessary first to set out some facts relating to the case.

The testator died at Nairobi on 8th June 1934, leaving property, it is alleged, both there and in India. He made a will written in Urdu, which, on the face of it, was duly executed and when he died, an application for probate of this will was made in the Supreme Court of Kenya, and probate of the will was duly granted on 18th September 1934 to "Ram Lal Guranditta Mal of Nairobi the executor in the said will named". The evidence of the will and probate offered is the original probate of the will issued at Nairobi, the original will itself being retained in the Probate Registry there. The grant contains first a copy of the Urdu will and then a translation into English and is beyond question a document regularly issued by a Court of competent jurisdiction. Under the Succession Act, whether for probate or letters of administration with the will annexed, the normal course is that the original will should be lodged with the application, but S. 228 empowers the Court, when a will has been proved and deposited in a Court of competent jurisdiction situated beyond the limits of the Province, and a properly authenticated copy of the will is produced, to grant letters of administration with a copy of such copy annexed. It will be observed that this section gives power to grant letters of administration, but the difference in such a case between probate and letters of administration is little more than technical. The learned District Judge had before him two issues:

(a) Whether the Court at Nairobi had jurisdiction to grant probate for the property situate in British India; and (b) whether the objectors had notice and if not, what is the legal effect of this?

But in his judgment he points out that in addition to these two issues before him the arguments raised certain other points. These being:

(c) If the Nairobi Court had no jurisdiction to grant probate for the property in British India, could it grant probate of the will on the ground that the deceased was domiciled there at the time of his death and some at least of the property was situated within the jurisdiction of that Court?

(d) If so, what is the effect of the grant of that probate in the present case?

As to (a) he points out that the applicant never contended that the Court at Nairobi had jurisdiction to grant probate for property situated in British India and that the real question was that put by him at (c). He held that it was within the jurisdiction of the Nairobi Court, as it

obviously was, to grant probate of a will dealing with property situated within its jurisdiction. On the final point at (d), as to the effect of the grant of probate on this case, he seemed to take the view that it was conclusive as between the parties and that whether notice was issued or not, the law of Kenya having been complied with, not only was the probate good in Nairobi but that all questions concerning the execution of the will and the like were finally determined. In my opinion, this is not the effect of S. 228, Succession Act. The real object of that section is to dispense with the production of the original will owing to its having been deposited in some other Court. It is well known that a Court of probate acting under the English practice retains for ever every original will of which probate has been granted by it. The section is merely an enabling section and if the Court in this country considers that there is a question to be decided relating to the validity of the will, I think that the Court is bound to try that question before enabling the executor to act under the will in this country.

The respondent in this case through his counsel insists that he wishes to attack this will on the ground that it has not been duly executed and also on the ground that the testator was not of sound mind when he executed it. He is entitled, in my opinion, to have this question tried before effect is given to the will in this country and though there is no indication on the record that there is any good ground for such allegations, it may be that the respondent could say that he has not yet had an opportunity of showing whether there was any substance in them. In the arguments before me it was suggested that the form of the application in this case was fatal and that the learned District Judge was right in rejecting the application on a technical ground. I do not agree with this view and I would be prepared to hold, if necessary, that as the application stands, the facts being all set out clearly in the petition, letters of administration under S. 228 could be granted to the petitioner; but in any event I am prepared to allow the amendment of the petition and I think it ought to be amended so as to alter the prayer to a prayer for letters of administration with a copy of the copy of the will contained in the grant of probate issued by the Supreme Court at Nairobi on 18th September 1934 annexed.

I may say that it was contended before me that there was no power to make such an amendment but the one case cited, 41 I C 279,¹ has no application to the circumstances of the present case. As I have said, the respondent must be allowed to substantiate his objections to the will, if he can do so, and accordingly I set aside the order of the learned Judge, dismissing the petition, and I direct the learned Judge to frame issues for the trial of questions relating to the validity of the will in accordance with the provisions of the Succession Act and to try the case on the merits and accordingly to give judgment either granting or refusing to grant letters of administration with a copy of the copy of the will on the record annexed, as the facts before him may justify. The costs of the proceedings up to the present will be costs in the cause.

B.D./R.K.

Order accordingly.

1. Behari Lal v. Ganga Dai, (1917) 4 A I R Pat 209=41 I C 279.

A. I. R. 1938 Lahore 350

TEK CHAND J.

Mt. Chawli and another — Defendants
— Appellants.

v.

Kidar Nath — Plaintiff — Respondent.

Second Appeal No. 834 of 1937, Decided on 16th December 1937, from decree of Dist. Judge, Delhi, D/- 3rd March 1937.

Civil P. C. (1908), O. 43, Rr. 1, 2 and O. 41, R. 1—Consolidated order recording compromise and granting decree in its terms—Appeal from such order filed with copy of order containing prayer that the order recording compromise and decree based thereon be set aside—Appeal held one under O. 43, R. 1 (m)—Copy of order is sufficient to satisfy O. 41, R. 1 read with O. 43, R. 2.

Where an appeal from the consolidated order recording the compromise and granting a decree in terms thereof was filed with a copy of such order and the appeal contained the prayer that the order recording the compromise and the decree based thereon be set aside and the case be remanded for trial on merits :

Held that the appeal was one under O. 43, R. 1 (m) and the further prayer that the decree passed in terms of the compromise be set aside was merely consequential : [P 351 C 1]

Held further that the copy of the consolidated order satisfied the requirements of O. 41, R. 1 read with O. 43, R. 2. [P 351 C 1]

Bishan Narain — *for Appellants.*

Shamair Chand — *for Respondent.*

Judgment.—This is an appeal from the judgment and decree of the District Judge, Delhi, dismissing the defendants-appellants' appeal to his Court, on the ground that it was incompetent in the form in which it had been brought. The decision is based on entirely untenable grounds and cannot be sustained. The trial Judge had recorded a compromise between the parties and had passed a decree in accordance therewith. In appeal the prayer was clearly stated to be that

the order recording the alleged compromise and the decree based thereon be set aside and the case remanded for trial on the merits.

The provision of law, under which the appeal was preferred, was not stated but having regard to the "claim in appeal" as stated above, there can be no doubt that the appeal was one under O. 43, R. 1 (m), which allows an appeal from an order under R. 3 of O. 23, recording or refusing to record a compromise. The further prayer, that the decree passed in terms of the compromise be set aside, was merely consequential.

The principal reason given by the learned Judge for holding that the appeal, if it was from the order recording the compromise, was incompetent is that no copy of that order had been attached to the memorandum of appeal. This observation appears to have been made on a misapprehension. It is clear from the trial Court's order that there was only one consolidated order passed by it recording the compromise and granting the plaintiff a decree in terms thereof. A copy of this order had actually been filed by the appellants with the memorandum of appeal, and the requirements of O. 41, R. 1 read with O. 43, R. 2, had been fully complied with. The second reason for holding the appeal to be incompetent is that a court-fee of Rs. 10 had been paid on it, instead of a court-fee of Re. 1. This however appears to have been done by the appellants *ex majore cautella*. As already stated, the order of 14th October was a composite order, recording the compromise and passing a decree in its terms, and it seems that the appellants, in order to avoid all possible objection, had paid court-fee in excess of what was legally necessary. Obviously, this excess payment could not be made a ground for dismissal of the appeal. Mr. Shamair Chand, the learned counsel for the respondent, frankly conceded that he could not support the decision of the learned Judge on the grounds on which it

is based. I hold that the appeal before the learned District Judge had been properly instituted and it should have been decided on the merits.

On this finding two courses were open to me—either to remand the case to the learned District Judge for decision of the only point arising in the appeal, whether a lawful compromise had been arrived at, or to transfer the appeal to this Court and decide the question myself. I considered that it would shorten the proceedings and tend to a speedy disposal of the case, if I adopted the latter course. Accordingly I have heard both counsel on the merits and have examined the record. I have no doubt that it is not possible to hold that a lawful compromise had been arrived at freely between the parties on 14th October 1937. The defendant Khacheru Mal is no doubt recorded as having agreed to the compromise, but he forthwith resiled from it and declined to sign the statement which he was recorded to have made. It seems quite clear that an effort was made to make him consent to the proposed compromise, but he does not appear to have been agreeable. Obviously, it is not possible to bind him to the alleged compromise in these circumstances. I accept the appeal, set aside the judgment of the Courts below and remit the case, through the District Judge, to the Court of first instance for trial of the suit on the merits. As the Subordinate Judge, who decided the case is no longer in Delhi, the learned District Judge will assign the case to another Subordinate Judge of competent jurisdiction. Court-fee on this appeal shall be refunded; other costs shall be costs in the cause.

V.B.B./R.K.

Appeal accepted.

A. I. R. 1938 Lahore 351

BHIDE J.

Mt. Jan — Plaintiff — Appellant.

v.

Mt. Fajjan and another—Defendants—
Respondents.

Second Appeal No. 491 of 1937, Decided on 3rd November 1937, from decree of Dist. Judge, Rawalpindi, D/- 17th March 1937.

Power of attorney—Construction—Power of attorney executed by A in favour of B entrusting management of A's property with B—Power of sale also mentioned—Power of sale held must be exercised only if it was necessary for purpose of management.

One of the rules of construction of a power of attorney is that where authority is given to do particular acts, followed by general words, the general words are restricted to what is necessary for the proper performance of the particular acts.

[P 352 C 2]

A executed a power of attorney in favour of B whereby B was entrusted with the management of A's property as A was married and could not look after her estate. Power to mortgage and sell the property was also mentioned in the deed. B sold the property although there was no necessity of the sale for the purpose of management of the property :

Held that B was only authorised to sell the property when it was necessary for the purpose of the management of the property. As there was no necessity for the sale, the sale could not be upheld.

[P 353 C 1]

J. N. Aggarwal, Shamair Chand and Yashpal Gandhi — *for Appellant.*

Achhru Ram — *for Respondents.*

Judgment.—The material facts of the case giving rise to this second appeal may be briefly stated as follows : Mt. Jan, a young girl, on being married, executed a power-of-attorney in favour of her step-mother Mt. Fajjan on 6th April 1929. By this document Mt. Fajjan was authorized to manage the land of Mt. Jan, to realize rents and also to sell and mortgage the property. The relations between the two ladies apparently became strained later on and on 25th May 1934 Mt. Jan executed another document revoking the power-of-attorney and got it registered. A notice of the revocation was sent by registered post to Mt. Fajjan on 16th June 1934 but the notice was not accepted by Mt. Fajjan and was returned to Mt. Jan. Mt. Jan also sent an application to the Tehsildar on 18th June 1934 informing him of the revocation of the power-of-attorney. The revocation was also notified by beat of drum in the village. In spite of these facts, Mt. Fajjan sold the whole of the property belonging to Mt. Jan to Abdul Aziz, defendant 2, her nephew, on 8th November 1934. Thereupon Mt. Jan instituted the present suit for a declaration that the sale should not affect her rights. The defendants resisted the suit pleading that Mt. Fajjan had authority to sell the property, that the power-of-attorney had never been revoked and that the revocation had at any rate never been brought to the notice of Mt. Fajjan or the vendee Abdul Aziz. The trial Court found the issues in favour of the plaintiff and decreed the suit.

On appeal by the defendant Abdul Aziz, two main contentions were raised before the learned District Judge on behalf

of Mt. Jan, viz. (1) that the sale was made after cancellation of the power-of-attorney of which cancellation both the defendants had knowledge, and (2) that the power-of-attorney conferred no right to sell the property. The learned Judge held on the first point that the revocation was not proved to have been brought to the notice of either of the defendants. On the second point he was of opinion that in view of the provisions of S. 237, Contract Act the plaintiff was bound by the acts of Mt. Fajjan, which fell within the scope of her authority. It seems to me that the second point is really the most important one in the case. The learned counsel for the appellant has contended that the power-of-attorney was really given to Mt. Fajjan for management of the property of the plaintiff as she was married and was not in a position to look after the land. The power to sell and mortgage was no doubt mentioned in the document but it was purely incidental to the power of management and was not meant to be exercised except when it was necessary for that purpose. Counsel relied in this respect on the law as laid down in Article 34 in Bowstead on Agency, Edition 8, which runs as follows :

Powers-of-attorney must be strictly pursued, and are construed as giving only such authority as they confer expressly or by necessary implication. The following are the most important rules of construction : (1) The operative part of the deed is controlled by the recitals. (2) Where authority is given to do particular acts, followed by general words, the general words are restricted to what is necessary for the proper performance of the particular acts.

Bearing in mind the above principles, the recitals in the power-of-attorney leave, I think, no doubt that the main object of the plaintiff was to entrust the management of the land to Mt. Fajjan, as she was married and was no longer in a position to manage it. It was obviously not the intention then to sell the property. If this had been so, the land would have been sold soon after the power-of-attorney had been executed. Mt. Fajjan has not given any explanation as to why the land was sold in the year 1934, some five years after the execution of the power-of-attorney. It is not suggested that there was any difficulty in connexion with the management of the property, which necessitated the sale. The sale cannot therefore be defended unless it be held that the power-of-attorney gave unqualified authority to Mt. Fajjan to sell the property whenever she liked. After

carefully considering the recitals in the document and the circumstances in which the document was executed, I feel no doubt that there was no intention to give Mt. Fajjan any general power to sell the land. In this aspect of the question the respondents cannot get any assistance from the provisions of S. 237, Contract Act. The sale deed makes reference to the power of attorney, the contents of which must be presumed to have been known to the vendee Abdul Aziz. For the reasons stated above, it seems to me that the recitals in the document taken as a whole show clearly that Mt. Fajjan was only authorized to sell the property when it was necessary for the purpose of the management, (for example, it might have been necessary to sell part of the property if the land was encumbered and the debt could not be discharged otherwise). The vendee however did not trouble to ascertain why the sale of the land was necessary and consequently he cannot be protected.

The evidence on the record shows that Abdul Aziz was living with Mt. Fajjan for many years and the sale appears to have been collusive; but even apart from that question it seems to me that the sale cannot be upheld because it was not within the real scope of the authority given to Mt. Fajjan by the power of attorney. On the above finding it is not necessary to discuss any other issues. I accept the appeal and setting aside the decree of the learned District Judge, restore that of the trial Court with costs throughout.

D.S./R.K.

*Appeal accepted.***A. I. R. 1938 Lahore 353**

TEK CHAND J.

Phaggu Shah — Decree-holder —
Appellant.

v.

Khair Din — Judgment-debtor —
Respondent.

Exn. Second Appeal No. 54 of 1937,
Decided on 1st April 1937, from order of
Dist. Judge, Sialkot, D/- 20th October 1936.

(a) Punjab Alienation of Land Act (13 of 1900), S. 2 (3) — Scope — Land assessed to revenue is not necessarily 'land'.

The fact that the land is still assessed to revenue will not necessarily prove that it is 'land' as defined in S. 2 (3) : 60 I C 580 and A I R 1929 Lah 164, Rel. on. [P 353 C 2; P 354 C 1]

(b) Punjab Alienation of Land Act (13 of 1900), S. 2 (3) — Onus of proving property in dispute to be 'land' under S. 2 (3) is on judgment-debtor.

The onus of proving that the property in dispute is 'land' as defined in S. 2 (3) and therefore exempt from attachment and sale is on the judgment-debtor and not on the decree-holder.

[P 354 C 1]

Shamair Chand — *for Appellant.*

Malik Mohammad Amin — *for Respdt.*

Judgment. — This case has not been properly tried. There are several lacunæ in the evidence and it is not possible to come to a satisfactory conclusion on the point involved on the scanty materials on the record. The relevant facts are as follows: In execution of a money decree obtained by the appellant against the respondent, a plot of land, 13 marlas in area, bearing khasra No. 2808/1068/1069, situate at Mianapura, a suburb of Sialkot, and belonging to the judgment-debtor, was attached. The judgment-debtor objected that the plot was not liable to attachment, as he was a member of an agricultural tribe and the property attached was 'land' within the meaning of 2 (3), Punjab Alienation of Land Act. This was denied by the decree-holder who stated that the attached property had been included within the municipal limits of Sialkot and that it was a building site, surrounded on three sides by buildings, and on the fourth by the railway line, and that it was not being used, nor had it been left for agricultural purposes or purposes subservient to agriculture. The Subordinate Judge placed on the decree-holder the onus of proving that the property was not 'land' as defined in the Act. The only evidence produced in the case was that of the decree-holder's Mukhtar on the one side, and of the judgment-debtor himself on the other. The judgment-debtor admitted that for 15 or 16 years the land had not been cultivated. He also stated, that he does not own any other agricultural land. He said nothing as to the nature of the adjoining properties. In the application for execution and the warrant of attachment it had been stated that the land was under mortgage for Rupees 3000. No question appears to have been put to the judgment-debtor on this point; nor is it clear from the record, whether the statement in the decree-holder's application that the area in question had been included in the municipal limits of Sialkot is correct.

The learned Judges of the lower Courts, in upholding the judgment of the trial Court,

have been largely impressed by the fact that the land was still assessed to revenue. This circumstance however will not necessarily prove that it was "land" as defined in S. 2, Punjab Alienation of Land Act (see 60 I C 580¹ and A I R 1929 Lah 164²). The learned Judges have also assumed that the land was uncultivated for eight harvests only. They appear to have overlooked the judgment-debtor's admission that it had remained uncultivated for 15 or 16 years. It was accordingly argued by the appellant's counsel, on the principle laid down in 78 I C 443,³ that the attached property was not exempt from attachment. There is considerable force in this contention. It seems to me however that it is necessary to make further enquiry on the point indicated above.

In my opinion the onus was wrongly placed on the decree-holder. It was on the judgment-debtor to prove that the property was "land" as defined in the Act and therefore exempt from attachment and sale. He must be given an opportunity to discharge this onus. I accordingly remand the case under O. 41, Rr. 25 and 27, to the Junior Subordinate Judge, Sialkot, to enable the judgment-debtor to produce further evidence on the point. The decree-holder will be allowed to lead evidence in rebuttal. The return shall be made within two months. Both counsel have been directed to cause their respective clients to appear before the Junior Subordinate Judge, Sialkot, on 19th of April 1937.

W.D./A.L.

Case remanded.

1. Muhammad Said v. Shaw Nawaz, (1921) 60 I C 580.
2. Uttam Chand v. Khodaya, A I R 1929 Lah 164=115 I C 417=30 P L R 516.
3. Gopi Mal v. Muhammad Yasin, A I R 1924 Lah 657=78 I C 443.

A. I. R. 1938 Lahore 354

TEK CHAND J.

Maghi Mal — Petitioner.

v.

Mohammad Ali and others —

Respondents.

Civil Revn. No. 490 of 1937, Decided on 8th November 1937, from order of Additional District Judge, Ferozepore, D/- 10th March 1937.

Punjab Alienation of Land Act (13 of 1900), S. 2 (3) — "Land" — Scope of definition.

Plot of land originally belonging to a non-agri-

records till recently as banjar, and which is situated in municipal limits in a new abadi is not 'land' as defined in the Alienation of Land Act : A I R 1924 Lah 657 and A I R 1938 Lah 353, Rel. on.
[P 354 C 2]

Shamair Chand — *for Petitioner.*R. P. Khosla — *for Respondents.*

Order. — One Imam Din, a Jat, was adjudicated insolvent in 1935 and his property vested in the Official Receiver. A part of this property consisted of a plot of land one kanal in area, situate within the municipal limits of the town of Zira. The Official Receiver has now sold this plot. The sons of Imam Din (who died in the meantime) objected that the plot in question is 'land' as defined in the Punjab Alienation of Land Act and therefore the Receiver had no power to sell it. The objection was allowed by the Insolvency Judge and the sale annulled. This order was upheld on appeal by the District Judge. The petitioner, who is a creditor of Imam Din, feeling himself aggrieved by this order, has presented a petition for revision under S. 75, Provincial Insolvency Act. He urges that the order of the Courts below is not in accordance with law as on the facts found by them the plot in question has been wrongly held to be 'land' as defined in the Punjab Alienation of Land Act.

The facts found are that this land originally belonged to one Choghatta, a Jhiwar (non-agriculturist), from whom Imam Din purchased it for Rs. 200. The revenue entries in the jamabandi for 1924-25 to 1933-34 describe the land as banjar kadim. This means that the land was not cultivated from 1921-22. The Girdawaris of 1935 and Rabi 1936 also show the land to be banjar. In the Kharif of 1936, it was described as sown with bajra. This was however after the order of adjudication had been passed, when the property had vested in the Receiver. The evidence on the record also establishes that the site is within the municipal limits and is in the midst of the new abadi. Houses have been built to the west and to the south and there are houses under construction to the east. To the north is a thoroughfare. On these facts there can be no doubt that the plot in question is not 'land' as defined in the Act : see 78 I C 443¹ and S. A. No. 54 of 1937.² The learned counsel for

1. Gopimal v. Muhammad Yasin, (1924) 11 A I R Lah 657=78 I C 443.
2. Phaggushah v. Khair Din, (1938) 25 A I R Lah 353.

the respondent emphasizes the fact that bajra had been sown in Kharif 1936. There is no doubt that this had been done merely with a view to defeat the sale in question. The plot in question is urban immovable property and the Receiver was entitled to sell it. I accept the petition for revision and set aside the orders of the Courts below annulling the sale. The objections filed by the sons of the insolvent are dismissed. The petitioner will have his costs from the respondents in all Courts.

R.M./R.K.

*Petition allowed.***A. I. R. 1938 Lahore 355**

YOUNG C. J. AND ABDUL RASHID J.

*Aziz Ahmad Jan Mohammad**Convict — Appellant.*

v.

Emperor.

Criminal Appeal No. 1120 of 1937, Decided on 3rd January 1938, from order of Sessions Judge, Gurdaspur, D/- 31st August 1937.

Criminal Trial—Murder—Sentence—Accused fatally stabbing deceased as result of deceased making and publishing denunciations against leader of his community in a poster—Accused having knowledge of poster for at least two days before offence—Held there was no grave and sudden provocation and sentence of death passed was proper.

In considering whether the sentence of death imposed upon an accused committing a murder out of religious zeal is proper or not, it would be dangerous in this country for the High Court to give cause for belief that death should not as a rule result from murders even when they are committed for attacks on leaders of religious communities or under their influence unless they are committed in circumstances which do amount to grave and sudden provocation. [P 357 C 2]

Conditions being as they are in India, it is most dangerous for leaders of religious communities to attack publicly their religious opponents from the pulpit and in particular to use such language by which some one may be easily influenced to commit murder. There are always fanatics in this country who believe that they are the instruments of God in carrying out such punishments. [P 357 C 2]

The accused fatally stabbed the deceased in the chest as a result of the deceased making and publishing certain denunciations against the leader of his (accused's) community in a poster. The accused had knowledge of the poster for at least two days before he committed the offence :

Held that there was no grave and sudden provocation and the accused was guilty under S. 302, I. P. C. Although it was difficult to entirely dissociate the death of the deceased from denunciations made by him and from the speeches made by the head of the community to which the accused belonged, there was clearly premeditation on the part of the accused to commit the murder. The

sentence of death passed under the circumstances of the case was proper. [P 357 C 1]

Bashir Ahmad — *for Appellant.*

Diwan Ramlal, Advocate-General and
R. C. Soni for Advocate-General —
for the Crown.

Young C. J. — Aziz Ahmad has been convicted by the learned Sessions Judge of Gurdaspur for the murder of Fakhar-ud-Din and for wounding Abdul Aziz. The learned Sessions Judge sentenced Aziz Ahmad to death on the charge under S. 302 and to one year's rigorous imprisonment under S. 324, I. P. C. Aziz Ahmad appeals to this Court. Fakhar-ud-Din was a follower till recently of the Khalifa of the Qadian Ahmadis. Both the deceased and one Misri Abdul Rehman, who also had been a follower of the Khalifa Sahib, had been turned out, or had retired, from the orthodox Ahmadis on disagreement with the Khalifa. They formed a separate Anjuman the main object of which appears to have been to oppose the Khalifa Sahib. They lived in Qadian, and as Qadian is mostly inhabited by orthodox Ahmadis, this naturally led to trouble with the orthodox community. According to the evidence the members of the opposition Anjuman were boycotted and their houses picketted. They were clearly in a very unpleasant position. The deceased had made several reports at the police station concerning the actions of the orthodox Ahmadis against him. On 23rd July 1937 the Khalifa himself addressed a meeting at the mosque and made a long personal attack on Misri Abdul Rehman and his followers. This speech was published in the "Alfazel" which is the orthodox Ahmadi newspaper, on 1st August 1937. The "Alfazel" report is exhibited on the record as Ex. P. T. In this speech the Khalifa Sahib protested against the attacks of the rival Anjuman and in particular against the attacks on his character. He made a counter attack upon his opponents. *Inter alia* he said :

But if they persist in raising filthy objections—as they are doing — and making ignoble attacks—as it is rumoured that they and their associates are contemplating—and do not repent I assert that even modesty will take leave of their families not to talk of the Ahmadi faith. I say in clearer words that you should not consider it inconceivable if as a result of the base and immodest attacks that they are making, their families become a centre of immorality.

It is alleged by some witnesses for the Crown that he used the word "brothel" in

his original speech. The Khalifa Sahib also said :

Hence, whoever opposes the Caliphs these days, strikes an axe on the practical life of Islam and the belief of the world. God Almighty therefore destroys his faith by way of punishment for his sin. But in former times opposition used to cause only political loss to Islam. Therefore the opposers used to get some corporal punishment. They never used to get such heavy spiritual punishment.

Further he said :

God Almighty has, by his action, shown a marked difference between the past and the present. Hence whoever turns against the Caliphate to-day deserves a far heavier punishment than his predecessors. If anybody persists in opposing the Caliphate and does not repent, it is certain that he will completely lose his faith and tomorrow, if not to-day, will start making attacks on Hazrat Masih Maud (peace be on him). Then it is quite possible that he may, as a result of this punishment, lose his good manners and modesty and bashfulness may say good-bye to him for ever. Hence, punishment varies with the circumstances of the time. The circumstances of the past were quite different from those of the present. Those who oppose the Caliphate now will certainly get such punishments as will be exemplary in the extreme and their faith will doubtless be affected according to the degree of their opposition and enmity.

That the Khalifa Sahib made these statements is not contested by counsel in this Court. As an answer to this speech, and in particular as a protest against the statement of the Khalifa that "their families become a centre of immorality", Fakhar-ud-Din exhibited a poster (Ex. P W 3/1) near his house in the Qadian Bazar on 5th August. The last portion of the poster reads as follows :

For this very reason we are demanding an enquiry by an open commission from the community, so that all the facts, evidence and secrets may be placed before it for decision as to whose family is the resort of immorality, or in other words is what was uttered by the Khalifa.

This poster is signed by Fakhar-ud-Din as Secretary, Majlis Ahmadia. There was another meeting of the orthodox Ahmadis on 6th August at the mosque in the morning and also another in the evening. At these meetings, according to the evidence of Sub-Inspector Lala Karam Chand, more speeches were made against the deceased. On that day Fakhar-ud-Din made the following complaint at the police station :

Exhibit P. H.

The Majlis-i-Ahmadia, Qadian (India).

To

The Officer-in-Charge,
Police Post, Qadian.

Sir,

To-day, the Khalifa of Qadian has excited the Ahmadia community against the members of the orthodox Ahmadian Qadian by making a most in-

flammatory speech at the time of Jumma prayers. Great excitement prevails amongst the Ahmadia public as a result of that and a proclamation is being made now for holding a meeting at night also. As this is likely to cause further excitement, the following members of the Majlis-i-Ahmadia apprehend danger to their lives and property. It is, therefore, requested that speedy arrangements be made for their safety.

Sd./- Fakhar-ud-Din,

Multani, Secretary Majlis-i-Ahmadia.

1. Sheikh Abdul Rehman Misri with his family near Bheni Bangar.
2. Fakhar-ud-Din, Multani with his family Mohalla Bab-ul-Anwar.
3. Qureshi Mohammad Sadiq Sahib, Sheikh with family Mohalla Darul Barkat near the mosque.
4. Hakim Abdul Aziz, Mohalla Bab-ul-Anwar.
5. Abdul Rab Khan Sahib in the Bungalow of Sir Mohammad Zafar-Ullah.

On 7th August Fakhar-ud-Din was murdered by the appellant while he was on his way to the police station, accompanied by Hakim Abdul Aziz and Bashir Ahmad, in order to ask for protection for himself and his associates. They had heard a rumour that there was a conspiracy to take their lives. Whether the rumour was founded on fact or not, while on the way to the police station the appellant came up in front of Fakhar-ud-Din and suddenly, without any warning, stabbed him with a knife in the chest. He also wounded Hakim Abdul Aziz on the shoulder and on the cheek with the knife. Fakhar-ud-Din was taken to the police chauki. He refused to go to the local Qadian hospital as it was an orthodox Ahmadia institution. The appellant was arrested at once. Fakhar-ud-Din was taken in a lorry to Gurdaspur and eventually died there some days later. There is no doubt that the wound given to the deceased by the appellant was responsible for his death.

The evidence consists of several dying declarations made by the deceased and the evidence of Hakim Abdul Aziz, Bashir Ahmad, Dr. Gurbakhsh Singh, whose place of business was on the spot, and Maghar Singh. These witnesses clearly establish the case for the Crown as regards the attack on the deceased. The appellant himself admits in his statement in the Sessions Court that he stabbed the deceased. He says that he was provoked by the language of the poster, and that the day he attacked Fakhar-ud-Din was the first time he had seen him since the poster had been put up. He admits however that the poster had been put on the notice board

some days before he attacked the deceased. The killing of Fakhar-ud-Din having been admitted by the appellant, it is for him to show that his case comes under any of the exceptions to S. 300, Penal Code. The sole point taken by counsel is that his action was caused by grave and sudden provocation. It is alleged that the putting up of the poster amounts to this. While the terms of the poster, though somewhat obscure, might be provocative to an orthodox Ahmadi if he thought that Fakhar-ud-Din was attacking the family of the Khalifa—which is not clear—we cannot agree that this amounts either to grave or sudden provocation. The appellant had had knowledge of the poster for at least two days. The provocation therefore cannot be said to be sudden. There can be no doubt that the appellant is guilty of an offence under S. 302, Penal Code, that is of murder.

With regard to the sentence of death imposed upon the appellant, we have in fairness to him, considered a point which was not taken for him by his counsel, who is himself an orthodox Ahmadi: that is that the speeches of the Khalifa might have influenced the appellant in committing the murder; that he might be said to be acting, as a result of these speeches, under the influence of the head of his community whom, the appellant says in his grounds of appeal, he loves more than his life, property, honour and every other worldly relation, and that therefore he ought not to be condemned to death, but that the alternative sentence of transportation for life would be appropriate. While we think we may in fairness to the accused infer that as a zealous Ahmadi he attended the meetings in the mosque on 23rd July and 6th August 1937, or that he read the "Alfazel" of 1st of August, and therefore that he was acquainted with the speeches of the Khalifa Sahib, we do not think after giving the matter most anxious consideration, that this is any ground for us to reduce the sentence. While it is difficult entirely to dissociate the death of Fakhar-ud-Din from the denunciations in the mosque, the appellant clearly had determined on the murder. There was therefore premeditation. He awaited his opportunity and found it when the deceased and his companions were walking in the street. The attack was made without the least opportunity for defence and according to the appellant's own statement, to teach the deceased a lesson. The appellant must

at least have known that to stab the deceased in the chest was likely in the ordinary course of nature to cause death. We consider it would be dangerous in this country to give cause for belief that death would not as a rule result from murders, even when they are committed for attacks on leaders of religious communities, or under their influence unless they are committed in circumstances which do amount to grave and sudden provocation.

We feel it our duty to say that, conditions being as they are in India, it is most dangerous for leaders of religious communities to attack publicly their opponents from the pulpit, and, in particular, to use the language that has been used by the Khalifa Sahib with regard to Misri Abdul Rehman and his followers; someone may easily be influenced thereby to commit murder. This is not the first time in India that death has followed hard on the heels of similar denunciations. Even if we accept, as contended by counsel for the appellant, that the Khalifa Sahib referred to punishment in the spiritual sense, it must be remembered that some zealous followers of any religious leader have difficulty in distinguishing spiritual from corporal punishment. In any event there are always in this country fanatics who believe that they are the instruments of God in carrying out such punishments. We must confirm the sentence of death passed upon Aziz Ahmad and dismiss his appeal.

R.M./R.K.

Sentence confirmed.

* A. I. R. 1938 Lahore 357

ADDISON AND DIN MOHAMMAD JJ.

Hukam Chand — Defendant — Appellant.

v.

Ramji Das, Plaintiff and another, Defendant — Respondents.

Second Appeals Nos. 531 to 533 of 1937 and Civil Revision No. 375 of 1937, Decided on 25th November 1937, from decrees of Addl. District Judge, Ludhiana, D/- 2nd April 1937.

(a) Civil P. C. (1908), S. 115—Error by lower Court in drawing certain presumptions and conclusions is no ground for revision.

Even where lower appellate Court has committed an error of law in drawing certain presumptions and in arriving at certain conclusions it would not afford any ground for revision.

[P 358 C 2]

* (b) Second Appeal — Erroneous finding of fact is no ground for second appeal. Question

whether statutory presumption is rebutted by rest of evidence is question of fact.

There is no jurisdiction to entertain a second appeal on the ground of erroneous finding of fact, however gross the error may seem to be. The proper legal effect of a proved fact is essentially a question of law, but the question whether a fact has been proved when evidence for and against has been properly admitted is necessarily a pure question of fact. The question whether a statutory presumption is rebutted by the rest of the evidence is a question of fact. [P 359 C 1]

(c) Second Appeal — Finding of fact — Question whether execution of document is genuine — Lower Court not impressed with mere presence of thumb-marks of executant but relying on other strong evidence in coming to conclusion that execution was genuine — His decision cannot be interfered with in second appeal.

It is true that a document is said to be executed only if it is proved to have been consciously signed or thumb-marked after the alleged executant had become aware of its contents and that the mere presence of a signature or a thumb-mark on a document may not in certain cases in itself amount to a proof of its execution. But where the Judge has not been impressed by the mere presence of the thumb-marks on the document in question, but there are certain other attending circumstances which have influenced his mind while formulating his conclusions that execution of document is genuine, his decision cannot be interfered with in second appeal: *A I R 1928 All 16, Ref.; A I R 1931 Pat 219, Disting.* [P 359 C 2; P 360 C 1]

Mehr Chand Mahajan, J. N. Aggarwal and Yashpal Gandhi — *for Appellant.*

Badri Das and J. L. Kapur — *for Respondent (Plaintiff).*

Din Mohammad J. — This judgment will dispose of Civil Appeals Nos. 531 to 533 of 1937 and Civil Revision No. 375 of 1937. They have arisen out of four suits instituted against the appellant Hukam Chand for recovery of various amounts advanced on four promissory notes alleged to have been executed on four different dates ranging from the 27th May 1929, to the 21st September 1930. All the promissory notes in suit are said to have been executed originally in favour of the respondent Sham Lal, but one of them was prior to the institution of the suits transferred by him to one Ramji Das who consequently figured as a plaintiff in one of the four suits and is the principal respondent in one of the three appeals before us. The defendant Hukam Chand resisted the suits on the grounds that he had not executed the promissory notes in suit, that the promissory notes were forged and fictitious, that Sham Lal had ample opportunity to secure his thumb impressions even if they were found to be genuine and that the defendant was in affluent circumstances and did

not stand in need of raising any loan from the plaintiff whose financial credit was at a low ebb. The Subordinate Judge, who tried the suits, upheld the pleas raised by the defendant and dismissed all the four suits. On appeal the Additional District Judge reversed the decrees of the trial Court holding that both the execution of the promissory notes in suit and their consideration had been established.

So far as the petition for revision is concerned, it can be disposed of on the short ground that it cannot be entertained under S. 115, Civil P. C. There is neither any exercise of a jurisdiction which was not vested in the lower Appellate Court by law, nor any failure to exercise a jurisdiction so vested, nor does it appear to have acted in the exercise of its jurisdiction illegally or with material irregularity. The main point urged against the judgment of the lower Appellate Court is that it committed an error of law in drawing certain presumptions and in arriving at certain conclusions. But even if this be so, it would not afford any ground for revision. This petition therefore stands dismissed. The rule for entertaining second appeals was enunciated as long ago as 1890 by their Lordships of the Privy Council in a case reported in 18 Cal 23.¹ It was held that under the Code no second appeal will lie, except on the grounds specified in S. 584 (which now corresponds to S. 100, Civil P. C., 1908). There is no jurisdiction to entertain a second appeal on the ground of erroneous finding of fact, however gross or inexcusable the error may seem to be. Where there is no error or defect in the procedure, the finding of the first Appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the findings.

In 46 Cal 189,²

where it was found that an appeal to the High Court was not within any of the grounds in S. 584, but that nevertheless the High Court had entertained the appeal, reversed the decree of the District Judge on questions of fact, making suggestions of prejudice and unreasonable assumptions on his part for which there was no justification, and so revising the evidence with which it was not competent to deal, it was held that the High Court had exceeded its jurisdiction by exercising functions completely circumscribed by the provisions of a statute passed for the express purpose of securing some measure of finality in cases where the balance of evidence, verbal and documentary, arose for decision.

1. *Durga Chowdharani v. Jewahir Singh*, (1894) 18 Cal 23=17 I A 122=5 Sar 560 (P C).
2. *Nafar Chandra Pal v. Shukur Sheikh*, (1918) 5 A I R P C 92=51 I O 760=46 Cal 189=45 I A 183 (P C).

Their Lordships further observed :

Questions of law and fact are sometimes difficult to disentangle. The proper legal effect of a proved fact is essentially a question of law ; so also is the question of admissibility of evidence, and the question of whether any evidence has been offered on one side or the other; but the question whether the fact has been proved when evidence for and against has been properly admitted is necessarily a pure question of fact.

Holding that the judgment of the High Court really amounted to no more than a finding that upon the documents and evidence placed before the District Judge the High Court would have come to a different conclusion and that this revision of evidence was excluded by the limited character of the appeal, its judgment was set aside.

In 11 Lah 199,³ S. 100, Civil P. C. was again the subject of discussion before their Lordships and they enunciated the following propositions, among others, for the guidance of the Courts ;

(1) There is no jurisdiction to entertain a second appeal on the ground of erroneous findings of fact, however gross the error may seem to be ;

(2) The proper legal effect of a proved fact is essentially a question of law, but the question whether a fact has been proved when evidence for and against has been properly admitted is necessarily a pure question of fact.

In the course of their judgment it was further observed that "the question whether a statutory presumption is rebutted by the rest of the evidence is a question of fact". Applying these principles to the appeals before us, we are forced to the conclusion that these appeals are concluded by findings of fact which we have no jurisdiction to disturb. The Additional District Judge considered each and every item of evidence which had been placed on the record on either side and it was only after full discussion of those items that he came to his own conclusions as regards the execution of the promissory notes in question as well as the passing of consideration on those documents. Sitting as a Court of first appeal, we might have come to a different conclusion, but that alone, as stated above, would not justify any interference with these findings.

Counsel for the appellant has contended that a question of law arises in this case, inasmuch as the Additional District Judge has misdirected himself as to the true legal import of the 'execution' of a document

and has wrongly held that execution is established as soon as the identity of a thumb-mark or a signature of the alleged executant on the document is proved. It is true that a document is said to be executed only if it is proved to have been consciously signed or thumb-marked after the alleged executant had become aware of its contents and that the mere presence of a signature or a thumb-mark on a document may not in certain cases in itself amount to a proof of its execution. But in the present case, the Additional District Judge has not been impressed by the mere presence of the thumb-marks on the documents in question; but there are certain other attending circumstances which appear to have influenced his mind while formulating his conclusions. Counsel for the appellant has referred to A I R 1931 Pat 219⁴ in support of his contention but, in our opinion, that judgment is distinguishable on facts. To this case, if at all, 50 All 145⁵ is applicable which was distinguished in the Patna ruling. The following observations of Ashworth J. are to the point :

On these findings the lower Appellate Court came to an extraordinary conclusion. It was that somehow or other the thumb-impression of Deosaran had been fraudulently obtained upon the document and that the defendant had failed to show that it was Deosaran's thumb-impression voluntarily impressed on the document. In order to give any meaning to this decision we have to suppose that the Subordinate Judge conceived the possibility either of a die having been made from some other thumb-impression of Deosaran and a forged impression by means of the die impressed on the document in question or that Deosaran's thumb impression had been obtained when he was asleep or drunk. . . . The presumption which the lower Appellate Court failed to make in this case was a presumption that when signature on a document is proved by a certain person, it is for that person to prove that it was affixed by him otherwise than voluntarily. According to Taylor on Evidence, Edn. 3, p. 145, 'Courts of law are in general bound to presume prima facie in favour of deeds which appear to have been duly executed'. 'Appear' must mean here 'which bear a proved signature'.

It cannot be said, in these circumstances that the finding of the Additional District Judge as regards the execution of the documents in question was in any way contrary to law. There are no doubt certain circumstances in the case which tend to create a suspicion in one's mind that the documents might not be genuine ; but on the other hand, there are equally strong circum-

3. Wali Muhammad v. Mohammad Baksh, (1930) 17 A I R P C 91=122 I C 316=57 I A 86=11 Lah 199 (P C).

4. Ram Lakhani Singh v. Gog Singh, (1931) 18 A I R Pat 219=134 I C 695=12 P L T 293.

5. Sita Ram v. Nanku, (1928) 15 A I R All 16=106 I C 250=50 All 145=25 A L J 893.

stances which incline one's mind to the other side. This being so, it was open to the Additional District Judge to lean to one side rather than the other and this conduct on his part is not open to criticism on second appeal. We accordingly hold that these appeals are not entertainable. We dismiss them; but in the peculiar circumstances of the case, we leave the parties to bear their own costs before us both of the appeals and the revision.

D.S./R.K.

*Appeals dismissed.***A. I. R. 1938 Lahore 360**

DALIP SINGH J.

Nanak Chand — Plaintiff — Appellant.
v.

Gandu Ram and others — Defendants
— Respondents.

Second Appeal No. 1020 of 1937, Decided on 13th January 1938, from decree of Senior Sub-Judge, Gurdaspur, D/- 10th May 1937.

(a) Transfer of Property Act (1882), S. 43—Certain share of person sold at Court sale though such person not entitled to any share at time of sale—Person subsequently becoming entitled to such share—Such person cannot be compelled to make good from such share title conveyed to vendee at Court sale.

Where certain share of a person is sold by a Court sale though in fact he was not entitled to any such share at the time of the sale but subsequent to the sale has become entitled to such share, such person in equity would not be compelled to make good from the share which he subsequently acquires the title conveyed to vendee at the Court sale because there can be no question of equities in the case of a Court sale. [P 361 C 1]

(b) Hindu Law—Joint family—Coparcener's share in coparcenary property is of fluctuating nature.

A coparcener's share in the coparcenary property, is not a fixed or certain thing; it is a fluctuating interest which on partition may or may not lead to a share falling to a particular coparcener. [P 361 C 1]

C. L. Aggarwal and Durga Das Jain —
for Appellant.

Shamair Chand — for Respondents.

Judgment. — Nanak Chand, plaintiff, obtained a money decree against one Puran Chand and in execution of this decree he brought the 1/6th share of Puran Chand in one shop and two houses to sale and purchased it himself in 1925. In 1929 he obtained joint possession along with the other co-sharers. In 1932 he conveyed 1/6th share in one house to Gandu Ram,

one of the cosharers. On 21st July 1936 he brought the present suit for partition of the share acquired by him in one shop and one house. The remaining cosharers raised various pleas but important pleas for the purposes of this appeal were that the house had belonged to one Lal Ditta who had six sons of whom Puran Chand, judgment-debtor of Nanak Chand, was one, that Lal Ditta was still alive or, at any rate, was not dead at the time when the share of Puran Chand was sold, and therefore Puran Chand had no 1/6th share at that time and therefore Nanak Chand, plaintiff, had acquired nothing under the said sale and therefore had no title on which to base his suit for partition.

The trial Court held that the property was ancestral, that Lal Ditta and his six sons formed a joint Hindu coparcenary and Puran Chand had no 1/6th share and the share of such a coparcener could not be attached and sold and the other coparceners could have avoided even a voluntary sale by a coparcener of a specified share, that there was no proof that Lal Ditta was dead at the time of the suit and no proof that he was dead at the time of the sale in 1925, that the purchase by Gandu Ram might estop him but could not estop the others and therefore that Nanak Chand, plaintiff, had not proved any title on which to base the suit for partition and therefore it dismissed the case. On appeal the learned Senior Subordinate Judge held that Lal Ditta had last been heard of in 1921; the presumption was that in 1936 he was dead, but that there was no presumption as to the date of death and therefore it was not shown that he was dead at the time of the sale in 1925, that Puran Chand was not proved to be the owner of 1/6th share at the time of the sale and there was no proof of any disruption of the joint Hindu family at that time or at any subsequent time and that therefore the plaintiff had acquired nothing by the purchase and that no question arose of Puran Chand now making good the title then conveyed as it was not a voluntary sale and therefore dismissed the appeal but left the parties to bear their own costs in both Courts.

The plaintiff has come in second appeal and his learned counsel has contended that there was no presumption as to the date of death of Lal Ditta but the circumstances of the case show that he must have been

dead in 1925. I am unable to follow this contention or the further contention that the onus of showing that Lal Ditta was alive in 1925 lay on the defendants. I am unable to hold that the circumstances raise any presumption as to the date of Lal Ditta's death. The plaintiff asserted that he had rightly purchased a 1/6th share in the property, namely the share of Puran Chand; it was for him to show that this assertion, which implies that Lal Ditta was dead, was true in fact and therefore the onus lay on him. The next contention of the learned counsel was that under the principles governing S. 18, Specific Relief Act and S. 43, T. P. Act, now that Puran Chand had a 1/6th share in the property, equity would compel him to make good from his share the title conveyed to the plaintiff by the Court sale in 1925. The proposition is not supported by any authority and it seems to me that there can be no question of any equities in the case of a Court sale and hence this contention is also unfounded.

The last contention was that Puran Chand, at any rate, had some right, title or interest in the property. If Lal Ditta were dead in 1925, then on partition the right, title or interest would have amounted to a 1/6th share in the property; if Lal Ditta were alive, the right, title or interest would have amounted on partition to 1/7 share of the property. But the learned counsel contends that though what was sold was a 1/6th share, it must be deemed to convey the right, title or interest of Puran Chand in the property at that time and now, when the suit is brought for partition, the right, title or interest of Puran Chand should fall to the plaintiff's share in partition. It is however difficult to hold that a sale of a 1/6th share should be deemed to be a sale of the right, title or interest. A coparcener's share in the coparcenary property is not a fixed, or certain thing; it is a fluctuating interest which on partition may or may not lead to a share falling to a particular coparcener. I therefore do not think on the whole that it is possible to deem the sale of 1/6th share to be a sale of the right, title or interest. On the whole therefore I consider that the opinion of the learned Senior Subordinate Judge was correct and the appeal must be dismissed with costs. I order accordingly.

D.S./R.K.

Appeal dismissed.

* A. I. R. 1938 Lahore 361

FULL BENCH

DALIP SINGH, MONROE AND
DIN MOHAMMAD JJ.*Jagat Ram — Defendant — Appellant.*
v.*Misar Kharaiti Ram and another,*
Plaintiffs and others, Defendants —
Respondents.

Letters Patent Appeal No. 29 of 1937, Decided on 17th December 1937, against Judgment of Bhide J., D/- 4th January 1937, reported in *A I R 1937 Lah 392*.

* (a) Civil P. C. (1908), O. 7, R. 11 and S. 149—Power under O. 7, R. 11 is discretionary and the wording of S. 149 does not stand in its way — (Per Din Mohammad and Goldstream JJ. in Order of Reference.)

It is not incumbent upon a Court of justice to allow the plaintiff an opportunity to make good the deficiency under O. 7, R. 11. O. 7, R. 11 is not an enabling provision and has nothing to do with the power of the Court to have the deficiency made up. It is on the other hand a disabling provision, enjoining the Court to reject a plaint if deficiency is not made good as ordered by the Court. The authority to issue the order lies in S. 149 and the penalty for default in R. 11 of O. 7. Whether the Court condones a mala fide mistake and grants time or it does not condone bona fide one and does not grant time, the wording of S. 149 does not stand in its way. The Court of Appeal may supervise the discretion but it cannot be denied that the discretion is there: *A I R 1917 Lah 377, Dissent.; Case law discussed.*

[P 364 C I, 2]

(b) Civil P. C. (1908), S. 149—Discretion under, should be exercised in favour of litigant except in cases of contumacy or positive mala fides (Per Full Bench).

The discretion conferred on the Court by S. 149 is normally expected to be exercised in favour of the litigant except in cases of contumacy or positive mala fides or reasons of a similar kind. The question of bona fides in this connexion should be construed in the sense that the word is used in the General Clauses Act and not as used in the Limitation Act.

[P 365 C 2]

Qabul Chand for J. L. Kapur and J. L. Kapur — for Appellant.

Achhru Ram and D. N. Aggarwal — for Respondents.

Order of Reference

Din Mohammad J. — This appeal has arisen in the following circumstances: The defendants had executed a mortgage bond in favour of the plaintiffs on 13th January 1923. On 14th January 1935, which was the last day of limitation, a plaint was drafted on behalf of the plaintiffs for instituting a suit against the defendants on the footing of this bond, and after being stamped with a one rupee stamp instead of stamp of the

value of Rs. 210 which was the proper amount of court-fee chargeable on the plaint, it was presented at 4.15 P. M. to the Senior Subordinate Judge, Jullundur, to whom the functions of distributing plaints to various Courts working there had been delegated by the District Judge under S. 37 read with S. 34, Punjab Courts Act, and the rules and orders of the High Court, Vol. 1, Ch. I-B. The only visible action taken by the Senior Subordinate Judge on that day in relation to the plaint was to endorse the date and the time of the presentation of the plaint on its opening page over his own initials. On 16th January the full amount of court-fee was paid and on the same day an endorsement was stamped on the plaint by the Senior Subordinate Judge showing the institution of the suit on 16th January and making over the case to the Court of the Subordinate Judge, Second Class, for disposal. There the plaint was admitted and registered and summonses were issued to the defendants.

On the due date the defendants appeared and resisted the suit on the ground among others that the suit having been validly instituted only on 16th January when the full amount of court-fee was paid was barred by time. Thereupon a preliminary issue on the question of limitation was framed and tried. The plaintiffs stated that when they had gone to the treasury on 14th January at 2 P. M. to purchase the necessary stamps, they found the treasury closed and consequently, they were compelled to put in the plaint with a one rupee stamp only. They further averred that the Senior Subordinate Judge had verbally granted them time to make up the deficiency of the court-fee leviable on the plaint and on their complying with the order, the plaint came to have the same force and effect as if such fee had been paid in the first instance. Moreover, the Court of the Subordinate Judge, Second Class, having admitted and registered the plaint on 16th January should be deemed to have acquiesced in the order made by the Senior Subordinate Judge. The defendants, on the other hand, contended that in the first place, the Senior Subordinate Judge's verbal order, if any, was of no legal effect. Secondly, the Senior Subordinate Judge in the act of distributing plaints was not discharging the functions of a Court, but was merely performing a ministerial function. Thirdly, the order of the Subordinate Judge, Second Class admitting and regis-

tering the suit could not be treated as an order approving of and adopting the action taken by the Senior Subordinate Judge. The Senior Subordinate Judge was examined as a witness in the case and he stated that he was acting as a "distributing Court" when he sent the case to the Subordinate Judge, Second Class, for disposal and that on the day when the plaint was first presented to him, he had made an order granting the plaintiffs time to make up the deficiency of the court-fee.

The Subordinate Judge, Second Class, came to the conclusion that the Senior Subordinate Judge had no authority to make an order under S. 149, Civil P. C., that the plaintiffs' conduct was not bona fide, inasmuch as one of the plaintiffs being a pleader of long standing fully knew the amount of court-fee required and was intimately acquainted with the hours of working in the treasury, that no order was made by the Court taking seisin of the case, nor was the delay in paying the court-fee condoned by the Court in any other manner and that in these circumstances, the suit having been validly instituted on 16th January only, was barred by time. He accordingly dismissed the suit. The plaintiffs appealed to the District Judge, and he took a different view. In his opinion, the verbal order made by the Senior Subordinate Judge was good in law, and the Senior Subordinate Judge, although a "distributing officer" only, was competent to allow the plaintiffs time to make up the deficiency of court-fee. He allowed the appeal and held the suit to be within time.

Thereupon, the defendants preferred an appeal to this Court which came on for hearing before Bhide J. The learned Judge agreed with the defendants' contention in so far as to hold that the Senior Subordinate Judge was a mere ministerial officer and as such could not make a valid order granting time to the plaintiffs to make good the deficiency. He even remarked that this position was not seriously challenged by the plaintiffs' counsel. He further observed that the action of the plaintiffs in not paying proper court-fee in the first instance was not bona fide. But relying on R. 11 of O. 7, Civil P. C., he dismissed the appeal and maintained the order of the District Judge. In the course of his judgment he said :

* * * the worst that the trial Court could do was to ask the plaintiff to make up the court-fee on the very day on which the plaint was presented.

As it was, the deficiency in the court-fee had already been made up before the plaint reached the trial Court. In these circumstances, the mere fact that the deficiency had been made up on the requisition by the Senior Subordinate Judge who was not authorized to extend any time for the deficiency in the court-fee being made up does not appear to me to be material.

It is against this judgment that the present Letters Patent appeal has been preferred. The case rests on the true construction to be put on S. 3, Limitation Act; Ss. 6 and 28, Court-fees Act; and R. 1 of O. 4; S. 149 and R. 11 of O. 7, Civil P. C. S. 3, Limitation Act, provides that every suit instituted after the period of limitation prescribed therefor shall be dismissed. In the explanation appended to this section, it is stated that, in ordinary cases, a suit is instituted when the plaint is presented to the proper officer. S. 6, Court-fees Act, lays down that no document of any of the kinds specified as chargeable in the first or second schedule to the Act annexed (which include plaints) shall be filed, etc. in any Court of justice or shall be received or furnished by any public officer, unless in respect of such document a fee of an amount not less than that indicated by either of the said schedules be paid. S. 28, Court-fees Act, says that no document which ought to bear a stamp under the Act shall be of any validity, unless and until it is properly stamped, but at the same time adds that when any such document is through mistake or inadvertence received, etc. in any Court or office without being properly stamped, the presiding Judge or the head of the office, as the case may be, may, if he thinks fit, order that such document be stamped as he may direct and on such document being stamped accordingly, the same and every proceeding relative thereto shall be as valid as if it had been properly stamped in the first instance.

Coming now to the Civil Procedure Code, we find that R. 1 of O. 4 enacts that every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf. This is in consonance with the Explanation to S. 3, Lim. Act. S. 149 confers power on the Court to allow the person who has not paid the whole or any part of any fee prescribed for any document to pay the whole or part, as the case may be, of such court-fee and provides that upon such payment the document in respect of which such fee is payable shall have the same force and effect as if such fee had been paid in the first instance.

This is in harmony with S. 28, Court-fees Act, the only difference being that it is wider in its scope. O. 7 deals with plaints. It defines the procedure to be adopted in drafting, admitting or returning them, and in the course of those provisions, it deals with their rejection. R. 11 (c) lays down that the Court shall be bound to reject a plaint written upon paper insufficiently stamped, if the plaintiff on being required to supply the requisite stamp paper within a time to be fixed by the Court, fails to do so. This Rule however has been so interpreted by the various Courts in India as to be hardly reconcilable with S. 149, Civil P. C.

In 39 I C 766¹ a Division Bench of this Court, composed of Scott-Smith and Shadi Lal JJ., held that under R. 11 of O. 7, the Court is bound to grant time for affixing the proper court-fee and has no discretion in the matter. It was further observed that S. 149, Civil P. C. containing a general provision relating to all documents cannot control the rule laid down in R. 11 of O. 7, which deals specifically with plaints. A similar interpretation has been put on this Rule by a Division Bench of the Madras High Court in A I R 1927 Mad 1002;² by Wallace J. of the same Court in 95 I C 439;³ and by a Division Bench of the Calcutta High Court in 49 Cal 880.⁴ The remarks made by Chamier C. J. of the Patna High Court in 42 I C 675⁵ which have been quoted with approval in another Patna judgment reported in 70 I C 378⁶ also support that construction. The trend of the decision in 3 P R 1893⁷ and 29 All 749,⁸ too, lies in the same direction, although those decisions do not deal exactly with the same matter as is now before us. I respectfully agree with those decisions in so far as to hold that for the purposes of the Limitation Act, a plaint stamped under

1. *Jiwan Das v. Khushali Ram*, (1917) 4 A I R Lah 377=39 I C 766=27 P R 1917.
2. *Subramania Iyer v. Rama Iyer*, (1927) 14 A I R Mad 1002=105 I C 881=54 M L J 67.
3. *Basavayya v. Venkatapayya*, (1926) 13 A I R Mad 676=95 I C 439=51 M L J 90.
4. *Radha Kanta Saha v. Debendra Narayan Saha*, (1922) 9 A I R Cal 506=70 I C 101=49 Cal 880=27 C W N 566=38 C L J 74.
5. *Ram Sahay Ram Pande v. Lakshmi Narain Singh*, (1917) 4 A I R Pat 26=42 I C 675=3 Pat L J 74.
6. *Deonath Sahai v. Radha Nath Prasad*, (1922) 9 A I R Pat 56=70 I C 378=3 P L T 142.
7. *Janda Khan v. Bahadur Ali*, (1893) 3 P R 1893.
8. *Hari Ram v. Akbar Hussain*, (1907) 29 All 749=4 A L J 686=1907 A W N 252 (F R).

the order of the Court with proper court-fee after the expiry of limitation becomes valid from the day it was first presented. But, equally respectfully I beg to differ from them where they further lay down that under R. 11 of O. 7, it is incumbent upon a Court of justice to allow the plaintiff an opportunity to make good the deficiency. It is clear that S. 149, Civil P. C. was introduced for the first time in 1908, when the Code was amended, while S. 54 (to which R. 11 of O. 7 corresponds) existed in the old Code in the very shape in which it now exists. If a statutory duty had already been imposed on the Court by the terms of S. 54 to grant time to the plaintiff to make good the deficiency, it passes my comprehension why in derogation of that section, the matter was placed in the discretion of the Court by the terms of the new S. 149. The effort made in 39 I C 766¹ to get over this difficulty, if I may say so with respect, does not appear to me to be successful. With due deference to the learned Judges therefore who have interpreted R. 11 of O. 7 in the manner indicated above, I am disposed to think that that interpretation is wrong.

To me the various provisions of law which have been alluded to above appear to be quite plain and consistent. A suit can only be taken to have been instituted when a plaint is presented (O. 4, R. 1, Civil P. C. and Explanation to S. 3, Lim. Act). A plaint is valid only when proper court-fee is paid in respect thereof (S. 28, Court-fees Act). No plaint can be received, etc. unless it bears proper stamp (S. 6, Court-fees Act). Every suit instituted after the period of limitation is to be dismissed (S. 3, Lim. Act). The combined effect of these provisions is that unless a plaint bearing proper stamp is presented within time, the suit is barred by the statute of limitation and must be dismissed. But there are further provisions by way of exceptions which relax the rigour of this rule. Prior to 1908, S. 28 empowered the Court to have the deficiency made up in those cases where insufficiently stamped plaints were filed etc., through mistake or inadvertence. In 1908, a provision, wider in scope, was added in the form of S. 149, Civil P. C. In both cases the validation has a retrospective effect, but in both of them the exercise of the power is discretionary. Then comes R. 11 of O. 7, which provides the penalty for not complying with the order of the Court. It is not an

enabling provision and has nothing to do with the power of the Court to have the deficiency made up. It is, on the other hand, a disabling provision, enjoining the Court to reject a plaint if deficiency is not made good as ordered by the Court. The authority to issue the order, in my view, lies in S. 149, Civil P. C., and the penalty for default in R. 11 of O. 7. Interpreted in this manner, every provision of law becomes intelligible and harmonious and our first effort should be to find harmony and concord in the various enactments and not disharmony and discord.

In addition to the authorities referred to above, counsel for the respondent has relied on 123 P R 1907,⁹ 74 P R 1903,¹⁰ A I R 1928 Lah 274,¹¹ (1936) 38 P L R 445,¹² 27 Bom 330,¹³ 32 Mad 305,¹⁴ 70 I C 378⁶ and 37 I C 507;¹⁵ but none of these authorities is in point, as in every one of them, the Court hearing the suit had granted time to make up the deficiency of court-fee and I have already remarked, that if this be so, no question arises as to the invalidity of the plaint. I may also observe that I am not impressed by those judgments which introduce the question of bona fide or mala fide mistakes. To me, that also is an unjustifiable attempt to introduce foreign matter into the plain provisions of law which do not admit of any such intrusion. Whether the conduct of the plaintiff is bona fide or mala fide, it does not matter. Whether the Court condones a mala fide mistake and grants time or it does not condone a bona fide one and does not grant time, the wording of S. 149, Civil P. C., does not stand in its way. The Court of Appeal may supervise the discretion but it cannot be denied that the discretion is there.

In the view of the law that I have taken, the only question that falls to be determined in the present case is whether the order granting time was made by a proper

9. Saif Ali Khan v. Fazil Mehdi Khan, (1907) 123 P R 1907=82 P W R 1907.

10. Tara Singh v. Muhammad, (1903) 74 P R 1903.

11. Muhammad Shafi Muhammad Ayub v. Delhi House of Multan, (1928) 15 A I R Lah 274=115 I C 757.

12. Hira Lal v. Mt. Fayazi Khanam, (1937) 24 A I R Lah 111=167 I C 291=(1936) 38 P L R 445.

13. Dhondi Ram v. Taba, (1903) 27 Bom 330=5 Bom L R 198.

14. Gavaranga Sahu v. Boto Krishna Patro, (1909) 32 Mad 305=1 I C 507=19 M L J 340 (F B).

15. Gaya Loan Office Ltd. v. Awadh Behari Lal, (1916) 3 A I R Pat 136=37 I C 507=1 Pat L J 420.

tribunal within the meaning of S. 149, Civil P. C. If it is held to be so, the suit is within time; if not, it is time-barred. It is common ground that the Senior Subordinate Judge was only a distributing officer or at the best a 'distributing Court' as he chooses to call himself. Whatever his designation, his functions were not that of a Court taking cognizance of the case. He was performing a duty which had been delegated to him by the District Court and that delegation was limited. It was confined merely to distributing work among various Subordinate Judges and he could not, therefore, arrogate to himself the functions of the Court trying the suit. This being so, he had no power to grant time to the plaintiffs to make good the deficiency and his ultra vires order can be of no avail to the plaintiffs to save limitation. In fact, this was practically conceded before Bhide J. On this ground, I would have allowed this appeal and dismissed the suit as time-barred but for the mass of authority against the view I am inclined to take of R. 11 of O. 7, Civil P. C. I consider therefore that it is a fit case to be referred to a larger Bench and I would order accordingly.

Coldstream J. — I agree throughout.

Opinion of Full Bench.

Dalip Singh J.—The facts of this Letters Patent appeal are set out at length in the order referring this case to a Full Bench for decision. The point on which the Division Bench referring the Letters Patent appeal felt some hesitation was whether it was correct to hold that under O. 7, R. 11, Civil P. C. in the case of a document insufficiently stamped the Court had no discretion to reject the document and was bound to give an opportunity to the person presenting the document to make up the court-fee. It is unnecessary on the facts of this case to enter into any discussion of the point which caused the reference, because the whole case was referred to the larger Bench for decision, and the appeal can be disposed of on another ground.

It appears to me that this case can be decided without going into the point of law which caused the reference because on the facts the discretion conferred on the Court by Section 149, Civil Procedure Code, should, in the circumstances, have been exercised in favour of the plaintiff. The only reason given by the trial Court for

not exercising that discretion in favour of the plaintiff was that the mistake was not bona fide. The reason for holding that the mistake was not bona fide was that he was a practising lawyer of 17 or 18 years' standing and should have been expected to know the working hours of the Treasury. We have been informed at the Bar that the plaintiff practises in the tahsil of Nakodar in the Jullundur District and it is not clear why he should know the working hours of the Jullundur District Treasury at headquarters. As a matter of fact, I doubt if many practising lawyers know the working hours of the Treasury in any particular District because the work of obtaining stamps, etc., from the Treasury is generally left to the clerk of the counsel concerned; but be that as it may, it seems to me that the discretion conferred on the Court by S. 149, Civil P. C., is normally expected to be exercised in favour of the litigant except in cases of contumacy or positive mala fides or reasons of a similar kind. The question of bona fides in this connexion should be construed in the sense that the word is used in the General Clauses Act and not as used in the Limitation Act. A thing should be presumed to be done bona fide, if it is done honestly whether it is done negligently or not for the purposes of judging whether the discretion under S. 149 should or should not be exercised in favour of the litigant. On this point of view there is no proof and no suggestion has been made in this Court that there was any mala fides on the part of the plaintiff. The only thing that has been suggested is that he might have gone earlier in the day to the Jullundur Treasury or should have taken the precaution of depositing his money one day earlier and thus making certain of getting stamps on the last day of limitation. This can hardly be said to constitute mala fides sufficient to disentitle him from the exercise of the discretion in his favour.

It has been urged as a last resort that the discretion under S. 149 could not be exercised because at the time when the document came before the Court the court-fee had already been made up. The argument does not appeal to me at all, for the simple reason that once the plaint had been presented to the Officer of the Court, assuming that the learned Senior Subordinate Judge was acting in a ministerial capacity only and not judicially, the plaintiff had no longer any control over the document and could not legally proceed to

stamp it at all. Assuming again that the order of the Senior Subordinate Judge allowing him to stamp this document was not a judicial order, it could not be said that the document had been validly stamped by the plaintiff at all. Therefore when the plaint came before the learned trial Court, in the eye of the law it remained a document insufficiently stamped and therefore the Court had the discretion under S. 149 of treating the stamp, which no doubt already existed as a fact on the document, as being put on in compliance with the order that it should have passed exercising the discretion in favour of the plaintiff. For these reasons therefore I would hold that there is no force in this appeal and the decision of the learned Judge in Single Bench should be upheld. The parties will be left to bear their own costs in the Letters Patent appeal.

Monroe J. — I agree.

Din Mohammad J. — I agree that the appeal should be dismissed.

V.B.B./R.K.

Appeal dismissed.

A. I. R. 1938 Lahore 366

SKEMP J.

Budhu—Accused—Petitioner.

v.

Emperor.

Criminal Revn. Petn. No. 1531 of 1937, Decided on 6th January 1938, from order of Senior Sub-Judge, Hoshiarpur, D/- 11th May 1937.

(a) Criminal P. C. (1898), S. 480—Conciliation Board constituted under the Punjab Relief of Indebtedness Act is "Court" and proceedings before it are judicial proceedings—Board can take action in respect of contempt of Court committed before it.

A Conciliation Board constituted under the Punjab Relief of Indebtedness Act is a Court and the proceedings before it are judicial proceedings. Where such Board takes action against a party appearing before it for contempt of Court under S. 480, Criminal P. C., and fines him under S. 228, Penal Code, it acts within its jurisdiction.

[P 367 O 1]

(b) Punjab Relief of Indebtedness Act (7 of 1934), S. 22—Board constituted under Act starting proceedings for contempt of Court against party appearing before it and fining him—Order of Board is open to revision.

Section 22, Punjab Relief of Indebtedness Act, refers only to order passed in pursuance of the Act and does not alter or affect the Code of Criminal Procedure.

[P 367 O 2]

Where a Board constituted under the Act takes proceedings for contempt of Court against a person

under S. 480, Criminal P. C., and fines him, its order is open to revision. S. 486, which allows an appeal from an order under S. 480, to the Court to which such decrees or orders are ordinarily appealable, does not apply to the case as ordinarily there is no appeal against order passed by the Board, but S. 439 enables the High Court to exercise any of the powers conferred on a Court of Appeal and it has jurisdiction to deal with the matter in revision. [P 367 O 2]

J. R. Agnihotri—for Petitioner.

Order.—This is a petition for revision against an order of the Conciliation Board, Garhshankar fining the petitioner Rs. 50 for contempt of Court. The Board dealt with the matter themselves in accordance with S. 480, Criminal P. C. The petitioner appealed to the Senior Sub-Judge at Hoshiarpur, who held quite correctly that in view of S. 22, Punjab Relief of Indebtedness Act, no appeal lay. He has now come here in revision. Notice issued to the District Magistrate of Hoshiarpur who held that Crown representation was unnecessary, and I have not had the advantage of hearing the Crown. The District Magistrate could not have thought that the matter was clear beyond doubt and the inference is that he did not think that the point was of any importance. Mr. Agnihotri, who represents the petitioner, addressed to me a very interesting argument. His case is that the Conciliation Board is not a Court but rather resembles arbitrators and that in any case proceedings before the Board are not judicial proceedings.

On the first point he referred particularly to the commentary on Ss. 14 and 16, Punjab Relief of Indebtedness Act, in Khalifa Shuja-ud-Din and N. K. Iyer's Edition. At page 75, the learned authors express the opinion that it is nowhere provided that the Board is to be considered to be a Court and that the members of the Board can be said to be arbitrators. I do not agree with this opinion. The first reason advanced by Mr. Agnihotri for holding that a Conciliation Board is not a Court is its name; its name, the Board, has the honour of sharing with their Lordships of the Judicial Committee of the Privy Council, who frequently refer to themselves as a Board. S. 8 of the Act provides for the setting up, constitution and duties of Debt Conciliation Boards. S. 8(1)(a) provides that :

The Local Government may for the purpose of amicable settlement between debtors and their creditors establish Debt Conciliation Boards.

Section 8(1)(b) enables the Local Government to define the local limits of the Board's jurisdiction, and (c) to determine the pecuniary limits of the jurisdiction. Local and pecuniary limits of jurisdiction suggest a Court. S. 16 provides that any Board

may exercise all such powers connected with the summoning and examining of parties and witnesses as are conferred on Civil Courts by the Code of Civil Procedure, and every proceeding before the Board shall be deemed a judicial proceeding.

It appears to me that this section settles the matter. The Board has the powers of a Civil Court with reference to the examination of the parties and witnesses and their proceedings are judicial proceedings. A body so empowered must be a Court.

Mr. Agnihotri and the learned authors of the commentary suggest that they are arbitrators; but this is not borne out by the provisions relating to arbitration in the Second Schedule to the Civil Procedure Code. Leaving aside arbitration without the intervention of the Court, where the parties choose their arbitrator, an arbitrator is appointed by the Court and the matter in difference is referred to the arbitrator by the Court (Paras. 2 and 3). By Para. 7, the Court shall issue processes to the parties and by Para. 7 (2), if any one is guilty of contempt, it is the Court which shall punish the guilty person. I am of opinion that a Conciliation Board is a Court.

The next point taken is that the proceedings were not judicial proceedings, and various authorities were referred to; but the matter seems to me to be concluded by the statute itself which says (S. 16): "Every proceeding before the Board shall be deemed a judicial proceeding." Therefore, I think that the Board was acting within jurisdiction in passing an order of fine under S. 228, Penal Code, and in adopting the procedure laid down in S. 480, Criminal P. C.

The next question is whether the High Court has jurisdiction to deal with the matter on revision in view of S. 22 of the Act, which says: "No appeal or application for revision shall lie against any order passed by the Board". I think however that this section refers only to orders passed in pursuance of the Act. In this connexion reference may be made to S. 21, which bars civil suits to question the validity or legality of any agreement made under the Act, and to S. 23, which empowers the

Board to review its own order. The present proceeding was under the Penal Code and the Criminal Procedure Code. Here I may refer to Maxwell's Interpretation of Statutes, Edn. 7, p. 52:

It is in the interpretation of general words and phrases that the principle of strictly adapting the meaning to the particular subject matter with reference to which the words are used finds its most frequent application. However wide in the abstract, they are more or less elastic, and admit of restriction or expansion to suit the subject matter. While expressing truly enough all that the Legislature intended, they frequently express more, in their literal meaning and natural force; and it is necessary to give them the meaning which best suits the scope and object of the statute without extending to ground foreign to the intention. They are to be construed as particular if the intention be particular; that is, they must be understood as used with reference to the subject matter in the mind of the Legislature, and limited to it.

See also page 71:

One of these presumptions is that the Legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares, either in express terms or by clear implication, or, in other words, beyond the immediate scope and object of the statute. In all general matters outside those limits the law remains undisturbed. It is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness and to give any such effect to general words, simply because they have a meaning that would lead thereto when used in either their widest, their usual or their natural sense, would be to give them a meaning other than that which was actually intended. General words and phrases therefore however wide and comprehensive they may be in their literal sense, must usually be construed as being limited to the actual objects of the Act, and as not altering the law beyond them.

Therefore, I am of opinion that S. 22 of the Act does not alter the Code of Criminal Procedure. S. 486 of that Code allows an appeal from an order under S. 480 to the Court to which such decrees or orders are ordinarily appealable. As ordinarily there is no appeal, this section therefore has no application. There remains S. 439 which enables the High Court to exercise any of the powers conferred on a Court of Appeal.

In the present instance I think the sentence is excessive. The petitioner had purchased the debt in question (the amount is not shown) and the decree was in his name. This led to a misunderstanding about his name and the petitioner was rude to the Board. Subsequently he recovered his temper and the order of the Board shows that at the intervention of a friend he apologized. The Board however insisted

on an apology in writing, which the petitioner would not give. Thereon they passed the order in question under S. 480. In my opinion, in view of the apology made at the time, the fine is excessive and I reduce it to one of Rs. 5. The balance, if paid, is to be refunded.

R.M./R.K.

*Order accordingly.***A. I. R. 1938 Lahore 368**

DALIP SINGH J.

Panna Lal Jain — Judgment-debtor —
Appellant.

v.

Jain Bank of India, Ltd., Lahore —
Decree-holder — Respondent.

Exn. First Appeal No. 115 of 1937, Decided on 29th October 1937, from order of Dist. Judge, Lahore, D/- 4th March 1937.

(a) Limitation Act (1908), Arts. 182 and 183 — District Judge by virtue of S. 164, Companies Act, does not for purpose of Art. 183 become High Court — Art. 182 and not Art. 183 applies to his order.

Though by reason of S. 164, Companies Act, the District Judge has the same jurisdiction and the same powers as the High Court, yet the District Judge by virtue of S. 164 does not become the High Court for purpose of Art. 183, Limitation Act. Hence to a payment order passed by the District Judge under powers conferred by S. 164, Art. 183 has no application and the only Article applicable is Art. 182. [P 368 C 2]

(b) Estoppel — Counsel's admission on point of law is not binding.

The fact that the counsel has waived the objection as to limitation does not estop his client from raising the same, as counsel's admissions on a point of law are not binding. [P 368 C 2]

N. C. Mehra — *for Appellant.*

F. C. Mital for Chiranjiva Lal Aggarwal (for Officiating Liquidator) — *for Respondent.*

Judgment. — In this case the Jain Bank of India Ltd. was directed to be wound up by an order of the High Court in 1928. Under S. 164, Companies Act, the subsequent proceedings were directed to take place in the Court of the District Judge, Lahore. In 1931 the list of contributories was settled and a payment order was passed against the present appellant as well as others. No execution of this payment order was taken out till the present application was made on 5th October 1936. On 5th December 1936, notice to show

on the judgment-debtor but he did not appear. The Court proceeded to issue a warrant of attachment of his property and on 30th January 1937 the present appellant appeared and pleaded that the execution was time-barred, that he was not liable to pay and that he was unable to pay. The Court struck issues involving these three points. On the question of limitation, the learned counsel for the present appellant waived the objection regarding limitation. The other two issues were decided against the present appellant and the Court granted the Official Liquidator's prayer for attachment of the judgment-debtor's property.

The appellant has come to this Court and the only ground urged on his behalf, which has any force, is the question of limitation. On the face of it, as the payment order was made in 1931 and the execution application was not made till 1936, the plea of limitation was good. The learned counsel for the respondent however contends that Art. 183 of Lim. Act, applies because, by reason of S. 164, Companies Act, the District Judge has the same jurisdiction and the same powers as the High Court. It is quite clear however that the District Judge does not for this purpose by virtue of S. 164 become the High Court and therefore Art. 183, Lim. Act, has no application and the only Article applicable is Art. 182.

Next it was contended that the counsel having waived the objection, the present appellant was estopped from raising the objection. But there is obviously no estoppel and counsel's admissions on a point of law are not binding. Thirdly it was contended that as the appellant had not appeared on 5th December 1936 in accordance with the notice to show cause, the point of limitation must be held to have been decided against him by the rule of constructive res judicata. I do not think there is any force in this contention either. I therefore accept the appeal and hold that the application for execution is time-barred. No order as to costs.

D.S./R.K.

Appeal accepted.

* * A. I. R. 1938 Lahore 369

FULL BENCH

YOUNG C. J., BHIDE AND DIN

MOHAMMAD JJ.

Mosque known as Masjid Shahid Ganj and others — Plaintiffs — Appellants.

v.

Shromani Gurdwara Parbandhak Committee, Amritsar — Defendants — Respondents.

First Appeal No. 244 of 1936, Decided on 26th January 1938, from decree of Dist. Judge, Lahore, D/- 25th May 1936.

* * (a) Limitation Act (1908), S. 3 — Suit relating to mosque is not exempt from operation of Act (Per Full Bench, *Din Mohammad J. Dissenting*).

Per Full Bench. — The personal law of the Mahomedans has been modified by the Punjab Laws Act and the Limitation Act. Every suit is subject to the Limitation Act, and the Act applies without distinction to suits concerning both sacred and secular property. And there being no provision in the Limitation Act exempting suits relating to "wakf" properties from its operation, a suit relating to a mosque must be held to be subject to the rules of limitation prescribed in the Limitation Act : *Case law discussed*. [P 376 C 2 ; P 377 C 1 ; P 380 C 1]

Per *Din Mohammad J.* — British Courts in India cannot ignore the provisions of the Mahomedan law altogether while dealing with a mosque and the special features which it possesses and the peculiar privileges which it enjoys are always to be determined under the Mahomedan law and under no other law, even though one of the parties to the suit before them may be a non-Muslim. Although S. 5, Punjab Laws Act, contemplates that Mahomedan law can be altered or abolished in certain respects, in regard to the privileged position that a mosque occupies under the Mahomedan law, it has neither expressly nor impliedly been altered or abolished by the Limitation Act, or for that matter, by any other enactment, and as such a suit relating to it is not governed by Limitation Act but by Mahomedan law simpliciter : *Case law discussed*. [P 411 C 1, 2]

* (b) Adverse Possession — Wakf property can be adversely possessed (Per Full Bench, *Din Mohammad J. Dissenting*).

Per Full Bench. — The title of a person claiming adverse possession over dedicated property rests not on Mahomedan or Hindu law but on the law of limitation and prescription as it prevails in British India and if personal law has been modified by the statute of limitation, the Courts in British India have no option but to give effect to that statute. Hence a mosque can be adversely possessed. It is difficult to see why the building of a mosque or its site cannot be looked upon as "property" merely because the "mosque" has been held to be capable of suing or being sued as a "juristic" person. A mosque is the house of God but is not the deity. A mosque as a building is clearly property : *Case law discussed*. [P 375 C 2 ; P 380 C 2 ; P 381 C 1 ; P 382 C 1 ; P 383 C 1]

Per *Din Mohammad J.* — Inasmuch as a mosque is placed extra commercium and is in its very

nature incapable of being owned by human beings it cannot be considered "property" in the sense that it can be the object of a right of ownership. It is possible therefore to argue that a mosque is outside the mischief of the Limitation Act, even though that Act purports to deal with properties comprised in a Hindu or Mahomedan endowment in the circumstances mentioned in Arts 134-A, 134-B and 134-C. It can also be argued that a mosque as a juristic person is not property and is thus not touched by the Limitation Act : *Case law discussed*. [P 411 C 2]

* * (c) Mahomedan Law — Wakf — Adverse possession of mosque by non-Muslim — It loses its sacred character (Per Full Bench, *Din Mohammad J. Dissenting*).

Per Full Bench. — Where a mosque has been adversely possessed by non-Muslims, it loses its sacred character as a mosque and there is no duty cast on such persons to maintain its original sacred character or to maintain it as a building : *Case law discussed*. [P 377 C 1]

Per *Din Mohammad J.* — Even assuming that a mosque is covered by the provisions of the Limitation Act, it continues to retain its sacred character wherever it may be and in whatever condition it is placed so long as it retains its original shape and form and its sacred character is never lost by any act of desecration, however profane and sacrilegious it may be. The only act of hostility that the Courts in India can countenance in the case of a religious institution like a mosque is an act of direct physical interference with its building and anything short of it cannot be taken into account inasmuch as all through the period that a so-called adverse possessor does not throw such an open challenge as is indicated above, he continues to remain under a heavy burden of which he is never relieved. By taking possession of a religious institution and not using it for the purpose for which it is intended, he merely imposes upon himself the duties and obligations of a quasi manager or a custodian and any breach of those duties in the shape of not using the institution in the manner for which it is intended does not benefit him in any way nor does it extinguish the right of the beneficiaries of that institution just as a breach of duty on the part of a recognized custodian or manager would not entail these consequences. A beneficiary aggrieved by his act may seek relief against him if he so chooses to do, but his inaction does not prejudice the other beneficiaries : *Case law discussed*. [P 411 C 2 ; P 412 C 1]

(d) Limitation — Suit by juristic person is also subject to law of limitation (Per Full Bench).

"Juristic" persons like other plaintiffs are subject to the law of limitation, and enjoy no special privilege in this respect : 32 Cal 129 and 37 Cal 885, *Rel. on*. [P 385 C 1]

* * (e) Mahomedan Law — Wakf — Mosque adversely possessed by non-Muslims — All rights of Muslims are lost — Refusal to allow them to pray is not continuing wrong (Per Full Bench, *Din Mohammad J. Dissenting*).

Per Full Bench. — Where Sikhs have got adverse possession over a mosque all rights of Muhammadans in the mosque are extinguished and the Sikhs become the owners of the building and the "right to pray" in the mosque is also extinguished and hence in refusing that right to the

Mahomedans the Sikhs cannot be held to be guilty of any wrong, much less a 'continuing' one. *A I R 1917 Lah 160, Disting.* [P 385 C 2; 386 C 1]

Per Din Mohammad J. — So long as the original shape and form of a mosque remain intact, the trespass by a wrong-doer is a continuing injury giving rise to a cause of action at every moment of the day that the trespass continues and this cause of action accrues not only to the mosque itself as a juristic person but also to its beneficiaries who in the very nature of the wakf are not confined to any place or period of time but are spread over all places and all ages. The rights and obligations attaching to a mosque are paramount to the estate and they cannot be lost merely by the efflux of time and such rights and obligations follow the property and adhere to it wherever it goes. Even if it be considered that the right of beneficiaries of a mosque to offer their prayers in it is an interest in immovable property, this right cannot be extinguished: *Case law referred.* [P 412 C 1]

(f) Religious Endowment — Juristic person. (*Per Full Bench.*)

The position of a juristic person is not that of a minor and it is doubtful whether a suit instituted by a next friend is properly instituted: 32 Cal 129 and *A I R 1932 Mad 328, Rel. on.*

[P 386 C 1]

**** (g) Specific Relief Act (1872), S. 42— Mosque in possession of non-Muslims—Suit on behalf of Muslim community—Relief of possession of mosque open to it though not to individuals — Suit for mere declaration and injunction is not maintainable.** (*Per Full Bench, Din Mohammad J. Dissenting.*)

Per Full Bench. — Where a suit is filed on behalf of the Mahomedan community which could have sued for possession of a mosque in possession of non-Muslims even though the individuals of that community cannot sue for such relief, but the relief asked for is only for a mere declaration and injunction, the suit is not maintainable: *Case law referred.* [P 386 C 1, 2]

Per Din Mohammad J. — A beneficiary in some cases may be entitled to recover endowed property for the benefit of the trustee; but it is not necessary for the beneficiaries of a mosque to bring a suit for possession of the mosque itself and they cannot be compelled so to do if they merely seek to establish their right to offer prayers in it. This right they can exercise irrespective of the fact that the mosque is in the custody of a non-Muslim, inasmuch as under the Mahomedan law a non-Muslim can be a custodian of a mosque. To deny the beneficiaries a relief by way of declaration in the circumstances of this case would be to limit the scope of the substantive part of S. 42 within a very narrow limit and to extend that of the Proviso beyond legitimate bounds. The Proviso to S. 42 comes into play only where the plaintiff being able to seek further relief than a mere declaration of title omits to do so and, the beneficiaries of a mosque are not able to sue for possession of the mosque within the meaning of the Proviso: *Case law discussed.* [P 416 C 1, 2]

**** (h) Tort—Mosque in possession of Sikhs for long time — Demolition of building by Sikhs does not give cause of action to Muslims to sue.** (*Per Full Bench, Din Mohammad J. Dissenting.*)

Per Full Bench. — Where a mosque has been in the possession of Sikhs for a long time and the Muslims have lost all their rights, the demolition of the mosque by the Sikhs does not constitute a tort so as to give a cause of action to the Muslims to sue: *Case law referred.* [P 387 C 2; P 388 C 1]

Per Din Mohammad J. — So long as the mosque retains its original shape and form, its sacred character is never lost by any act of desecration. The only act of hostility that can be countenanced is an act of direct physical interference with the building and anything short of it cannot be taken into account. Hence even if the Sikhs have been in possession of the mosque for a long time, the demolition of the building by them gives a valid cause of action for the Muslims to sue: *Case law referred.* [P 412 C 2]

*** (i) Res Judicata — Suit tried and decided according to procedure then prevalent—Subsequent suit is barred even if procedure has been changed subsequently.** (*Per Full Bench.*)

Where a suit is tried according to the procedure then in force and is taken up to the highest Court of Appeal, the mere fact that the procedure then in force was of a summary character is immaterial for the purposes of S. 11, Civil P. C., and a subsequent suit is barred by res judicata. [P 388 C 1, 2]

*** (j) Civil P. C. (1908), S. 11—Suit by mutawalli for possession of mosque dismissed on ground of adverse possession — Demolition of mosque — Subsequent suit for restoration of building and declaration of right to say prayers held barred by res judicata.** (*Per Full Bench, Din Mohammad J. Dissenting.*)

A mutawalli filed a suit for possession of a mosque. The suit was dismissed on ground of adverse possession. The mosque was demolished and subsequently another suit was brought for the restoration of the building and declaration of right to say prayers: [P 388 C 2; P 389 C 1]

Held Per Full Bench. — That S. 11 applies not only to the final decision but also to issues. The real issue in the subsequent suit was also adverse possession and as such it was barred by res judicata even though there was no prayer for the relief of possession.

Per Din Mohammad J. — The subject-matter of the subsequent suit was not the same as it was in the previous litigation, as in the prior suit the plaintiff sought to recover possession of the property to which he laid claims as mutawalli, while the subsequent suit was by the mosque itself as well as the beneficiaries for the restoration of the mosque to its original shape and form, with the additional prayer that the beneficiaries may be allowed to sue it as a mosque. Hence the rule of res judicata did not operate. [P 418 C 2]

(k) Punjab Sikh Gurdwaras Act (8 of 1925), S. 5 — Petition under — O. 1, R. 8, Civil P. C. is not applicable (*Per Full Bench.*)

The Sikh Gurdwaras Act is an enactment of a special nature and is governed by its own procedure. Hence the procedure under O. 1, R. 8, Civil P. C., is not applicable to a petition under S. 5, Punjab Sikh Gurdwaras Act and a notification of the claim under S. 3 in the Gazette and also at head quarters of district is sufficient. [P 389 C 2; P 390 C 1]

(l) Civil P. C. (1908), O. 1, R. 8 — Bona fide litigation—Omission to follow procedure under O. 1, R. 8 is only technical irregularity (*Per Full Bench.*)

Where the previous litigation is bona fide, the omission to follow the procedure in O. 1, R. 8 is only a technical irregularity which causes no prejudice and the previous decision is binding: *A I R 1933 P C 183, Rel. on.* [P 390 C 2]

(m) Punjab Sikh Gurdwaras Act (8 of 1925), S. 30 (ii) — Claim in representative capacity — Finding of tribunal that Mahomedans in general have no right — S. 30 (ii) has no application (Per Full Bench).

Where in a representative suit by an Anjuman, the Tribunal held that the Mahomedans in general had no right left in the mosque, that finding must be held to be binding on all. In this aspect of the case, no question of assertion of a claim on behalf of any individual on the ground of want of knowledge, etc. within the purview of S. 30 (ii) arises. [P 390 C 2]

(n) Specific Relief Act (1877), S. 56 — Suit for injunction for restoring demolished building to its former condition — Relief can be granted and on failure to obey it, procedure under O. 21, R. 32 (5), Civil P. C. can be applied (Per Din Mohammad J.).

In a suit for an injunction for restoring a demolished building to its original condition, the defendant contended that it was impossible for the Court to grant this relief as it would be difficult to determine the original condition:

Held that a person who takes upon himself the responsibility of demolishing the building of a mosque cannot escape his liability to restore it to its original shape merely on the ground that it is physically impossible to re-construct it in the exact shape, form and condition in which the building stood when it was demolished. If the defendants refuse to obey the injunction issued, the Court can direct under O. 21, R. 32 (5), Civil P. C., even the plaintiffs, or any other person, to do the act required to be done so far as practicable, at the cost of the judgment-debtors, and the expenses incurred thereon can be recovered as if they were included in the decree. [P 417 C 1]

(o) Civil P. C. (1908), S. 11 — Decisions passed in executive capacity do not operate as res judicata (Per Din Mohammad J.).

Decisions which are contemplated to operate as res judicata under S. 11, are those which are given after a complete observance of the procedure laid down by the law and not those which are more or less orders passed in an executive capacity. To found the decision of a Civil Court entirely on the findings arrived at in a criminal judgment robs it of all its sanctity and binding force. [P 418 C 2]

(p) Punjab Sikh Gurdwaras Act (8 of 1925), S. 15 — S. 15 does not absolve tribunal from following procedure under O. 1, Rule 8, Civil P. C. (Per Din Mohammad J.).

The power conferred on the tribunal under S. 15, Sikh Gurdwaras Act is similar to the one conferred upon the Civil Courts by O. 1, Rule 10 (2), Civil P. C. and does not absolve it from the necessity of following the procedure as laid down in O. 1, R. 8 of the Code. [P 421 C 1]

(q) Mahomedan Law—Wakf—Right to use mosque is individual right—Suit by beneficiary to exercise right of devotion is not representative suit (Per Din Mohammad J.).

The right of a Muslim to use a mosque is an individual right and can be exercised whenever he chooses so to do, so long as the mosque exists, and

a suit instituted by a beneficiary for the exercise of his right of devotion in a mosque, is a suit for the enforcement of an individual right and is not covered by the provisions of O. 1, R. 8, Civil P. C.: *Case law referred.* [P 421 C 2; P 422 C 1]

(r) Punjab Sikh Gurdwaras Act (8 of 1925), S. 5—Tribunal cannot declare property to be Sikh Gurdwara (Per Din Mohammad J.).

On hearing a petition under S. 5, the tribunal has no power to make a declaration that the property in suit belongs to a Sikh Gurdwara; all that it can do is to reject the claim as put forward in the petition: *A I R 1935 Lah 279, Rel. on.*

[P 422 C 2]

(s) Punjab Sikh Gurdwaras Act (8 of 1925), S. 32—Section does not cover suits instituted long after time when petition could be made has expired (Per Din Mohammad J.).

Section 32 is intended to apply only to those suits which were pending at the commencement of the Act or in which, though instituted after its commencement, the claim could be made under the sections mentioned therein within the time prescribed. It does not obviously cover such suits as are instituted long after the time during which the petitions could be made has expired: *A I R 1934 Lah 390, Dissent.; A I R 1931 Lah 85 (F B), Expl.* [P 424 C 1]

Dr. Mohammad Alam—for all Appellants except Nos. 1, 2, 6, 9, 12 and 17.

Barkat Ali—for all Appellants.

Ghulam Rasul Khan and Taj-ud-Din—for Appellants Nos. 1, 6, 9, 12 and 17.

M. Aslam Khan—for Appellant No. 2.

Coltman—for all Appellants (on 10th & 11th January 1938).

Badri Das, Charan Singh, Harnam Singh and Narindar Singh—for Respondents.

Young C. J.—This is an appeal from the Court of the learned District Judge of Lahore. The plaintiffs brought a suit in the lower Court praying for a declaration that a certain parcel of land known in this case as Shahid Ganj was and is the site of a wakf mosque, dedicated to God; that the mosque could not be used for any purpose which, according to Mahomedan law, was opposed to the purposes of a mosque, and that plaintiffs Nos. 2 to 18, and also all other followers of Islam, had a right to use the mosque for the purposes of worship without let or hindrance by any one. Consequential relief was claimed in the form of a mandatory injunction to the following effect, that the defendants: (a) Should not use plaintiff No. 1 (i. e. the mosque itself) for any purpose which may be contrary to its sanctity and use according to Mahomedan law; (b) Should not in any way interfere in the plaintiffs Nos. 2 to 18's rights of worship relating to the said mosque; and (c) Should re-construct the portion of the

mosque which was demolished by them on the night between 7th and 8th July 1935, in the same shape and form as it was before demolition. In the alternative, the plaintiffs claimed damages for the demolition so that they might rebuild it in its former shape. It is to be noted that the plaintiffs did not sue for possession.

By their defence the defendants, that is the Shromani Gurdwara Parbandhak Committee and another, who are in possession of the site, denied that the building was a mosque, claimed that the suit was barred by (a) the principle of *res judicata*, (b) by the provisions of the Sikh Gurdwaras Act, (c) by decision of the Sikh Gurdwaras Tribunal, dated 20th January 1930, and that the suit was not within the time prescribed by the Limitation Act. The learned District Judge found that the building was in its origin wakf, that is originally dedicated for prayers in 1722, but that it had not been used as a mosque for prayers since 1762. He decided that the claim was not within limitation, and was barred by the decision of the Sikh Gurdwaras Tribunal and the provisions of the Sikh Gurdwaras Act, but not by the decisions of the Courts between 1850 and 1883. He held that the defendants had acquired a title by adverse possession and that plaintiff No. 1, that is the mosque itself, was a juristic person capable of suing through its next friend.

The facts which are proved, and accepted by the parties, are that in the year 1722 the mosque was erected, dedicated to God, and used as a mosque until the establishment of Sikh Rule in the year 1762; that from the year 1762 till the institution of the suit the building had not been used as a mosque or place of worship; that two actions had been brought by a descendant of the original Mutwalli of the mosque in 1854 and 1855, but both these actions had failed on the ground of limitation; that in 1925 the Sikh Gurdwaras Act was passed and the question was litigated under that Act as to whom this property belonged; the Anjuman Islamia of Lahore filed a petition on behalf of the Muslims under S. 5 of the Act praying that the mosque should be excluded from the consolidated list, and an issue was framed as to what right, title or interest the Anjuman had in the property claimed; the tribunal decided that the Anjuman had no right, title or interest in the property; that on the night

of 7th July 1935 the Sikhs demolished the mosque.

From the date of their possession in 1762 the Sikhs have used this building as their own. In one of the domes they kept the Guru Granth Sahib until about the year 1883 when the dilapidation of the building made it dangerous for the Granth Sahib still to be kept there. The Sikhs have also for many years let the building on rent to tenants, and for the use of the tenants they placed a latrine upon the roof. These facts have not been challenged here in appeal. Mr. Badri Das on behalf of the respondents accepts the findings that the mosque as an institution is a juristic person, and also that the building was originally dedicated to sacred uses as a mosque. It is not contested by the appellants that the building has not been used as a mosque, that is for the purpose of prayers, since 1762. In fact the findings of fact by the lower Court throughout are not contested here. There has been continuous adverse possession by the Sikhs for no less than 173 years, and during that time there has been a complete denial to the Muslims of all their rights. The facts being as they are, it is obvious that no appellants ever were faced with a more difficult task than the appellants in this appeal. The fact that the plaintiffs did not sue for possession shows that they recognized the difficulties of their position. The main point argued in this Court concerns the Limitation Act, and the finding of the Court below that the suit was not brought within time. It has been somewhat difficult to follow the arguments of learned counsel appearing for the appellants, but the points appear to be these: (1) that Mahomedan law governs wakfs, and that Mahomedan law does not recognize any rule of limitation; (2) that a mosque as a juristic person, and because of its sanctity, has a perpetual existence and cannot be subject to adverse possession; (3) that property in a mosque vests in God and nothing divests God of His property except, perhaps, an Act of the Legislature; (4) that a mosque is not immovable property and, therefore, Art. 144, Lim. Act, does not apply; (5) that if the Limitation Act is held to apply, a new period of limitation commenced to run from the date of the demolition of the mosque on the ground that when property is dedicated to sacred uses, there is a duty cast on an owner of such property, whether his title is acquired by adverse possession or in

any other manner, to maintain the sacred character of the land or building so dedicated, and to maintain the sacred building.

We have been referred to a mass of authority, little of which is of assistance in dealing with the points in issue. All these points can be dealt with together. In my opinion it is clear that if the Limitation Act applies to the suit, there is no force in any of them. The first point to be considered is the effect of the Punjab Laws Act (Act 4 of 1872) upon the personal law of the Muslims. S. 5 of the Act is very much in point. It is as follows :

5. In questions regarding succession, special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies gifts, partitions, or any religious usage or institution, the rule of decision shall be :

(a) Any custom applicable to the parties concerned, which is not contrary to justice, equity, or good conscience, and has not been by this or any other enactment altered or abolished, and has not been declared to be void by any competent authority;

(b) The Mahomedan law in cases where the parties are Mahomedans, and the Hindu law, in cases where the parties are Hindus, except in so far as such law has been altered or abolished by legislative enactment, or is opposed to the provisions of this Act, or has been modified by any such custom as is above referred to.

It is clear therefore from this Act that Mahomedan law does not necessarily govern cases in which even Mahomedans only are interested. This Act allows for modification of Mahomedan law by legislative enactment and makes it clear that Mahomedan law only applies in cases where the parties are Mahomedans and there has been no legislative interference with the personal law. The next point to consider is the Limitation Act, 1908 (Act 9 of 1908). S. 3 is as follows:

3. Subject to the provisions contained in Ss. 4 to 25 (inclusive), every suit instituted, appeal preferred, and application made after the period of limitation prescribed therefor by Sch. 1 shall be dismissed, although limitation has not been set up as a defence.

This section applies to every suit instituted. It provides no exception for suits concerning wakfs, religious institutions, or land and buildings dedicated to sacred uses. Art. 144, Limitation Act provides a period of 12 years within which an action for possession of immovable property must be brought, the time to run from the date when the possession of the defendant became adverse. Arts. 134-A, 134-B and 134-C, which prescribe the period of limitation in

actions concerning Hindu, Mahomedan or Buddhist religious or charitable endowments show conclusively that the contention of the appellants that wakfs—or property dedicated to God—are outside the law of limitation is not maintainable. That the Act is concerned with the personal law of Mahomedans is shown by reference to Arts. 103, 104 and 125. The Limitation Act therefore beyond any argument, applies to this suit, and the original Mahomedan law has been accordingly modified by legislative enactment. It is not possible therefore for it to be argued now that Mahomedan law simpliciter can be applied by the Courts of British India. While dealing with the Limitation Act it is important to note S. 28 which reads as follows:

At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished.

It has been frequently held, and now cannot be disputed, that the operation of S. 28 perfects a title to the property in favour of the person in adverse possession after the period prescribed for recovery of possession has run. 12 years' continuous possession by a wrong-doer not only bars the remedy and extinguishes the title of the rightful owner of land, but confers a good title upon the wrong-doer: *see* 3 Cal 224¹ and 3 All 435.²

It was conceded by counsel for the appellants that there is no direct authority in favour of his proposition that a suit concerning wakf property was not subject to the Limitation Act. Having regard to the quotations herein from the Act itself it is quite clear that there could be no such authority. The cases to which we have been referred, which were alleged by counsel indirectly to apply to this point, were cases in which only Muslims were involved, or the Limitation Act did not apply, or adverse possession had not been established. 35 Mad 681³ was strongly relied upon by the appellants. All that that case decided however was that, according to Mahomedan law, when a wakf was created all proprietary rights of men were extinguished in the property so dedicated. No question of adverse possession or limitation arose. This proposition of law however clearly applies

1. Gossain Dass Chunder v. Issur Chunder Nath. (1877) 3 Cal 224.

2. Jagram Bibi v. Ganeshi, (1881) 3 All 435.

3. Kuttayan v. Mammanna Rayuthan, (1912) 35 Mad 681=18 I C 195.

only as between Muslims themselves, and then only when no statutory modification of Mahomedan law exists. We have not been referred to any authority for the proposition that as between Muslims and non-Muslims dedicated property was inalienable or not subject to adverse possession. We have also been referred by counsel for the appellants to cases both civil and criminal concerning grave-yards. In none of these however was the question of limitation or adverse possession raised or decided. The Mahomedan law relating to wakfs was laid down, namely, that once land was dedicated to the purpose of a grave-yard it was inalienable. I deal later with the offence under S. 297, I. P. C.; it can have no bearing upon the civil aspect of this question. The principal authority on civil law relied upon by the appellants is that in 38 P L R 182.⁴ This was a decision of their Lordships of the Privy Council. This case however by no means covers the proposition argued by the appellants. In this case in the year 1928, Ballabh Das, according to the findings in the lower Courts, obtained by deed a transfer of the land in suit from one Mt. Musaheb Khanam, who was the descendant of the original manager of the qabristan or grave-yard. Their Lordships held that the land was a grave-yard and that the ancestor of the vendor was not the owner of the land but only the manager; that the land was a cemetery in the ordinary Mahomedan sense and was no longer the subject of private ownership. It followed that the vendor had no title to the land and that therefore Ballabh Das could not get a better title than his vendor had. It is to be noted in this case that the question of adverse possession did not arise, the land was alienated in 1928 and the suit brought well within time. This case is therefore no authority for the proposition that land dedicated to sacred uses is not alienable to strangers, or that adverse possession would not confer a good title upon a vendee who was in possession of the land for 12 years even after wrongful alienation to him by the manager. It would appear to be obvious that anything which admits of possession also admits of adverse possession. A mosque can clearly be "possessed". On the other hand the cases reported in A I R 1935

Oudh 425⁵ and A I R 1936 Oudh 207⁶ are authorities showing that suits concerning Muslim grave-yards are subject to limitation and adverse possession.

It is conceded by the respondents that a mosque as an institution (but not as a building consisting of stones, bricks and mortar) is a juristic person. According to Mahomedan law its sacred character is perpetual. Counsel for plaintiff 1, that is the mosque, could not refer us to any authority of the Indian Courts or of the Privy Council for his proposition that property dedicated to sacred uses retains its sacred character under all circumstances and for all time. He relied upon two decisions of the Courts in England reported in (1885) 16 Q B D 379⁷ and (1869) 4 Q B 407.⁸ Those cases decided that if land was dedicated to sacred uses, only an Act of Parliament could divest such land of its sacred character. In fact the position in England—as indicated by these authorities—would appear to be much the same as the position under Mahomedan law where that law has not been modified by statute. In these cases no question of limitation or adverse possession arose, and they do not decide that the sacred character of such property in England would prevent the title passing by adverse possession to a third party. In any event they recognize that an Act of Parliament may alter the character of such land. The Limitation Act in India is equivalent to an Act of Parliament, and it clearly deals with property dedicated to God.

It was impossible to follow or understand the argument that a mosque as a "juristic person" had a perpetual existence and was not "property", and therefore could not be subject to adverse possession. It appeared to be based on the false analogy of the position in law of a Hindu deity. It is true that "God" as a deity has a perpetual existence and cannot be subject to possession of any kind and there are many authorities to this effect; indeed no authorities

4. Ballabh Das v. Nur Mohammad, (1936) 23 A I R P C 83=160 I C 579=38 P L R 182 (P C).

5. Wahid Ali v. Mahboob Ali Khan, (1935) 22 A I R Oudh 425=156 I C 92=1935 O W N 815=11 Luck 297.

6. Ramzan v. Mahomed Ahmad Khan, (1936) 23 A I R Oudh 207=165 I C 104=1935 O W N 96.

7. Wright v. Ingle, (1885) 16 Q B D 379=55 L J M C 17=54 L T 511=34 W R 220=50 J P 436.

8. Reg v. Sir Travers Twiss, (1869) 4 Q B 407=38 L J Q B 228=10 B & S 298=20 L T 522=17 W R 765.

are needed for such an obvious proposition. On the other hand there are authorities to the effect that the wood or stone idol of a Hindu deity is property and therefore subject to adverse possession: see Gour's Hindu Code, S. 199, Para. 2072, 4 Mad 315⁹ and 51 All 621.¹⁰ In any event there is no analogy between a Hindu or—any other—deity and a mosque. A mosque is the house of God but is not the deity. A mosque as a building is also clearly "property" in every sense of the word even if it be the "property of God". There is a clear distinction between a mosque as an institution, or as a juristic person which can own property, and a mosque as a building; the mosque as a building may be owned by the institution (juristic person) or by anyone else who may acquire adverse possession over it. A mosque as a building has every attribute of "property", it is, for example, subject to trespass, and it has been held that a mosque is "immovable property" and that the juristic person—that is the institution—as owner of such immovable property has a right of pre-emption under S. 13, Punjab Pre-emption Act 1905. An eminent Muslim Judge (Shah Din J.) was a party to this view in 59 P R 1914;¹¹ and see also 153 P R 1884.¹² It was also argued that the mosque as a juristic person was divorced from the mosque building, and as a juristic person could not be subject to the Limitation Act whatever might happen to the mosque or to the Muslim worshippers. I cannot understand this argument. A "juristic person" cannot exist apart from property or right. All property in the mosque and all rights having been lost to the Muslims and to the juristic person by 12 years' adverse possession, the juristic person—a legal fiction—ceases also to exist. It owns nothing and represents nothing.

Another argument of a similar character which has been addressed to us is as follows: That if the Limitation Act does apply, and by virtue of S. 28 of that Act a title to the land in suit is acquired by the respondents, the mosque being sacred in character, it is the duty of the present pro-

prietors not only to maintain that sacred character but the building itself; in fact that there is some form of onerous covenant running with such land which cannot be got rid of, and apparently that no matter if the owner of the land be atheist or infidel of any kind, this duty is paramount and must be carried out. This argument is based upon the case in 38 P L R 182⁴ already referred to, and in particular upon the use of the words "extra commercium" by their Lordships in that judgment, and perhaps also upon S. 297, I. P. C. It is said that such land is not governed by any human law and that the sacred character must therefore be maintained. As I have pointed out above, the decision of their Lordships in 38 P L R 182⁴ cannot possibly be used as an authority for this purpose. Dedicated property is "extra commercium" as regards Muslims themselves but not as regards Muslims and third parties, or if there is statutory modification of Mahomedan law. Indeed if there was anything in this point at all the appellants would not have had to go to the length of contending that the Limitation Act did not apply to this suit.

The criminal liability cast upon persons under S. 297, I. P. C. for deliberately destroying sacred edifices with the intention of offending religious sentiment cannot have any bearing upon the point under consideration. There may be complete ownership of property by adverse possession or otherwise, but for good cause the Legislature may enact that the owner, in the interest of the public, cannot do what he likes with his own. A cow may be owned and similarly it is an offence to slaughter a cow publicly; but it cannot therefore be said that there is, by reason of this salutary provision, a duty cast upon a Muslim owner of a cow to maintain its sacred character and therefore to keep it alive and not have it slaughtered at all. We have nothing to do in this appeal with the demolition of the mosque in relation to any possible liability under the Indian Penal Code. We have not been referred to any authority for this proposition, and I would be very slow, without authority, to lay down that a building once dedicated to God retains its sacred character for all time and under all circumstances, or that it was the duty of any owner of such property to maintain the original sacred character of the building. This proposition, if accepted, must apply to all forms of

9. Subbaraya v. Chellappa, (1882) 4 Mad 315.

10. Dasami Sahu v. Param Shameshwar, (1929) 16 A I R All 315=116 I O 433=51 All 621=1929 A L J 473.

11. Jindu Ram v. Hussain, (1914) 1 A I R Lah 444=24 I C 100=59 P R 1914=147 P L R 1914.

12. Shankar Das v. Said Ahmad, (1884) 153 P R 1884.

property dedicated to God. It would apply equally to a Hindu temple. We would then get the curious and dangerous position that where Muslims have taken possession of Hindu temples dedicated to God, demolished them, and erected mosques on the sacred sites, it would be the duty of the Muslims to maintain the sacred character of the land as understood by the Hindus. If this contention were correct, the position, if such a mosque eventually came into the possession of a third religious community, apparently might be that three forms of rites might have to be performed in the same building at the same time. One thing is clear that if the general proposition was established—greatly to the detriment of the maintenance of law and order—that there could be no adverse possession of land dedicated to God and the Limitation Act did not apply, there is no mosque in this country built on the site of a Hindu temple which could not now be recovered by the Hindus. There have been many decisions of their Lordships of the Privy Council which make it clear that the doctrine of adverse possession does apply to property dedicated to God : see 36 Bom 135,¹³ 27 Bom 363,¹⁴ 27 Bom 500,¹⁵ 23 Cal 536,¹⁶ 37 Cal 885,¹⁷ 51 All 621,¹⁰ 41 Mad 124¹⁸ and 23 Mad 271.¹⁹ The law as laid down by these authorities cannot now be disputed. There can be no distinction in law, in my opinion, between different forms of land dedicated to God ; for instance there is no distinction between a mosque and its site dedicated to God and land dedicated to God for the use of that mosque. The same would apply to Hindu temples and the land dedicated thereto.

On the last point that, assuming the Limitation Act applied, a new period of limitation commenced to run from the date of the demolition of the mosque, it was argued that although all rights may have

13. *Huran Bibi v. Hinghan Bibi*, (1912) 36 Bom 135=12 I C 926=13 Bom L R 1160.

14. *Dattagiri v. Dattatraya*. (1903) 27 Bom 363=4 Bom L R 743.

15. *Saguon v. Kaji Hussein*, (1903) 27 Bom 500=5 Bom L R 303.

16. *Nilmoney Singh v. Jagabandhu Roy*, (1896) 23 Cal 536.

17. *Damodar Das v. Lakhan Das*, (1910) 37 Cal 885=7 I C 240=37 I A 147=14 C W N 889=12 C L J 110 (P C).

18. *Chidambaranatha Thambiran v. Nallasiva Mudaliar*. (1918) 5 A I R Mad 464=42 I O 866=41 Mad 124=33 M L J 357.

19. *Gnanasambanda Pandara Sannadhi v. Velu Pandaram* (1900) 23 Mad 271=27 I A 69=10 M L J 29=7 Sar 671 (P C).

been lost to the Muslims and to the mosque—as a building—by virtue of the Limitation Act, there was a right remaining in the mosque—as a juristic person—to be maintained in its original form and that therefore on its demolition a right of action arose. This argument was difficult to understand but it appears to have been based upon the argument already considered that it was the duty of any owner to maintain the sacred character of a building in his possession and, in addition, that there was a duty to maintain the building itself. We have not been referred to any authority on this point and indeed it appears to me that it is without any force whatever. When the Sikhs took possession of the mosque in 1762, limitation clearly began to run, and all rights being lost to the mosque and its worshippers at the expiry of the prescribed period of 12 years, no new act by those in possession could give a fresh cause of action. It was argued that the demolition of the mosque amounted to desecration and that this was a new act of desecration giving rise to a cause of action. From the history however of this building it is clear that from the Muslim point of view, there was complete desecration of the mosque many years ago and the demolition of the building was no more desecration than the original acts. In addition the injury to the Muslims was complete when they were dispossessed, and there cannot be after the expiry of the limitation period—all rights being lost—any further right accruing to the mosque itself, as a building or as a juristic person, or to the Muslims.

The final argument which shows that there is nothing in the contentions of the appellants is that if they thought they were right that the Limitation Act did not apply, and that adverse possession could not be obtained by the respondents, there was nothing to prevent them from suing for possession. They have not done so and the reason is obvious ; they knew the Limitation Act did apply and that therefore they could not get possession. They have tried therefore by the exercise of considerable ingenuity to attain their end by this suit for a declaration and injunction.

To sum up therefore : The personal law of the Mahomedans has been modified by the Punjab Laws Act and the Limitation Act. Mahomedan law regarding wakfs, and the lack of any rule of limitation within that law, cannot apply to this suit.

The Limitation Act and Art. 144 of the Act apply. A mosque is immovable property. Every suit is subject to the Limitation Act, and the Act applies without distinction to suits concerning both sacred and secular property; nor does it make any difference if the plaintiffs in such suits are divine or human. It therefore follows that the Muslims and the mosque at the end of 12 years' adverse possession by the Sikhs lost all rights in the land and building, including the right of worship. The Sikhs on the other hand by virtue of S. 28, Lim. Act, obtained a good title to the land and building thereon and have full rights therein as owners. The building under the circumstances cannot be held to have maintained its sacred character as a mosque, nor is there any duty cast upon the present proprietors to maintain its original sacred character or to maintain it as a building. Property dedicated to God can be alienated if adverse possession of the property is obtained and kept for 12 years. Finally there was no subsisting right in the plaintiffs at the date of suit and therefore no action lay. On these grounds therefore this appeal must be dismissed with costs and it is unnecessary for me to discuss the other points raised. I have had the advantage of reading the judgment of my learned brother Bhide upon the other points. I agree with him on all his conclusions and have nothing to add.

Bhide J.—In the vicinity of a well known Sikh Shrine called the 'Gurdwara Shahid Gunj Bhai Taru Singh' situated in Lahore City, there used to be a mosque which according to the deed of dedication relied upon by the plaintiffs in this case (vide Ex. P. 14.1) was built by one Qurban Ali and was made over by his son Falak Beg to one Sheikh Din Mohammad as a mutwalli or custodian in the year 1134 of the Hijri era, corresponding to 1722 A. D. According to the defendants the mosque or the adjacent site was subsequently the scene of massacre of thousands of Sikhs who fell victims to the religious persecution of the then Muslim Governors of Lahore. About the year 1760, when the Sikhs came into power, they took possession of the mosque and the adjacent site, and on a portion thereof erected the shrine known as Gurdwara Shahid Gunj Bhai Taru Singh referred to above, in memory of Bhai Taru Singh, one of the principal martyrs. Since then the mosque admittedly

remained in possession of the Sikhs. There is evidence on the record showing that the Sikh Holy Granth was kept in it and it was used as a place of worship for some years, but subsequently it seems to have been turned to secular uses and let out for residential purposes from time to time. Shortly after the advent of British Rule, Nur Ahmad, a descendant of Sheikh Din Mohammad the first Mutwalli of the mosque, made strenuous efforts to recover possession of the mosque and some land which was attached to it. He filed several petitions for the purpose, and also a civil suit which was fought out up to the Court of the Judicial Commissioner; but his claim was dismissed as it was found that the Sikh mahants in charge of the neighbouring Gurdwara had held adverse possession of the property for over 20 years. In 1883, one Pirshah sent a petition to the Lieutenant Governor of the Punjab on behalf of the Mahomedans for restitution of the mosque. An enquiry was again made through Sayyad Alam Shah, Extra Assistant Commissioner, but after considering his report the Lieutenant Governor refused to interfere.

No further attempt to recover the mosque was apparently made till the year 1925, when on the Gurdwara Shahid Gunj Bhai Taru Singh having been notified as a 'Sikh Gurdwara' under the Sikh Gurdwaras Act, and the adjacent property including the building of the mosque having been claimed to belong to the Gurdwara, a muslim association of Lahore, known as the Anjuman-i-Islamia, Punjab, claimed the mosque on behalf of the Mahomedan community under S. 5 of that Act. This petition was however dismissed by the Sikh Gurdwaras Tribunal on 20th January 1930 and no appeal was preferred from that decision.

There was litigation between the then mahants of the 'Gurdwara Shahid Gunj Bhai Taru Singh' and the present defendants under the Sikh Gurdwaras Act, in which the latter were successful and as a result, the Gurdwara and the appertaining properties including the mosque passed under the control of the defendants. On the night of the 7th and 8th July 1935 the Sikhs, whose title had been upheld by the Courts more than once, proceeded to demolish the building of the mosque which had become old. This however offended the feelings of the Mahomedan community and led to serious

communal disturbances followed by a public agitation for the recovery of the site of the mosque, which eventually resulted in the institution of the present suit on 30th October 1935. Plaintiff 1 in this case is the mosque itself, suing in its juristic capacity, while the other plaintiffs (2 to 18) are Mahomedans, including some minors and pardanashin ladies, claiming to have a right to pray in the mosque. The latter set of plaintiffs sued in a representative capacity on behalf of the Mahomedan community and the procedure laid down in O. 1, R. 8, Civil P. C., was complied with for the purpose. The plaintiffs did not sue for possession but dating their cause of action from the demolition of the mosque on the night of 7th and 8th July 1935 prayed for the following reliefs :

(a) a declaration to the effect that plaintiff 1 (i. e. the site of the mosque) is the site of a wakf mosque dedicated to God and that it cannot be used for any purpose, which according to Mahomedan law be against the purposes of a mosque and that the plaintiffs 2 to 18 and all other followers of Islam have a right to use the said mosque for purposes of worship without let or hindrance by any one, and

(b) consequential relief in the shape of the following injunctions : (i) that defendants should not use plaintiff 1 for any purpose which may be contrary to its sanctity and use according to Mahomedan law ; (ii) that defendants should not in any way interfere with the rights of plaintiffs 2 to 18 to worship in the said mosque, and (iii) that the defendants should be required to reconstruct that portion of plaintiff 1, i. e. the mosque, which they demolished or caused to be demolished on the night of 7th and 8th July 1935, in the same shape and form as before or in the alternative that they should be ordered to pay such amount to the plaintiffs as may be held to be sufficient for such reconstruction.

The defendants resisted the suit on various grounds, including limitation and *res judicata*. The issues framed in the case were as follows :

1. Is plaintiff 1 a juristic person, capable of suing through Maulana Mohammad Ahmad as next friend ? O. P.

2. Does a suit for declaration lie, when plaintiffs 2 to 18 are not in possession of the subject-matter of the suit ? O. P.

3. Is the suit barred : (a) by decision of the Sikh Gurdwaras Tribunal, dated 20th January 1930, (b) by provisions of the Gurdwaras Act,

(c) by previous decisions between 1850 and 1883 ? O. D.

4. Was the notification under the Gurdwaras Act secured by fraud and deceit ? If so, what is the effect ? O. P.

5. Is the subject-matter of the suit waqf, that is a mosque, dedicated for prayer ? O. P.

6. (a) Was the subject-matter of the suit used as a mosque by Muslims for prayers prior to July 1935 ? O. P. (b) If the dedication is proved, but the subject-matter of the suit was not actually used for prayers up to 1935, what is the effect on the suit ? O. P.

7. Is the suit within time ? O. P.

8. Have the defendants acquired a title to the property in dispute by adverse possession or otherwise ? O. D.

9. Are the plaintiffs entitled to : (1) right of worship at the subject-matter of the suit ; and (2) mandatory injunction for reconstruction of the buildings on the site in suit ? O. P.

The learned District Judge in dismissing the suit summarised his findings on the above issues as follows :

1. The "Masjid Shahid Ganj" is a juristic person capable of suing through Maulana Mohammad Ahmad as next friend.

2. A suit for a declaration does lie ; but

3. The suit is barred : (a) by decision of the Sikh Gurdwaras Tribunal, dated 20th January 1930 ; (b) by the provisions of the Gurdwaras Act, though not by (c) the decisions between 1850 to 1883.

4. The notification under the Gurdwaras Act was not secured by fraud and deceit.

5. The subject-matter of the suit was in its origin waqf, that is, a mosque originally dedicated for prayers in 1722 ; but

6. It has not been used as a Muslim place of worship, since possession and control passed to the Sikhs, about 1762.

7. The plaintiff's suit is not within limitation.

8. The defendants have acquired from the mahants in possession from about 1762 to 1934 a title by adverse possession.

9. The plaintiffs are not entitled to the reliefs claimed.

From the above decision the present appeal has been preferred. The defendants had disputed in the Court below that the demolished building was ever used as a mosque (*vide* Issue 5), but their learned counsel did not challenge before us the findings of the learned District Judge on the point, viz that the building was constructed by one Qarban Ali and was dedicated as a mosque in 1722 A. D. and that one Sheikh Din Mohammad was appointed as its first custodian or mutwalli, as shown by the deed of dedication Ex. P-14/1. The learned counsel for the defendants also did not dispute the finding on Issue 1 that plaintiff 1—the mosque—could sue as a

'juristic person'. The plaintiffs had attempted to prove in the Court below that in spite of the long possession of the Sikhs, Mahomedans had occasionally exercised their right to pray in the mosque (*vide* Issue 6) but the evidence on the point was meagre and wholly unconvincing and the point was not pressed by their learned counsel before us. The decision of the appeal must therefore proceed upon these findings viz. that the building in question was originally constructed and dedicated for being used as a mosque about the year 1722 A. D., that the Sikhs had been in possession of it for over 150 years and that the Mahomedans had not exercised their right of saying prayers in the mosque during this long period.

On the above findings, the first and foremost difficulty in the way of the appellants is that of limitation, and consequently, the main arguments addressed to us centred round Issues 7 and 8 which relate to this question. The position taken up by the learned counsel for the appellants at the outset was that according to Mahomedan law, property dedicated as waqf vests in the Almighty, is 'extra commercium' and retains its character as 'waqf' for all time. It was contended that in view of these characteristics, 'waqf' property is not subject to the law of limitation. On behalf of the defendants, the fact that according to Mahomedan law, pure and simple, 'waqf' property has the above characteristics was not disputed; but it was contended that the law governing the decision of the point is not pure Mahomedan law but that law as modified by statute and that suits relating to waqf property are subject to the operation of the law of limitation like any other suit.

An examination of the above question raises the following points for consideration: (1) To what extent is Mahomedan law applicable to the decision of the point? (2) If the law of limitation is applicable, what is the section or article of the Limitation Act which applies to this case? (3) Is the suit within time according to the law applicable?

As regards the first point, the law is to be found in S. 5, Punjab Laws Act, which lays down that in questions regarding succession and certain matters including any religious usage or institution, the rule of decision shall be any custom applicable to the parties, if one is proved, and otherwise the Mahomedan law in cases where

the parties are Mahomedans, and the Hindu law in cases where the parties are Hindus, except in so far as such law has been altered or abolished by legislative enactment or is opposed to the provisions of the Act or has been modified by any custom. It will thus appear that even when both the parties to the suit are Mahomedans (in the present case the defendants are not governed by Mahomedan law), the Mahomedan law applies only in so far as it has not been altered or abolished by legislative enactment. Now the Mahomedan law does not admittedly place any time limit on the enforcement of claims. But the Limitation Act applies to all suits without any reservation in favour of claims based on Mahomedan law. In fact the Limitation Act specifically provides for limitation in respect of certain claims which are purely governed by Mahomedan law (see e. g. Arts. 103, 104, 125 etc., of Sch. 2, Lim. Act). There are also special provisions which prescribe periods of limitation in connexion with Mahomedan religious endowments along with Hindu and Buddhistic endowments (see Art. 134-A, 134-B of Sch. 2, Lim. Act). It cannot therefore be disputed that the Mahomedan law has been altered by the law of limitation and even waqf property is not outside its scope. The Limitation Act is a comprehensive enactment laying down specific periods of limitation for different kinds of suits and when no specific section or article is applicable, the residuary Art. 120 will ordinarily apply. S. 10, Lim. Act lays down that limitation shall not apply in the case of certain suits against trustees etc. relating to religious endowments; but it is not disputed that the present suit does not fall within the scope of that section. In support of the contention that the present case should be decided according to the principles of Mahomedan law, pure and simple, reliance was placed on behalf of the appellants on 20 Cal 116²⁰ at p. 137. That was a case decided by a Full Bench of the Calcutta High Court in 1892 and all that was laid down therein was that questions relating to the validity of dispositions made by Mahomedans should be determined according to the Mahomedan law and that this had been the uniform practice of that Court from the year 1798 onwards. No

20. *Bikani Mia v. Suk Lal Poddar*, (1893) 20 Cal 116 (F B).

question of limitation was involved and that ruling is certainly no authority for the proposition that suits relating to waqf property are not subject to the law of limitation. Besides in the Punjab we have a positive enactment of the Legislature laying down the extent to which the Hindu or Mahomedan law is applicable in this province and S. 5 of that Act lays down, as stated above, that even when the parties are Mahomedans, that law will apply only so far as it is not altered by statute. S. 3, Limitation Act, lays down that :

Subject to the provisions contained in Ss. 4 to 25 (inclusive) every suit instituted, appeal preferred and application made after the period of limitation prescribed therefor by Sch. 1 shall be dismissed, although limitation has not been set up as a defence.

There being no provision in the Limitation Act, exempting suits relating to 'wakf' properties from its operation, the present suit must be held to be subject to the rules of limitation prescribed in the Limitation Act. The learned counsel for the appellants admitted his inability to cite any direct authority laying down that a suit of the present description relating to what was once 'wakf' property is not governed by the Limitation Act. He referred to a number of authorities in support of his contention that, according to Mahomedan law 'wakf' property is 'extra commercium' and retains its character as such permanently : viz. 38 P L R 182,⁴ 27 P R 1913,²¹ 2 M I A 390,²² 1906 A W N 159,²³ 26 Bom 198,²⁴ A I R 1930 Oudh 245,²⁵ 35 Mad 681³ and 100 I C 241.²⁶ But none of these rulings really appears to have any bearing on the question of limitation before us. In 38 P L R 182,⁴ a decision by their Lordships of the Privy Council on which great reliance was placed, a piece of land, which was a portion of a grave-yard was sold by one Mt. Musahib Khanam to the defendant Ballabhadass, professing to have derived

her title to it from her grandfather Kale Khan. The Mahomedans of Lucknow sued to establish that the land was a part of a grave-yard and as such inalienable. The main point for decision in the case was whether the land in dispute was a portion of a grave-yard or the private property of Kale Khan and the chief evidence on the point was that of the Khasra or the 'revenue record' of 1868. In this Khasra the land was described as a 'grave-yard' (qabarastan) and this entry raised a presumption in favour of the plaintiffs. Kale Khan was shown in the Khasra as the owner of the land, but he had been also described as a 'Sunni Faqir' and his occupation given as 'service,' and their Lordships, after taking into consideration all the entries in the Khasra and the other relevant facts, came to the conclusion that Kale Khan was merely a manager or custodian and not the real owner. On the basis of this finding it was held that the land was inalienable and the plaintiff's suit was decreed. The land had been sold only in 1928, shortly before the suit and no question of title by adverse possession of the alienee arose in the case. Kale Khan, having been found to be only a manager, could not, of course, claim any adverse possession.

It will thus appear that the decision of their Lordships in the above case lends no support whatever to the view that 'wakf' property being 'extra commercium' could not be adversely possessed. When it is said that 'wakf property' is 'extra commercium' according to Mahomedan law all that is meant is that, such property cannot be dealt with or alienated like ordinary property according to that law—the reason apparently being that according to that law human ownership in such property ceases and it vests in the Almighty. This feature of 'wakf' or dedicated property is not peculiar to Mahomedan law and the position as regards dedicated property is practically the same under Hindu law, as will be shown hereafter. But this does not mean that no one can acquire a valid title to dedicated property by adverse possession over twelve years. The title of a person claiming such adverse possession over dedicated property rests not on Mahomedan or Hindu law but on the law of limitation and prescription as it prevails in British India and if personal law has been modified by the statute of limitation (as shown above), the Courts in

21. *Court of Wards v. Ilahi Baksh*, (1913) 40 Cal 297=17 I C 744=40 I A 18=27 P R 1913 (P C).

22. *Jewun Doss Sahoo v. Shah Kubeeroodeen*, (1897-41) 2 M I A 390=6 W R 3=1 Suther 100=1 Sar 206 (P C).

23. *Salig Ram v. Amjad Khan*, (1906) A W N 159=3 A L J 546.

24. *Ram Rao v. Rustum Khan*, (1902) 26 Bom 198=3 Bom L R 717.

25. *Abdul Ghafoor v. Rahmat Ali*, (1930) 17 A I R Oudh 245=122 I C 326=7 O W N 882.

26. *Shah Mahomed Naim Ata v. Mahomed Shamshud-din*, (1927) 14 A I R Oudh 113=100 I C 241=2 Luck 109=4 O W N 116.

British India have no option but to give effect to that statute. The other rulings cited on behalf of the appellants on this question are also of no assistance to the appellants but may be noticed briefly.

27 P R 1913²¹ was a Privy Council ruling similar in some respects to 38 P L R 182.⁴ In that case also the entry in the revenue records to the effect that the land in suit was a 'qabarastan' (grave-yard) was held to be sufficient to show that it was so and one Makhdum Husain Shah whose name was entered in the column of 'owners' was found to be a mere trustee or a custodian. No question of adverse possession was raised, but it is significant that the portions of the 'qabarastan' which had been already sold or encroached upon were excluded from the scope of the suit. 2 M I A 390²² was an old case decided by their Lordships of the Privy Council in 1840. In that case the wakf property was held to be exempt from the law of limitation, but this decision was based on a special regulation (*viz.* Regn. 2 of 1805) which was then in force. In 1906 A W N 159,²³ on which some stress was laid by the learned counsel, the property in dispute which had been confiscated by Government was found to be a grave-yard and it was therefore held that the Government could acquire no better rights than those of the original owners. For, Government could only confiscate such rights as the original owners had, and nothing more. In 26 Bom 198,²⁴ the land in dispute was found to be a grave-yard, which though disused for some years, retained its character as such and the Mahomedans had been in the habit of performing religious services at the tombs thereon. It was remarked:

The ownership of the soil may be vested in others; but the permission to bury in the land, granted as it must be subject to the custom of the community, carries with it the right to perform all customary rites.

It will thus appear that the decision was based on the permission for burials granted by the owners and local custom. In A I R 1930 Oudh 245,²⁵ a Single Bench ruling of the Oudh Chief Court, the question of adverse possession was raised, but no such possession was apparently proved and the point was not discussed. In 35 Mad 681,³ it was said that all proprietary rights of men are annihilated when property is dedicated and vests in God and the same was also held in 100 I C 241,²⁶ but in neither of

these rulings was any question of adverse possession by a third party involved.

It will thus appear that there is no warrant either in the Limitation Act or the rulings cited for the proposition of law contended for by the learned counsel for the appellants, *viz.* that 'wakf' property is not subject to the law of limitation. On behalf of the respondents, on the other hand, A I R 1935 Oudh 425⁵ and A I R 1936 Oudh 207⁶ were cited. The former was a suit for possession of a portion of a wakf property (a grave-yard) governed by Mahomedan law, but it was held to be barred under Art. 142, Limitation Act. In the latter case, which was of a similar type, it was remarked that the plaintiff could recover only such portions of the grave-yard over which defendants' title had not been perfected by adverse possession. Both these suits were apparently between Mahomedans and related to wakf property and yet they were held to be governed by the ordinary law of limitation. In 50 Cal 329,²⁷ a mutwalli had mortgaged a portion of a wakf property for a purpose unconnected with the wakf and in 1906 a final decree for foreclosure and possession had been obtained. In 1913, the successor of the mutwalli brought a suit to recover the property. Their Lordships of the Privy Council held that the suit was governed by Art. 142 or 144, Limitation Act, but was within time, as the late mutwalli had been in possession within 12 years. 56 All 111²⁸ is another ruling of their Lordships of the Privy Council in which wakf property was held to be governed by the law of limitation.

I have confined myself above to cases relating to wakf property under the Mahomedan law, because it was argued that the inalienability and permanent character of wakf property were peculiar features of Mahomedan law and could not be affected by the law of limitation. As a matter of fact these features are not really so peculiar to Mahomedan law. It was pointed out in 27 Mad 435²⁹ (at p. 450) that the "inalienable character of land consecrated to religious purposes has been generally

27. *Abdur Rahim v. Narayan Das* Aurora, (1929) 10 A I R P C 44=71 I C 646=50 I A 84=50 Cal 329 (P C).

28. *Allah Rakhi v. Shah Mahomed Abdur Rahim*, (1934) 21 A I R P C 77=147 I C 887=61 I A 50=56 All 111 (P C).

29. *Vidyapurna Tirtha Swami v. Vidyanidhi Tirtha Swami*, (1904) 27 Mad 435=14 M L J 105.

recognized under the Roman, Christian and Mahomedan systems as well as under Hindu law". In 12 Bom 247³⁰ (at p. 264) it was said that property dedicated to a pious purpose is by Hindu law as well as by Roman law placed 'extra commercium': In 6 Bom 546³¹ (at p. 552) it was remarked that grants made to a Hindu temple are permanent, irresumable and substantially inalienable. It will thus appear that there is no material difference in this respect in the character of property dedicated for religious purposes whether under Mahomedan law or other laws. There are many reported cases including several decisions of their Lordships of the Privy Council, wherein properties dedicated to Hindu temples or idols have been held to be subject to the law of limitation and prescription: see e. g. 23 Madras 271,¹⁹ 32 Cal 129,³² 37 Cal 885,¹⁷ 44 Mad 831,³³ 57 All 159,³⁴ A I R 1936 P C 183³⁵ etc. It is thus perfectly clear that the law of limitation applies to property whether sacred or secular.

The learned counsel for the appellants next contended that a mosque, being a place of worship had a peculiar sanctity attached to it and such property could not lose its character by any human act such as adverse possession by a stranger. No authority was cited in support of this contention and the only argument advanced was that the cases cited for the respondents were distinguishable as they did not relate to "mosque". But the Mahomedan law itself does not appear to make any distinction so far as the incidents of "wakf" property are concerned as between a "mosque" and other wakf properties. Any property which is "wakf"—whether it is a mosque or something else—is according to that law "extra commercium" and its ownership vests in God. There is therefore no reason why a "mosque" should not

be subject to limitation and prescription when other "wakf" properties have been held to be so as shown above. The Limitation Act certainly does not exempt wakf properties from its operation. Not only this, but as pointed out already, there are distinct provisions in it relating to "Muhammadan religious endowments"—which expression presumably includes "mosques" (*vide* Arts. 134-A and 134-B of Sch. 2 and S. 10 of the Act). In support of the contention that a "mosque" retains its character for all time, reliance was next placed on certain rulings relating to "grave-yards" wherein accused persons were convicted under S. 297, Penal Code, although the graves were on properties owned by the accused persons or where the accused persons had committed alleged criminal acts with the permission of the owners e. g. 18 All 395,³⁶ 40 Cal 548³⁷ and A I R 1932 Cal 459.³⁸ These rulings are based upon the language of S. 297, Penal Code, and appear to have really no bearing on the question of limitation before us. The mere fact that a person may be guilty of committing an offence under S. 297, Penal Code with respect to graves on land owned by himself, cannot show that adverse possession can never be obtained over land covered by graves and that a "grave-yard" must retain its character as such for all time. So long as the graves stand, even the owner of the land underneath will be guilty, under S. 297, Penal Code, if he commits any act falling within the purview of that section with the requisite knowledge or intention. For the purposes of the criminal offence under S. 297, Penal Code, the question of ownership may not be material but these rulings cannot support the proposition that a "grave-yard" must remain a grave-yard for all time and that private ownership over it cannot be acquired by adverse possession. For example, if a person builds on land covered by graves, and no action is taken for over 12 years, there seems to be no reason why that land should not become his private property. This was, in fact, the view taken in A I R 1935 Oudh 425⁵ and A I R 1936 Oudh 207⁶ already referred to.

30. Manohar Ganesh v. Lakshmiram Govindram, (1888) 12 Bom 247.

31. Collector of Thana v. Hari Sitaram, (1881) 6 Bom 546 (F B).

32. Jagadindra Nath Roy v. Hemanta Kumari Debi, (1905) 32 Cal 129=31 I A 203=8 CWN 809=8 Sar 698 (P C).

33. Vidya Varuthi Thirtha Swamigal v. Baluswami Ayyar, (1922) 9 A I R P C 123=65 I C 161=48 I A 302=44 Mad 831 (P C).

34. Mahadeo Prasad Singh v. Karia Bharthi, (1935) 22 A I R P C 44=153 I C 1100=62 I A 47=57 All 159 (P C).

35. Daivasikhamani Ponnambala Desikar v. Periyannen Chetti, (1936) 23 A I R P C 183=162 I C 465=63 I A 261=59 Mad 809 (P C).

36. Queen-Empress v. Subhan, (1896) 18 All 395=1896 A W N 119.

37. Jhulam Sain v. Emperor, (1913) 40 Cal 548=18 I C 677=17 C W N 534=14 Cr L J 117.

38. Abdul Kadar v. Abdul Kasim, (1932) 19 A I R Cal 459=1932 Cr O 449=137 I C 872=33 Cr L J 517=36 C W N 544.

The learned counsel for the appellants tried next to find some support for his argument from the analogy of English law and drew our attention to the law relating to consecrated property as summarized in Vol. 11 of Halsbury's Laws of England, pp. 860-864. It was urged that when a church is consecrated it retains its character "whoever may be the actual owner and whatever may be the nature of his tenure". Attention was also drawn to (1869) 4 Q B 407⁸ in which Lord Cockburn remarked :

.... Where ground is once consecrated and dedicated to sacred purposes, no Judge has power to grant a faculty to sanction the use of it for secular purposes and nothing short of an act of Parliament can divest consecrated ground of its sacred character.

But neither in the summary of English law as given in the paragraph in Halsbury's Laws of England referred to above nor in (1869) 4 Q B 407⁸ was there any reference to the question of adverse possession of third parties or limitation, and consequently the above remarks which are of a general character and based on English Ecclesiastical law can be of no more assistance to the appellants on the question of limitation than the general character and incidents of wakf property as laid down in Mahomedan law. Lastly, it was contended that as the 'mosque' was suing as a 'juristic' person and as the building of the mosque is the corpus of such a juristic person, it must be looked upon as incorporeal and eternal and not as ordinary 'immovable property,' and that it was, therefore, not subject to the law of limitation and prescription laid down in Art. 144 and S. 28, Limitation Act. This argument again was not supported by any authority and is difficult to follow. So far as I can see, it appears to be founded on some confusion of ideas. It is difficult to see why the building of a mosque or its site cannot be looked upon as 'property' merely because the 'mosque' has been held to be capable of suing or being sued as a 'juristic' person. The expression 'juristic' person (or its equivalent 'legal person') simply means any subject-matter to which the law attributes a legal or fictitious personality (*cf.* Salmond's Jurisprudence, 9th Edn. p. 425). The necessity for the attribution of such a personality in the case of a mosque arises from the fact that Mahomedan law recognizes the validity of gifts of property in favour of mosques and consequently a mosque can become a holder of property

(*cf.* Tyabaji's Mahomedan Law, Edn. 2 Para. 363; Ameer Ali's Mahomedan Law, Edn. 4 Vol. 1 p. 397 and Abdul Rahim's Mahomedan Jurisprudence p. 218). Hindu religious institutions have also been held to be 'juristic persons' in similar circumstances and for similar reasons: *see* 44 Mad 831³³ at p. 839, a decision of their Lordships of the Privy Council. As a holder of property, a mosque must have a status to take legal action to protect such property and consequently it is found convenient for the purposes of law to look upon a mosque as a 'juristic' or 'legal' person capable of suing and being sued. But when the law attributes such a personality to a mosque, it attributes it not to the building of the mosque, but to the mosque as an institution i. e. as a religious foundation. For, the building used as a mosque at a particular time may fall down and may be replaced by a new one; but the properties gifted in favour of the mosque will continue to be attached to the mosque as an institution. The learned counsel for the appellants were not able to cite a single authority in support of their contention that the mosque, as a 'juristic person' is identical with the building of the mosque. On the other hand, 59 P R 1914¹¹ and 153 P R 1884,¹² which were cited on behalf of the appellants go to show that the mosque conceived as a 'juristic' person is the religious foundation or the institution and not the building or the 'brick and mortar' of which it consists.

In 153 P R 1884¹² it was remarked :

As to the second point, we are of opinion that though theoretically 'wakf' property belongs to no human owner, nevertheless a mosque—as a concrete example of 'wakf'—is an institution, and its possession is legally maintained by its lawful guardian for the time being; in virtue of his position, the guardian can resist trespass, recover debts, make purchases and mortgages all in virtue of the right which resides in the institution. In the same way we think the mosque, as an institution, might acquire an easement by prescription; and that being so, we cannot think of any rule or principle by which we could deny to the mosque (as an institution) the same right of preventing strangers approaching its walls by the exercise of a right of pre-emption, as other house-holders have. The object of the right of pre-emption is to secure the cohesion of families, and obviate the inconvenience of a mixed or alien neighbourhood among private house-holders. Now it can hardly be denied that exactly the same convenience which results to a private house from the exercise of the right, may result also to a mosque.

We have no hesitation in deciding, on this principle, that the mosque as an institution has practically proprietary rights exercised through the guardian, and that one of the rights is to claim,

on the ground of vicinage, a right of pre-emption in the case of sales of adjoining properties. In the present case, the mosque adjoins the house sold, as much and, indeed, more than the plaintiff's house does, therefore the plaintiff has no preferential claim.

The above remarks were approved in the later ruling (59 P R 1914,¹¹ to which Shah Din J., an eminent Mahomedan jurist of this Province, was a party) and it was held that while the 'mosque' was a 'juristic' person, the building of a mosque was 'immovable property' for the purposes of giving a right of pre-emption under S. 13.1(7), Punjab Pre-emption Act 1905. It was urged, that in the case of a Hindu idol (which is also looked upon as a juristic person, in so far as it can be a holder of properties), it has been held that the idol cannot be looked upon as mere moveable chattel or property. Reference was made in this connexion to 38 Cal 284³⁹ and to 52 Cal 809.⁴⁰ In the former case, a suit was instituted, on behalf of the Thakurs (i.e. the idols) suing in their juristic capacity for removing themselves from the custody of the plaintiffs and the question was raised whether the suit was for recovery of 'moveable property' within the meaning of Art 49, Lim. Act. It was held that the suit by the Thakurs for removing themselves from the custody of the defendants to the custody of the plaintiffs 3 to 6 and being placed in their new habitation was not a suit for 'moveable' property within Art. 49 and that Art. 120 was appropriate. The facts of that case and the form of the suit were peculiar. The suit was by the idols themselves and the relief was not for the recovery of the 'idols,' but for the idols being located in a certain place. In this aspect of the question Art. 120 appears to have been held to be appropriate. For, after holding that Art. 120 applied, the learned Judges went on to remark :

In this view of the case, it is not necessary to consider whether the Thakur is to be considered a 'moveable property'.

The remarks on the latter point must therefore be treated as 'obiter'. In 52 Cal 809⁴⁰ their Lordships of the Privy Council remarked that idols cannot be regarded as mere chattel; but this remark was made with reference to the alleged right of a shebait to locate them anywhere or deal with them in any way he liked and not with reference to the general question whether

they can be treated as property for any purpose. The dispute in that case was between rival custodians and there was no question of adverse possession by a third party or of limitation involved. As pointed out by their Lordships of the Privy Council in 2 I A 145⁴¹ at p. 152 it is only in an ideal sense that a Hindu idol is looked upon as a "juristic" person. That idea must be therefore kept distinct from the idea of an idol, as a physical object. In Gour's Hindu Code, in his commentary on S. 199, the learned author remarks (*vide* Para. 2072): "An idol is treated by Hindu law, both as a juridical person and as property". In 4 Mad 315,⁹ it was held that idols were "property" in the eye of law. In 51 All 621¹⁰ at p. 628, it was remarked that adverse possession can be obtained not only against idols, but over the idols themselves.

The contention of the learned counsel for the appellants that a mosque as a juristic person cannot be looked upon as "immovable" property in law would seem to lead to the absurd result that no protection could be claimed for the mosque against torts or crimes relating to property. As stated already, the contention of the learned counsel on this point is not supported by any authority whatever and is opposed to the view taken in 153 P R 1884¹² and 59 P R 1914.¹¹ If we keep clear in our minds the two distinct notions, viz. the mosque as an institution and the mosque as a building (which is only intended to serve to carry out the purpose of the institution), there is no difficulty in seeing the fallacy underlying the argument that the mosque being a juristic person is not "immovable property". The mosque as a "juristic" person is, of course, a "person" (though a fictitious one) and not "property" at all. The "juristic person" is the institution and it is the institution which is the holder of properties attached to it—including the building of the mosque itself. In 41 Cal 57,⁴² it was held that where a temple had been washed away by the river and a new one had been erected elsewhere, the religious foundation continued and the endowed properties became automatically attached to the new temple.

39. Bali Panda v. Jadu Mony Sontra, (1911) 38 Cal 284=7 I C 475=15 C W N 96.

40. Pramatha Nath Mullick v. Pradyumna Kumar Mullick, (1925) 12 A I R P C 139=87 I C 305=52 I A 245=52 Cal 809 (P C).

41. Prosunno Kumari Debya v. Golab Chand Baboo, (1874) 2 I A 145=14 Beng L R 450=23 W R 253=3 Suth 102=3 Sar 449 (P C).

42. Bejoy Chand Mohatap v. Kali Pada Chatterjee, (1914) 1 A I R Cal 200=20 I C 78=17 C W N 1013=41 Cal 57=18 O L J 347.

In the present instance also although the building of the "Masjid Shahid Ganj" has been demolished, legally it is possible to conceive of the mosque as an institution to be subsisting but this is only in an ideal sense. It is only in this ideal aspect, that the present suit, which has been lodged on behalf of the mosque as a "juristic" person may be held to be maintainable. But this conception can be of no practical importance when the mosque does not possess or cannot legally claim any property as shown below.

The question whether the "juristic" person suing in this case can get the reliefs claimed, must depend in the first place on the question whether the suit is within time. For, "juristic" persons like other plaintiffs are subject to the law of limitation and enjoy no special privilege in this respect. There are several decisions of their Lordships of the Privy Council in which properties owned by Hindu idols as "juristic" persons were held to be subject to the law of limitation and adverse possession: see e.g. 32 Cal 129³² and 37 Cal 885.¹⁷ I am therefore unable to see force in any of the grounds on which it is claimed that the present suit is not governed by the law of limitation and hold that the contention must be overruled. The next point for consideration is the rule of limitation governing the case. The plaintiffs have sued for a declaration and certain consequential reliefs. The suit being on behalf of the mosque as a "juristic" person (i. e. as a religious institution) and also on behalf of the whole of the Mahomedan community, the plaintiffs ought to have sued for possession as will be shown hereafter. But leaving that point for the moment, the declaratory suit as framed would appear to be governed by Art. 120, Lim. Act, which prescribes a period of six years. The starting point for limitation would prima facie be the time when the Sikhs took possession of the mosque sometime about 1760 A. D., and the rights of the institution as well as of the Mahomedan community were denied.

The appellants however contended that the cause of action accrued to them when the mosque was demolished in July 1935. This contention of the appellants is based on the assumption that the building of the mosque retained its character as a mosque till the date of the demolition. The appellants had alleged that they had exercised their right of saying prayers in the building

from time to time till its demolition; but as already stated this allegation was not substantiated. The first question for consideration therefore is whether the mosque retained its character as such, in the hands of the defendants. The defendants contended that the ownership of the building vested in them long ago by "adverse possession" over 12 years since the Sikhs took possession of the building, sometime about the year 1760 A. D. Considering the circumstances under which the property was taken by the Sikhs, there can be no doubt that their possession must have originated either in an act of State or trespass. There is no direct evidence as to how the building was used from 1760 up to 1853, when Nur Ahmad instituted his suit for possession of the mosque. But it is scarcely likely that the Mahomedans would have been allowed to have access to the building for any purpose whatever during this period. There is moreover direct evidence to show that in 1853, it was found that the Sikhs had held adverse possession of the property for over 20 years (*vide* petition of Nur Ahmad, dated 26th March 1853, marked as Ex. D-35, and judgments in the suits instituted by him marked as Exs. D-40, D-41 and D-42). It may therefore be safely taken that the defendants had been in adverse possession of the mosque for over 12 years before 1853, and consequently by the combined operation of S. 28 and Art. 144, Lim. Act all rights of the persons entitled to possession of the mosque or of any interest therein were extinguished. The juristic person, i. e. the "institution" was certainly entitled to claim possession of the building of the mosque on behalf of all interested in it when the Sikhs took possession of it and by their adverse possession over 12 years the rights of the institution in the building were lost. Further the Sikhs having remained in possession for over 12 years, the ownership of the property vested in them (*cf.* 3 Cal 224,¹ 3 All 435,² 4 Cal 699,⁴³ etc.). It follows therefore that as the Mahomedans had no rights of any kind left in the building the demolition of the building in July 1935 could give the appellants no cause of action to sue for the reliefs claimed. In this aspect of the question, the defendants' refusal to allow the Mahomedans to pray on the site of

43. Goluck Chunder v. Nundo Coomar Roy, (1879) 4 Cal 699=3 O L R 450.

the mosque could not constitute a "continuing wrong" within the meaning of S. 23, Lim. Act. For when all rights of Mahomedans in the mosque were extinguished and the Sikhs became the owners of the building, the "right to pray" in the mosque was also extinguished and in refusing that right to the plaintiffs the defendants cannot be held to be guilty of any wrong, much less a "continuing" one. 31 P R 1917⁴⁴ cited on behalf of the appellants is clearly distinguishable, as the mutwalli in that case was in lawful occupation of the hujra and it was only his wrongful user of the place as private residence that was complained of. Consequently, each act of wrongful user was held to give a fresh cause of action in that case.

It is significant that the appellants have chosen to sue only for a declaration of their rights and certain mandatory injunctions. No satisfactory explanation was given as to why the appellants did not sue for possession, if wakf property was immune from the law of limitation as claimed by them. Plaintiff 1 in the case is the mosque suing as a juristic person, while the remaining plaintiffs are suing on behalf of the whole of the Mahomedan community. The position of a juristic person is not that of a minor (*see* 32 Cal 129³² and A I R 1932 Mad 328⁴⁵ at p. 333) and it is doubtful if the suit was properly instituted through S. Mohammad Ahmad as a "next friend". For, this gentleman is admittedly not a mutwalli and has no particular connexion with the mosque. But even assuming that the suit on behalf of the 'juristic person' was properly instituted through a "next friend", there seems to be no reason whatever why the 'juristic' person should not have sued for possession. The argument that the 'juristic person' being the mosque, could not sue for its own possession is obviously fallacious; for as pointed out before, the 'juristic' person is the religious institution and not the building of the mosque and the institution was therefore clearly entitled to claim possession of the mosque or its site for the benefit of all persons interested in the institution. As regards the other plaintiffs also, although they may not be individually entitled to claim possession, the suit being on behalf

of the whole of the Mahomedan community, they could have sued for possession (*see* 158 I C 916,⁴⁶ 71 I C 463,⁴⁷ and the remarks of their Lordships of the Privy Council as regards the proper relief in A I R 1936 P C 83⁴⁸ at p. 89). The possession of the defendants being unlawful according to the allegations of the plaintiffs, this relief was clearly open to them. In the circumstances, it seems to me that it was not even open to the plaintiffs to sue for a mere declaration and injunction as they did and the suit was liable to be dismissed on this short ground. According to S. 42, Specific Relief Act, it is not permissible to sue for a mere declaration when further relief in the shape of possession is open to a party. Again, according to S. 56, Cl. (1) of the same Act, no relief by way of injunction (which is purely discretionary) can be granted, when an equally efficacious relief could be obtained by other usual modes of proceeding. It is well established that when it is open to a person to sue for possession, he cannot be granted any relief in the shape of a mere injunction (*see* 24 I C 199⁴⁹ and 33 Mad 542⁵⁰).

The plaintiffs seem to me to have sued for a mere declaration and injunction owing to their consciousness that a suit for possession would be barred by time. But they cannot circumvent the law of limitation, by merely suing for an injunction, when they could have sued for possession (*see* 13 Mad 445⁵⁰). As already stated, all rights of the plaintiffs were extinguished long ago by the operation of S. 26 and Art. 144, Lim. Act, and the present suit must, therefore, be held to be hopelessly barred. In the end, I may refer to the rather curious argument on behalf of the appellants that the mosque retained its sacred character in the hands of the defendants, although the plaintiffs may not be entitled to recover possession owing to lapse of time. It was contended that a duty was cast on the Sikh defendants, who were in possession, to maintain the building intact owing to its sacred character and,

46. Muhammad Abid v. Haji Baksha, (1936) 23 A I R Oudh 133=158 I C 916=1935 O W N 1149.

47. Rengaswami Nayudu v. Krishnasami Aiyar, (1928) 10 A I R Mad 276=71 I C 463=44 M L J 116,

48. Bhramar Lal Banduri v. Nanda Lal, (1915) 2 A I R Cal 23=24 I C 199=18 C W N 545.

49. Rathnasabapathi Pillai v. Ramasami Aiyar, (1910) 33 Mad 452=5 I C 630=20 M L J 301.

50. Kanakasabai v. Muthu, (1890) 13 Mad 445.

44. Muhammad Ahmad v. Muhammad Fazul, (1917) 4 A I R Lah 160=39 I C 116=31 P R 1917.

45. Periyanan Chetty v. Govinda Rao, (1932) 19 A I R Mad 828=187 I C 487=62 M L J 496.

therefore, the demolition of the building in July 1935 by the defendants gave a fresh cause of action to the plaintiffs—or at any rate to plaintiff 1, viz. the mosque, as a 'juristic' person. This argument appears to be based partly on a misconception as regards the true nature of a 'juristic' person and partly on the assumption that the building retained its sacred character even when the rights of Mahomedans in it were lost and title had passed to strangers.

As regards the first point, it has been already pointed out that the 'juristic' person in this case is the institution and not the building of the mosque. The mere fact that the mosque's right to sue as a 'juristic' person was admitted by the defendants does not, therefore, involve any admission that the building of the mosque retained its character as a mosque and was still sacred when it was demolished in 1935. The learned District Judge has, no doubt, found that the building was originally erected as a mosque; but he has also found that the title thereto had passed to the defendants long ago by adverse possession. His finding is therefore of no assistance to the appellants. The essential character of a 'mosque' consists in its being a place of worship for the use of Mahomedans; but the Mahomedans had been denied, and had lost, their right to pray in it long ago. The mere fact that the building was referred to in some comparatively recent documents as a 'mosque' is of no significance whatever, as the description of the building must obviously be attributed to its old associations. There is ample evidence on the record to show that the building had been used by the Sikhs for years for secular purposes.

The contention that the mosque retained its sacred character in spite of its adverse possession by the defendants was not supported by any authority and seems to be devoid of any force. The position taken up by the appellants that waqf property being 'extra commercium' retains its character for all time and is not subject to the law of limitation, has been already shown to be wholly untenable. The cases relating to Mahomedan grave-yards on which again reliance was placed in this respect (viz. 18 All 395,³⁶ 40 Cal 548³⁷ and A I R 1932 Cal 459³⁸) have also been dealt with already. The decision in these cases, as pointed out before, is based on the wording of S. 297, I. P. C. The mere fact that

a person may be guilty of committing an offence under S. 297, I. P. C., with respect to a grave on his own land, cannot show that the land underneath the grave will always remain sacred. In the case of a grave it is the presence of the remains of the dead body that makes the grave sacred. Consequently the grave will be considered to be sacred so long as the remains of the dead body are enshrined in it. But if the grave is dug up and the land is built upon, it cannot be said that the land will still remain sacred for ever. Similarly the building of a mosque cannot be considered to be sacred, unless it retains its essential characteristics as a mosque, i. e. unless the Mahomedans have a right to say their prayers therein. So long as the Mahomedans have such a right, even a non-muslim in possession of it, may be bound to respect it and may be found guilty if he commits any act falling within the purview of S. 297, I. P. C. But once this right is lost and the title passes to a stranger as in this case, it is difficult to see on what possible grounds the building of the mosque could be considered to be sacred.

In the present instance I do not see how the defendants could be considered to have had when they demolished the mosque in 1935 the requisite knowledge or intention even for the purpose of an offence under S. 297, I. P. C., as they had been in possession over 150 years, had peaceably used the building for secular purposes, and their title also had been upheld by Courts ever since 1853. It is however unnecessary to go into that question for the purposes of this appeal. All that need be considered for the purpose of the argument under discussion is whether the demolition of the building of the mosque in July 1935 could constitute a "tort" and give any cause of action to the plaintiffs. It seems to my mind, perfectly clear that when the Mahomedans had lost all rights in the building by adverse possession long ago and title had passed to the Sikhs, the building could no longer be held to be a 'mosque' in the true sense of the term and was therefore not sacred. As the plaintiffs had lost all their rights, and ownership had vested in the defendants there could not be any obligation on the defendants to keep the building intact. For, there could be no such obligation in law unless there was a corresponding right in the plaintiffs. I have therefore no hesitation in holding that the demolition of the mosque in July 1935,

was not a 'tort' and gave no cause of action to the plaintiffs.

On the above findings the appeal must fail on the question of limitation but as the question of res judicata was also argued at length, I shall deal with that point briefly. The defendants' plea of res judicata was based (1) firstly, on the decisions on the petitions filed by Nur Ahmed in the years 1853-55 to recover possession of the mosque and (2) secondly on the decision of the Sikh Gurdwaras Tribunal dated 20th January 1930 on the petition filed by the Anjuman-i-Islamia, Punjab, on behalf of the Mahomedans under S. 5, Punjab Sikh Gurdwaras Act.

As regards No. (1), it appears that Nur Ahmed filed several petitions but it is sufficient to refer to one of them, viz. the one dated 23rd June 1855, which was apparently filed as a regular suit in forma pauperis and was dismissed by the Deputy Commissioner of Lahore on 14th November 1855 (see Ex. D-40). The decision of the Deputy Commissioner was confirmed by the Commissioner on appeal on 9th April 1856 and by the Judicial Commissioner on 14th June 1856 (see Ex. D-41 and D-42). It will appear from Ex. D-40, that Nur Ahmed sued for possession of the mosque with seven shops and a 'hamam' and 'khanqah,' valuing the claim at Rs. 17,000. He based his claim on the deed of dedication in favour of his grand-father by Qurban Ali. The Deputy Commissioner after considering the evidence produced and the decision in some previous cases with respect to the same property, dismissed the suit. As regards this decision, it was contended on behalf of the appellants that it cannot operate as res judicata, as it does not fall within the ambit of S. 11, Civil P. C. It was urged that the procedure followed in the suit, was not regular, e. g. no issues were framed and evidence was not recorded on oath and so forth. It was also suggested that the 'Punjab Civil Code' which was then followed, had not been duly sanctioned by the Government of India. Lastly it was contended that Nur Ahmed was suing in a private capacity on the basis of a gift by Qurban Ali and not as a mutwalli.

None of these contentions appears to have any force. The suit was apparently tried according to the procedure then in force and was taken up to the highest Court of Appeal. The mere fact that the procedure then in force was of a summary character seems to be immaterial for the purposes of

S. 11, Civil P. C. The contention that the Punjab Civil Code, which was then followed by the Courts, had not received the sanction of Government was sought to be supported by a decision reported in 64 P R 1867.⁵¹ But that ruling itself shows that the Government of India had subsequently approved of it. The fact remains that the decision of the Deputy Commissioner was upheld by the highest Court of Appeal and this raises a presumption that the suit was properly tried according to the law and procedure then in force. It is clear from the Deputy Commissioner's judgment that Nur Ahmed was suing for possession of the very mosque now in dispute. Nur Ahmed stated that the property was gifted by Qurban Ali, and the deed of dedication produced by him, which is relied on by the appellants, shows clearly that he claimed to be a descendant of the first mutwalli, Din Mohammad, and as such entitled to possession of the mosque. There can be no doubt therefore that he was not claiming the mosque as private property. As a mutwalli, Nur Ahmed was entitled to recover possession of the mosque, for the use of the Mahomedans. His suit was thus of a representative character and the decision therein must be held to be binding on all Mahomedans by virtue of Expln. VI to S. 11, Civil P. C. (*cf.* 46 All 651⁵²).

The learned District Judge has held that the decisions on the petitions and the suit of Nur Ahmed do not operate as res judicata because the claim in the present suit is not one for possession by ejectment as it was in Nur Ahmed's case, but only for a declaration that the Mahomedan community has a right of access to the mosque for purposes of prayer. But this fact alone does not appear to me to be sufficient to take the case out of the operation of S. 11, Civil P. C. S. 11 applies not only to the final decision but also to issues. The real issue in the present case was whether the mosque in question retained its character as a mosque till July 1935, when it was demolished. The decision of this issue depended upon the question whether the defendants had perfected their title by adverse possession and as a consequence the rights of all Mahomedans in the mosque had been lost. This question was also in issue in Nur Ahmed's case in 1855, and it was then

51. In re, Bick, (1867) 64 P R 1867.

52. Thakur Sri Gat Ashram Narainji v. Jaisbth Madho Acharia, (1924) 11 A I R All 504=80 I C 406=46 All 651=22 A L J 641.

found that Nur Ahmed, although he claimed to be a descendant of the original mutwalli (Sheikh Din Mohammad), was not entitled to recover possession as the Sikh defendants had been in adverse possession for over 20 years. The finding in Nur Ahmed's case that the defendants Sikhs were in adverse possession over 20 years before 1855 operates as *res judicata* and bars the agitation of the same issue in the present case. If that finding stands, it follows that the rights of the Mahomedans in the mosque in question were lost even before 1855, and the present suit must fail on that ground.

Coming to the decision of the Sikh Gurdwaras Tribunal, it seems to me that the present suit would also be barred by the provisions of S. 37, Punjab Sikh Gurdwaras Act. According to the provisions of that Act, when the mosque in question was claimed to be the property of the 'Gurdwara Shahid Gunj Bhai Taru Singh' and a notification issued with respect to the claim under S. 3 of the Act, it was incumbent on any person who claimed any right, title or interest in the property to file a petition under S. 5 of the Act to establish his claim. The present plaintiffs did not do so, but the Anjuman-i-Islamia, a well-known representative Mahomedan association of Lahore, did claim the mosque on behalf of all the Mahomedans. The claim was dismissed and the learned District Judge has held the decision to be binding on all Mahomedans. On behalf of the appellants it was however argued that (1) the Anjuman-i-Islamia was not a truly representative association (2), that the procedure laid down in O. 1, R. 8, Civil P. C., was not followed and therefore the decision of the Tribunal can bind none except the members of the Anjuman-i-Islamia.

As regards the first point, the learned District Judge has pointed out that the Anjuman-i-Islamia is an old Mahomedan association of Lahore, duly registered under the law, and one of its avowed objects is the protection of waqf properties. The association is admittedly in charge of the management of some six mosques in Lahore including the Badshahi Mosque. There is in fact no evidence worth the name on the record to show that the Anjuman-i-Islamia cannot properly be considered to be a representative Mahomedan association for the purposes of the question now under consideration. In the course of

the arguments, it was admitted before us that when a question arose recently about the restoration of an ancient mosque, which was in the possession of Government, to the Mahomedan community, the Government made over the mosque to this very Anjuman. It is therefore clear that the Anjuman is looked upon as a truly representative Mahomedan association to this day. I have therefore no hesitation in repelling the appellants' contention on this point. It was in the fitness of things that this Anjuman, which takes special interest in the protection of waqf properties, filed a petition under S. 5 on behalf of all the Mahomedans to recover the Masjid Shahid Gunj and it was probably because the Mahomedans in general had full confidence in this Anjuman that no other Mahomedan thought it necessary to file any other petition with reference to the said mosque.

The next point for consideration is the effect of the omission to follow the procedure laid down in O. 1, R. 8, Civil P. C. in connexion with the petition of the Anjuman under S. 5, Sikh Gurdwaras Act. It was argued on behalf of the appellants that in consequence of the omission to follow that procedure, the decision of the Tribunal is not binding on them. In support of this contention, reliance was placed chiefly on a decision of their Lordships of the Privy Council in 56 Mad 657,⁵³ in which it was held that in a representative suit to which O. 1, R. 8, Civil P. C. is applicable, the decision will not bind persons who are not parties to the suit unless the procedure laid down in O. 1, R. 8, Civil P. C. is strictly followed. On behalf of the respondents, on the other hand, it was contended that O. 1, R. 8, Civil P. C. was not applicable to the petition and even if it were, the Anjuman was a truly representative body and its petition having been fought out bona fide on behalf of all the Mahomedans, the decision of the Tribunal was binding on all of them. In my opinion the contention of the learned counsel for respondents is correct. The Sikh Gurdwaras Act is an enactment of a special nature and is governed by its own procedure. Sub-s. 11 of S. 12 of the Act prescribes that the proceedings of the Tribunal shall be conducted according to the Civil Procedure Code, but only 'so far as may be' and 'subject to the provisions of the Act'.

53. *Kumaravelu Chettiar v. Ramaswami Ayyar*, (1933) 20 A I R P C 183=143 I C 665=60 I A 278=56 Mad 657 (P C).

In the present instance the petition under S. 5 was not really in the nature of an independent suit but was a reply to the claim put forward on behalf of the 'Gurdwara Shahid Gunj Bhai Taru Singh' to certain properties. This claim was notified as required by S. 3 in the Gazette and also published at the head-quarters of the district, the tahsil and the revenue estate etc. as required by rules. The publication of the claim with respect to the "mosque" in the above manner was a general notice to the public and it was an invitation to everybody who claimed to have any right, title or interest in the property to establish his claim in the manner prescribed by the Act. The purpose of the notice issued in a suit under O. 1, Rule 8, Civil P. C. has thus been already served. Only the Anjuman-i-Islamia came forward to claim the Masjid. The presumption is that others did not feel interested or were content to leave the matter in the hands of the Anjuman. The Anjuman claimed the Masjid on behalf of all the Mahomedans and the Tribunal treated their claim as a representative one. There is no suggestion that there was any collusion between the Anjuman and the defendants. The claim appears to have been fought out bona fide and there is no good reason whatever why the decision of the Tribunal should not be held to be binding on all Mahomedans.

It was urged that the notification was not proper notice to the Mahomedan public as the Masjid was described as 'Gurdwara Singhian.' But as the learned District Judge has pointed out, the defendants cannot be considered to be guilty of any fraud or deception in this respect as they did not treat the building in dispute as a mosque and could not be expected to describe it as such. The mere fact that in some rent-deeds executed in favour of the mahants of the Gurdwara, the property was referred to as 'Masjid' was obviously due to its old association and not because the Sikhs still looked upon the building as a Mahomedan place of worship or treated it as such. But, when the property had to be described for the purposes of the claim under S. 3, the defendants naturally described it in the true character in which they held it. The boundaries of the property were given and its location shown in a plan. There was therefore no deception in the matter and the notification and the publication of the claim were enough to give reasonable notice of the claim of the

Gurdwara to all concerned. The very fact that the Anjuman-i-Islamia did get such notice and put forward its claim is significant in this connexion and it appears that certain other Mahomedans also claimed adjacent properties. I have therefore no hesitation in rejecting the argument that the decision of the Sikh Gurdwaras Tribunal was not binding owing to fraud in the publication of the notification under S. 3. Even in 56 Mad 657,⁵³ their Lordships of the Privy Council recognized that there may be exceptional cases where it could be shown that the omission to follow the procedure in O. 1, R. 8, Civil P. C. was a technical irregularity which caused no prejudice and the litigation having been bona fide, the previous decision would be binding. In the present instance, it seems to me in the first place that O. 1, R. 8, Civil P. C. was not strictly applicable and secondly that even if it were applicable, the case would fall in the category of the exceptional cases referred to by their Lordships of the Privy Council in 56 Mad 657.⁵³

As the claim of the Anjuman was a representative one and it was decided that the Mahomedans were no longer entitled to recover possession, the decision must be held to be binding on the present plaintiffs. It was urged that every Mahomedan has an individual right to pray in a mosque (see 7 All 178⁵⁴) but when the Tribunal held that the Mahomedans in general had no rights left in the mosque that finding must be held to be binding on all. In this aspect of the case, no question of assertion of a claim on behalf of any individual on the ground of want of knowledge etc. within the purview of S. 30 (ii), Sikh Gurdwaras Act, arises. According to S. 37 of that Act, no Court can now pass any decree or order which would be in conflict with the decision of the Tribunal on the petition of the Anjuman-i-Islamia under S. 5 of the Act. Consequently that decision bars the granting of the reliefs claimed in the present suit. In my judgment the appeal fails on all the grounds urged before us and must therefore be dismissed with costs.

Din Mohammad J.—(After setting out the facts of the case, the issues framed, the findings thereon and the decision of the lower Court, his Lordship proceeded.) Dissatisfied with this decision, the plaintiffs have appealed and, in view of the importance of the

54. *Jawahra v. Akbar Husain*, (1884) 7 All 178= 1884 A W N 325 (F B).

case and the complicated nature of the issues involved therein, the appeal has been placed before a Full Bench for decision. I may say at once that sitting as a Court of law we are neither concerned with the events which led up to the institution of this suit, nor with the agitation carried on by one community or the other in relation to the subject-matter of the suit. We have merely to determine whether the decision of the District Judge is in accordance with the law as is administered in the British Indian Courts.

It is strenuously contended by counsel for the appellants that inasmuch as the subject-matter of the suit has been found by the District Judge to be a mosque and as it is a well-recognized principle of the Islamic law that all proprietary rights of men are extinguished as soon as a building is constructed and consecrated as a mosque, it could not be possessed and owned by the defendants or their predecessors-in-interest in the sense in which mundane belongings are possessed and owned by human beings and that consequently it did not cease to be a mosque irrespective of the fact that it remained in the possession of the defendants for more than the prescribed period of limitation and had all along been put to profane use. It is further added that the use of the building by the defendants in a manner inconsistent with its original object was a continuous wrong and that the worshippers who are now represented by plaintiffs 2 to 18 were entitled to seek the reliefs they have claimed in spite of the lapse of time. It is next urged that, in any circumstances, a fresh cause of action accrued both to plaintiff 1 and the other plaintiffs on the day when the building of the mosque was demolished and that as that event happened on the night between 7th and 8th July 1935, the present suit was well within time.

Counsel for the respondents concedes that the building in suit was originally built and used as a mosque and does not challenge the finding of the District Judge that the plaintiff 1 as juristic person is competent to sue in its own right. He, however, lays stress on the fact that the defendants' predecessors-in-title came into possession of the building as long ago as 1762, that the object of the Sikhs from the very beginning was to rob the building of its sanctity, that since then the Muslims have never been allowed to offer their prayers in it and that, on the other hand, it has mainly been used as

residential quarters and in one of its rooms Granth Sahib was read for some time and in another room fodder had been stacked. He further contends that the building in suit, even if it was a religious institution at its inception, is as much subject to the law of limitation as any other property endowed or attached to a religious institution and that the rights of the mosque as well as of the Muslims having been extinguished by virtue of S. 28, read with Art. 144, Lim. Act, long ago, it lost its religious character and became a worldly possession of the defendants and their predecessors-in-title with which they could deal in any manner they liked. According to him, there was no question of the applicability of S. 23, Lim. Act, inasmuch as the defendants' title matured into full ownership long before the advent of the British Rule in the Punjab and the use of the building or its site by the defendants in a manner inconsistent with its original character constituted no wrong so as to afford the plaintiffs a new cause of action, and consequently no new cause of action arose even on the demolition of the building.

It may be mentioned here that after the case was first argued before us, we considered that certain matters, which were very material for the proper disposal of the case, had not been sufficiently argued. We consequently called upon the parties to address further arguments on the following points: (1) Whether a new period of limitation starts to run from the date of the demolition of the mosque; (2) if so, has the mosque or the worshippers the right to seek relief from the Court and ask for a mandatory injunction to issue to the defendants to rebuild the mosque; (3) if such a right exists, can the Court issue such an injunction; and (4) will the Court issue such an injunction, and if such an injunction is issued, can this injunction be enforced?

Both parties fully availed themselves of the opportunity so granted and placed before us their respective points of view in connexion with the questions set out above. The appellants reiterated their former position and urged that the demolition of the mosque gave both the mosque and the worshippers a fresh cause of action and that both or either of them could sue for a mandatory injunction which, in the circumstances of the case, was the only proper relief that could be granted. Our attention was further drawn to O. 21, R. 32, Civil P. C., which clearly empowered the Court

to enforce any decree that it might pass in this respect. The respondents demurred to this proposition and stated that in the first instance no fresh cause of action arose on the demolition of the building inasmuch as no right subsisted in the plaintiffs at that time; secondly that neither the mosque nor the worshippers could sue for a mere injunction as they were admittedly out of possession; and thirdly that a relief by way of injunction would be both impossible and impracticable.

From the arguments advanced before us on the case in general, two principal questions arise for decision in the first instance: (1) whether the defendants or their predecessors-in-interest had not acquired an indefeasible right by prescription or otherwise in the subject-matter of the suit and if they had, what was the nature of that right considering that the building in suit had been originally constructed and consecrated as a mosque; and (2) whether S. 23, Lim. Act, applies and even if it does not, whether the suit of any of the plaintiffs is within limitation in respect of any of the reliefs claimed in view of the recent demolition of the building.

Before dealing with these questions, however, it is necessary to determine how far the rules of the Islamic law relied upon by the appellants can be invoked in this matter. They have based their arguments on Ss. 5 and 6, Punjab Laws Act, the material portions of which are reproduced below:

Section 5. — In questions regarding . . . any religious usage or institution, the rule of decision shall be

(a)

(b) the Mahomedan law, in cases where the parties are Mahomedans, and the Hindu law, in cases where the parties are Hindus, except in so far as such law has been altered or abolished by legislative enactment, or is opposed to the provisions of this Act, or has been modified by any such custom as is above referred to.

Section 6. — In cases not otherwise specially provided for, the Judges shall decide according to justice, equity and good conscience.

Seeing that the party in possession of the religious institution in suit happens to be a non-muslim, the question naturally arises whether the personal law of the plaintiffs would still apply in the present case. As long ago as 1885 a similar question came up for decision before five Judges of the Allahabad High Court in a pre-emption case reported in 7 All 775⁵⁵ where one of the

parties to the suit was a non-muslim and although the statute which governed the case was different, it was couched in the same language in its material portions as S. 5, Punjab Laws Act, 1872. The principal judgment was delivered by Mahmood J. who, after discussing the matter in all its aspects, came to the conclusion that rights derived from members of the Muslim community, whether by Hindus or by other non-Mahomedans would be governed by the Mahomedan law, inasmuch as the inception of the right and not the array of the parties to the suit was the determining point of the decision in such cases. The other four Judges did not adopt the reasoning employed by Mahmood J. but accepted his conclusion on the grounds of equity, remarking that it would not be equitable that persons who are not Mahomedans, but who have dealt with Mahomedans in respect of property knowing perfectly well the conditions and obligations under which the property is held, should merely by reason that they are not themselves subject to the Mahomedan law, be permitted to evade those conditions and obligations. Reference in this connexion may also be made to the dissentient judgments of Norman and Macpherson JJ. in 4 Beng L R 134.⁵⁶ Norman J. observed:

In a country like British India, where Hindus and Mahomedans are living side by side, each governed by their own personal law, a person of one persuasion dealing with a person belonging to the other is bound to take notice of the law which regulates the extent of the power of disposition of property possessed by the person with whom he contracts. I think it clear that a Hindu who purchases the property of infants from the elder brother in a Mussalman family would not be allowed to contend that he acted in good faith, and did not know that the elder brother acting as guardian for the infants had not the same authority as the karta in a Hindu family possesses. If a Mussalman purchased property belonging to a member of a joint Hindu family governed by the Mitakshara. I think he could not plead that he bought in ignorance of the provisions of that law, so as to give himself a title at the expense of the children or coparceners of the vendor.

I may also refer in this connexion to the remarks made by Ameer Ali, Ghose and Prinsep JJ. in 20 Cal 116,²⁰ which again was a case between a Muslim and a Hindu. At p. 137 of the report Ameer Ali J. observed as follows:

The first question therefore which one has to consider is whether the disposition in question is to be discussed upon the basis of the Mahomedan law, or of any other system of law. From the year

55. Gobind Dayal v. Inayatullah, (1885) 7 All 775 = 1885 A W N 182 (F B).

56. Sheikh Kudratullah v. Mahani Mohan Shaha, (1870) 4 Beng L R 134 = 13 W R 21 (F B).

1798 downwards, the Courts of justice have uniformly applied the Mussalman law to the determination of questions affecting the validity of dispositions made by Mahomedans. In 2 M I A 390,²² the defendant was a Hindu and the question was whether the property which formed the subject matter of the suit was wakf or not. Their Lordships in the Privy Council decided the case on the basis of the Mahomedan law. And every case before and since has proceeded upon the same principle. Whilst on this point, I would refer to the words of Levinge and Steer JJ. in (1864) W R 185⁵⁷ at p. 186.

For facility of reference I may reproduce here the words referred to by Ameer Ali J.:

It may be remarked that the Courts of this country have invariably applied in practice the Mahomedan law to a variety of cases other than those coming under the denomination of inheritance, marriage and caste, and even if immemorial and recognized practice did not legalise the action of the Courts, it cannot be said that when this Court administers to Mahomedans their own laws, they do otherwise than administer justice according to equity and good conscience.

At p. 179 of the report Ghose J. said :

I should here premise that the case before us is not between two Mahomedans, but between a Hindu, who is the creditor, and a Mahomedan, the debtor. S. 37 of Act 12 of 1887 provides as follows :

Where in any suit or other proceeding it is necessary for a Civil Court to decide any question regarding succession, inheritance, marriage or caste or any religious usage or institution, the Mahomedan law in cases where the parties are Mahomedans and the Hindu law in cases where the parties are Hindus, shall form the rule of decision except in so far as such law has, by legislative enactment, been altered or abolished.

(2) In cases not provided for by sub-s. (1), or by any other law for the time being in force, the Court shall act according to 'justice, equity and good conscience'.

This case is governed by Cl. 2 of the section, and the Court has here to act according to 'justice, equity and good conscience'.

Cases often occur in our Court where the parties to a suit are of different persuasions, and one of them relies upon the particular law which governs him as the inception of his title, and the Court has to consider that law But while the Court goes into these questions, it does so, not because the Mahomedan law applies to the Hindu, but because 'justice, equity and good conscience' require that they should be considered. In like manner, in the case before us we have to consider whether the property which the creditor desires to sell is still the property of B, and as such, is liable to be sold for his debts, or whether he has made a valid dedication of it as wakf, and as such, it is inalienable.

Prinsep J., at page 212 remarked :

The matter for our decision in these appeals is simply whether the deed of 4th Aughran 1281 constitutes a valid wakf such as is binding under the Mahomedan law.

It may be added that Petheram C. J., also referred to the Mahomedan law books alone in order to determine the validity of the wakf relied on by the Mahomedan debtor.

I am in respectful agreement with the opinions expressed by the learned Judges referred to above and have no hesitation in holding that, in spite of the fact that the defendants are non-muslims, the character of the building in suit and the incidents attaching to it would, on the principles of justice, equity and good conscience alone, if on no other ground, be decided on the basis of the Mahomedan law; and no rule of decision derived from any other law would come into play in respect of these matters. This is what happens every day in the British Indian Courts. Muslims when they happen to deal with the property of the Hindus, are faced with the Hindu law and similarly Hindus, when they choose to acquire any property from the Muslims, have to contend with the Mahomedan law as soon as their acquisitions are challenged in a Court of law. As remarked by Mahmood J., in 7 All 775⁵⁵:

It is to be remembered that Hindu and Mahomedan laws are so intimately connected with religion that they cannot readily be dis severed from it. As long as the religions last, the laws founded on them last.

In determining, therefore, the rights, if any, acquired by the defendants in the subject-matter of the suit on account of their long possession, we shall have to ascertain first the true position of the mosque under the Mahomedan law.

The plaintiffs have examined several Muslim theologians representing different schools of thought and they all have unanimously stated that a place once consecrated as a mosque remains a mosque for ever and that its character is never lost even if it is deserted or falls into ruins, or is obliterated from the face of the earth. They have further stated that as soon as a building is consecrated as a mosque, it vests in God and all proprietary rights of human beings are extinguished in it. They have even declared that it is not only the visible structure that constitutes a mosque but from the lowest point in the earth up to the highest point in the heavens it is all a mosque and remains as such till eternity. It is therefore that it can neither be alienated, nor partitioned, nor inherited. It can never be used as a place of human habitation : and even if the building collapses, its materials cannot be utilized or

57. *Zohorooddeen Sircar v. Baharoolah Sircar*, (1864) W R 185.

sold. These opinions have been based on the Quran, the Hadis (the traditions of the Prophet), and the standard works of the Muslim jurists. Maulana Mufti Muhammad Kifayat Ullah, P. W. 3, who is president of the All India Jamiat-ul-Ulema (a body of theologians) has placed P. W. 3/A on the record, which contains all the authorities on which he has relied for his evidence. Shamas-ul-Ulema Sayyed Ali-ul-Hairi is Muftahid (religious leader) of the Shias of the Punjab and has produced P. W. 5-A mentioning the various authorities on which his statement is based. Maulvi Sana Ullah, P. W. 6, is Secretary of the All India Jamait-i-Ahl-i-Hadis and the authorities, on which his opinion is founded, are contained in P. W. 6-A and P. W. 6-B. In one of the books quoted by him, the author says :

It is unlawful to sell or auction or demolish any waqf property, especially a mosque or to give it away for its being included in a temple or Shivala of the Hindus, no matter whether the creator of the waqf himself or the ruling authority intends to do so. Such property is subject to the same rules as a free man and just as a free man cannot be converted into a slave, so cannot a mosque be changed into private property.

Maulvi Muhammad Ali, P. W. 7, is President Ahmadiyya Anjuman-i-Ishait-i-Islam and his evidence is also in the same strain as that of the others. Maulvi Muhammad Ismail, P. W. 8 is Khatib (Preacher) Jami Masjid, Ahl-i-Hadis. In one of the authorities cited by him, in order to emphasize the interminable nature of a wakf like a mosque, the illustration of the Holy Temple in Jerusalem is recorded which according to the author, was demolished by Nebuchadnezzar and desecrated by him by the throwing of sweepings and the slaughter of swine but on the ruins of which one of the descendants of David was enjoined by God to put up a place of worship later. In another authority it is stated that even if no visible trace is left of the building used as a mosque, its site remains a mosque for ever (P. W. 8-A). Maulana Ghulam Murshid, P. W. 9, is Honorary Professor of the Ishait-i-Islam College and has referred to several authorities of which extracts are given in P. W. 9-A and P. W. 9-B. One of the theologians referred to in P. W. 9-B has cited the example of Kaaba, to which every Muslim in the world turns his face five times a day for prayers and which, according to the Muslims, is the first mosque built on this earth by the Prophet Abra-

ham. The building of Kaaba was for centuries used as a temple for idols but it lost neither its sanctity as the first house of God nor its status as a mosque. It is evident that the opinions alluded to above have not been invented for the occasion and it cannot be urged that they do not represent the true views of Islam on the character and status of a mosque. That this rule of Muslim law has been accepted without any modification in British India is amply borne out by authoritative text books like Baillie's "Digest of Muhammadan Law" on the subjects to which it is usually applied by British Courts of Justice in India, as well as by Ameer Ali's Muhammadan Law which again is a popular book of reference on all questions of the Islamic law which arise in the British Indian Courts. Some of the passages that are relevant to our inquiry are reproduced below :

1. "When a musjid (mosque) has fallen to decay and is no longer used for prayer, nor required by the people, it does not revert to the appropriator or his heirs and cannot be sold, according to the most correct opinions." (Baillie's Digest, 1865 Edition, page 606.)

2. "According to Abu Hanifa and Abu Yusuf, the land which has once been dedicated to a mosque continues wakf even though it has become waste and the building has fallen into ruin." (Ameer Ali's Muhammadan Law, Edn. 4, Vol. 1, page 403.)

3. "If a person were to make a wakf of a piece of land for the purpose of erecting a mosque, he cannot afterwards resume or sell it, neither can it be inherited, because this ground is altogether alienated from the right of the individual and appertains solely to God." (Ibid, page 404.)

4. "A masjid for which there no longer remained a congregation and all around it had gone to decay, it was not lawful to convert it into a cemetery." (Ibid, page 406.)

5. "A dedication in favour of a mosque is absolutely lawful according to Abu Yusuf for a mosque exists for ever until the Day of Judgment and can never revert to private proprietorship even though it be ruined and wholly disused, nor can its material be taken to any other mosque." (Ibid, page 407.)

6. "Though a mosque may be ruined and be never used, still it is a mosque, for ever consecrated to the eternal worship of God until the Day of Judgment." (Ibid, page 408.)

7. "But whether a mosque has become ruined or dilapidated, or the people have no further need owing to another mosque close by, still it will not revert to the ownership of the wakif, nor will it be lawful to take it or its property to another mosque." (Ibid, page 409.)

8. "It must be remembered that the failure or non-existence of the initial or primary object of a wakf does not, under the Hanafi law, affect the operative character or validity of the wakf, or avoid it." (Ibid, page 412.)

9. "When once a dedication has been duly effected, the right of the person making the wakf in the property dedicated 'drops' absolutely. Thenceforth the property is 'tied up' in the ownership of the Almighty, and nobody has a right to deal with it in any shape—neither the wakif, nor his heirs, nor the beneficiaries under the wakf. In other words, all right of proprietorship ceases, the property cannot be alienated, or transferred by sale or gift, nor is it subject to the rights of inheritance." (Ibid, page 482.)

10. "As a general rule therefore private alienation temporary or absolute, by mortgage or otherwise of wakf lands, even though for the repair or other benefit of the endowment, is illegal according to the Mussalman law." (Ibid, page 485.)

11. "No alteration made in a wakf building by the purchaser or anybody else can change the character of the wakf." (Ibid, page 491.)

12. "A wakf property is inalienable, because it belongs virtually to Almighty God, being intended for the benefit of mankind." (Ibid, page 541.)

13. "The second effect of the constitution of wakf is to render the property imprescriptible, that is, it cannot be subject to the rights of the sovereign as private property." (Ibid, page 543.)

14. "The third effect resulting from the constitution of wakf is that it renders the property so dedicated non-heritable." (Ibid, page 543.)

15. "The proprietorship of wakf property is transferred to God, that is to say, such property ceases for ever to be subject to the right of private proprietorship of" (Ibid, page 547.)

It is not peculiar to the Muslims alone to attach eternal sanctity to their mosques. A house of God in every religion that worships God is treated on similar lines. Take for example a church of the Christians. At p. 846 of Halsbury's Laws of England, (Edn. 2), Vol. 11, it is said that after consecration a church continues to exist as a church in the eye of the law, even though the material building is destroyed. At p. 860 it is remarked that property once consecrated will retain the ecclesiastical character thus bestowed upon it, whoever may be actual owner and whatever may be the nature of his tenure. At page 861 it is observed that property consecrated is separated for ever from the common uses of mankind and is set apart solely for sacred purposes for all time. At p. 863 it is stated that when the fabric of a church has once become devoted *in sacros usus*, it cannot ever be used as a habitation for man, nor has a Judge any power to sanction the use of it for secular purposes. It would thus appear that under English law a church stands on the same footing as a mosque under the Mahomedan law, the only difference being that, while under the former an Act of Parliament can divest a church of its sanctity, under the latter this authority is vested in no human being in the

world, even if he is a ruler of the State and in no human institution, even if it is a law-making body. Besides, a mosque is held in exceptional reverence and esteem and is treated as a house of God in the real sense of the term. None who is unclean can enter its precincts and even the mightiest potentate on earth is bound to take his shoes off when visiting it and must rub his shoulders with the humblest of his subjects when in prayers, for he stands there in the presence of the King of all kings. By virtue of the transcendent character that a mosque thus holds it is ranked far above every other kind of property whether secular or sacred.

Such being the inherent characteristics of the building in dispute, and such the conditions and obligations attaching thereto under the Mahomedan law, the question is how far the provisions of the Limitation Act affect the case. It is contended on behalf of the respondents that the Mahomedan law has been altered and abolished within the meaning of S. 5, Punjab Laws Act (4 of 1872) by the Limitation Act to this extent that if the possession of a mosque is acquired by a person whose interests are hostile to those of the Muslims and who does not believe in the sanctity of the building, it becomes adverse to the Muslims and that unless somebody interested in the mosque takes any step to recover its possession from the adverse possessor within the period of twelve years, all rights in the mosque are extinguished and its sacred character is lost as well. The Limitation Act being the law of the land, all the provisions of the Mahomedan law relating to a mosque are to be read subject to the modifications and improvements introduced by that statute. The law of limitation makes no exception in favour of any sacred property as such and consequently in the eye of the law so far as limitation is concerned, sacred property stands on the same footing as secular property. The only cases, which are immune from the operation of the Limitation Act, are specified in the Act itself and those that are not so specified are not entitled to claim exemption on any basis. In order to illustrate that the Mahomedan law has been partially altered by the Limitation Act, counsel for the respondents has referred us to Arts. 103 and 104 which prescribe a fixed period of limitation for recovery of dower. Under the Mahomedan law a claim for dower cannot be barred by time, as limita-

tion is not known to the Mahomedan law; but under the Limitation Act if any wife or widow, as the case may be, seeks to recover her dower through Courts, she is compelled under the law to bring her suit within the period prescribed therefor by the Limitation Act. It is further argued that by enacting Arts. 134-A, 134-B and 134-C the Indian Legislature has expressed its clear intention to bring the endowed property, of whatever nature it may be, within the purview of the Limitation Act. This being so, Art. 144, Lim. Act has barred the remedy of the Muslims to recover the building in suit for ever and S. 28, Lim. Act has extinguished their right to do so.

It is conceded on behalf of the respondents that a mosque is a juristic person, but it is contended that in relation to a mosque this legal fiction comes into existence only when any property takes a worldly shape and inasmuch as this fiction cannot exist divorced from property, it vanishes along with the property which brings the fiction into existence.

On behalf of the appellants it is not denied that the Limitation Act is the law of the land, nor is it asserted that S. 3, Lim. Act, is not applicable to any suit which is brought in a Court of law. It is however contended that the Limitation Act does not touch a religious institution like a mosque inasmuch as a mosque is not immovable property in the crude sense of the term but is something different from it. It is a juridical person and a juridical person as such cannot be treated as property, what to say of its being treated as immovable property. They further urge that a mosque is 'extra commercium' and as it cannot be purchased or sold, it cannot be adversely possessed. Even if the Limitation Act applies, and a mosque is covered by Art. 144, Lim. Act and is adversely possessed, it is in its nature incapable of being owned in the sense in which other worldly properties are owned. Its sacred character is never lost nor are the conditions and obligations attaching to it destroyed. An adverse possessor takes it subject to all the burdens which are imposed upon it and all the privileges to which it is entitled. Moreover, the mere fact of its being possessed by a non-muslim or its being used in a sacrilegious manner, is not such an act of hostility as would start the adverse possession of the non-muslim possessor in the legal sense of the term. Whether it remains in its original shape

and form or whether it falls into crumbles, it continues to be a mosque and every person who professes the Muslim Faith, is entitled to treat the building as of right as a mosque and to say his prayers therein. Under the Mahomedan law a zimmi (a non-muslim fellow subject) can be the custodian of a mosque and the religious faith of the custodian therefore does not matter. Every time that any Muslim belonging to any generation is prohibited from using the building or the site of the mosque as a mosque, a fresh cause of action arises to him to seek his remedy in a Court of law.

Both parties have relied on a large number of decided cases and even though I am disposed to think that most of them have no direct bearing on the question at issue, yet in view of the importance of the case and the complex nature of the issues involved, I consider it advisable to refer to them all and to comment upon them wherever necessary. I shall first discuss the authorities relied upon by the appellants. In 2 M I A 390²² decided in 1840, which was referred to with approval in a later judgment of their Lordships of the Privy Council reported in 44 Mad 831,³³ a sajjada nashin of a khankah entered into a contract with a Hindu of the name of Jewun Doss Sahoo for the loan of a certain sum of money and as security for the repayment thereof transferred certain lands comprised in and constituting part of the grants made to the khankah under a royal decree. It was stipulated that if the sum was not repaid within the prescribed period, the lands would become the absolute property of the said creditor. Later, another deed was executed in the creditor's favour by his Muslim debtor. On the debtor's death the successor challenged the alienations made by his predecessor and insisted that the lands in question were wakf property of which neither a conditional nor a bona fide sale could be made. The opinions of the law officers upon the tenure of the lands in suit were taken by the Sudder Dewany Adawlut and they were to the effect that by the Mahomedan law the sale or mortgage of wakf lands was illegal and on that ground the Sudder Dewany Adawlut decreed the claim. On appeal, their Lordships of the Privy Council came to the same conclusion and held that the property in suit was wakf and that inasmuch as a mutwalli, had no right to alienate such property, the transfer was illegal. In the

course of their judgment, their Lordships referred to *Hidaya*, Book XV, as translated by Hamilton in support of their conclusions. Limitation was pleaded as a bar in this case by the Hindu alienee, but his contention was repelled on the basis of a different enactment which is not now in force.

In 27 P R 1913,²¹ certain Mahomedan residents of Multan sued for an injunction restraining the defendants from selling a piece of land forming part of the area known as Mai Pak Daman grave-yard and entered in the settlement record as ghair mumkin kabristan in the possession of the Mahomedans and owned by Makhdum Hassan Bakhsh. Their Lordships of the Privy Council held that on the facts found the land in suit formed part of a grave-yard set apart for the Mahomedan community and that the Makhdum had no private rights of ownership over any part of the grave-yard. It may be remarked that the decision of this case was mainly influenced by the fact that the defendant was the trustee and custodian of the shrine of the Saint Mai Pak Daman. Their Lordships *inter alia* observed:

It is obvious that if it were held that within the area of the grave-yard, land unoccupied or apparently unoccupied by graves was private property and at the disposal of the recorded owner, it would lead to endless disputes, and the whole purpose of the Government in setting aside land as an open grave-yard for the Mahomedan community in Multan would be frustrated.

This case for the reasons stated above cannot serve as a useful authority for the proposition advanced by the appellants. In 44 Mad 831,³³ their Lordships of the Privy Council at p. 840 of the report observed as follows:

The conception of a trust apart from a gift was introduced in India with the establishment of Muslim Rule. But the Mahomedan law relating to trusts differs fundamentally from the English law. It owes its origin to a rule laid down by the Prophet or Islam; and means, 'the tying up of the property in the ownership of God the Almighty and the devotion of the profits for the benefit of human beings'. When once it is declared that a particular property is wakf, or any such expression is used as implies wakf, or the tenor of the document shows, as in 2 M I A 390,²² that a dedication to pious or charitable purposes is meant, the right of the wakif is extinguished and the ownership is transferred to the Almighty. The manager of the wakf is the mutwalli, the Governor, Superintendent, or Curator. The head of these khankas which exist in large numbers in India, is called a sajjada nashin. But neither the sajjada nashin nor the mutwalli has any right in the property belonging to the wakf: the property is not vested in him, and he is not a "trustee" in the technical sense.

This judgment too beyond making a general exposition of the nature of a Mahomedan wakf does not advance the appellants' case any further. It may also be remarked in passing that S. 10, Lim. Act has been amended since and the managers of religious or charitable endowments have been declared to be the trustees thereof.

In 38 P L R 182,⁴ the suit under appeal concerned a plot of land in the city of Lucknow. In the words of their Lordships of the Privy Council, the purpose of the suit was to establish that that plot of land was a grave-yard in the sense of the Mahomedan law, that is to say 'extra commercium' and dedicated for the benefit of the Mahomedans in general in such sense that private ownership therein did not exist. In 1928 that plot of land was sold by one Mt. Musahab Khanum to Ballabh Das, a Hindu. Thereupon certain Mahomedans sued in a representative capacity to recover the land from the defendants. In the course of the litigation that followed it was found that after the Mutiny of 1857 and by virtue of Lord Canning's Proclamation of 15th March 1858, all lands in Oudh were confiscated and every right in the soil in the city of Lucknow was vested in the Crown. By the letter of the Financial Commissioner of Oudh, dated 7th August 1868, lands were granted to people whom the Crown liked to grant. It was then that one Kale Khan from whom Mt. Musahab Khanum derived her title, was entered as a proprietor by virtue of possession of this land. It was admitted by the defendants that in 1868 and prior thereto some few persons had been buried in the land. In 1870 the land was closed for the purposes of a cemetery by order of the Municipal Board. It was proved that in 1913 there were some thatched houses of some tenants on the land for which rent was received by a daughter of Kale Khan. In 1919 a map of that plot of land was produced in Court in another legal proceeding and it showed a number of thatched huts and five or six latrines. On these facts the Subordinate Judge held that Kale Khan was neither a manager nor a takiadar of the land in suit and that the land was his private property. The District Judge agreed in this view. On appeal, the Chief Court reversed the judgments of the Courts below and decreed the suit. Ballabh Das appealed to their Lordships of the Privy Council but his appeal was dismissed with

a certain modification in the decree. In the course of their judgment, their Lordships observed at p. 137 of the report :

If however account is taken of the fact that the particular plot No. 108 is described as a grave-yard it becomes difficult indeed to suppose that the fact of possession or custodianship is not the basis of the entry. . . . The khasra can hardly mean that it was the intention of Government at the First Regular Settlement, to vest the ownership of such a cemetery as is described in the map in a private individual, thereby destroying its character as a qabristan according to ordinary conception of the Mahomedan law.

At p. 188 their Lordships have remarked:

If the materials in the present case fell to be looked at as a mere question of evidence, their Lordships are satisfied that the true inference to be drawn from the evidence as a whole would be that the suit land is a cemetery in the ordinary Mahomedan sense and is no longer the subject of private ownership.

In the result, their Lordships granted a declaration that the suit land was dedicated for the purposes of a grave-yard according to the Mahomedan law and that defendant 1 had no title thereto. In 1906 A W N 159,²³ a plot of land had been used as a cemetery for a number of years before the Mutiny of 1857. Subsequently the whole village in which the land was situated, was confiscated by Government in consequence of the misconduct of the Muslim owners of the village during the Mutiny and was sold to the defendants who were Hindus. Some time afterwards the Muslims brought a suit for a declaration that the plot of land referred to above was a public burial ground and was not the property of the Hindu purchasers of the village and further asked for an injunction restraining the defendants from making encroachments on the land. The Court of first instance dismissed the suit on the ground that an actual dedication of the land had not been proved. The lower Appellate Court found that the land was a cemetery and had been used as such for upwards of 100 years. The defendants appealed and Banerji J. who heard the appeal observed as follows :

In Mr. Amir Ali's Mahomedan Law, Vol. 1, Edn. 8, p. 315, it is stated that 'when a person erects an aqueduct for Musalmans or an inn for the occupation of travellers or a caravan-sarai' or constitutes his land into a cemetery, the right of property according to Muhammad (a disciple of Imam Abu Hanifa) abates when people have used the aqueduct, or have occupied the inn or caravan-sarai or buried in the cemetery'. . . . The Court below was therefore right in holding that the defendants had no longer any proprietary right in the land in suit. By the confiscation which took place after the Mutiny, only such rights were con-

fiscated as existed in the rebels at the date of the confiscation, and it is those rights only which have been acquired by the defendants. If a valid wakf had been created in regard to the land in question before the confiscation, the original owners had ceased to have any right to the said land. Therefore the defendants by acquiring the rights which had been confiscated, could not acquire the ownership of the land.

On the basis of the Privy Council judgment referred to above as well as on that of the Allahabad judgment, the appellants urge that even an act of State is not sufficient to rob the sacred property of its sanctity. They further argue that if a person acquires any rights in the sacred property which is so confiscated, he takes the property along with the burden which is imposed upon it, and that the only position that can be conferred by law on the transferee by virtue of such an acquisition is that of a mere possessor and not of an absolute owner. To this extent these judgments lend support to the appellants' contentions. In the Privy Council case, land had been confiscated and re-conferred upon Kale Khan and his name had also been entered as a proprietor by virtue of possession. He had built thatched huts on the land and had rented them to certain tenants. He had also constructed some latrines on it. Such use of the land was obviously inconsistent with its use as a grave-yard and these acts had been committed more than 12 years before the institution of the suit. There was not a scintilla of evidence to show that Kale Khan had anything to do with the original takia-dars of the land and it was only in view of the subject-matter of the suit that their Lordships of the Privy Council appear to have held that the entry as regards his ownership indicated mere possession and custodianship and not proprietorship in the ordinary sense of the term. Similarly, in the Allahabad judgment the whole village had been confiscated including the grave-yard and sold by the Government to non-Muslims. From the fact that the appeal had arisen in 1904 and that the confiscation had taken place in 1857, it appears that the suit by the Mussalmans had been instituted long after the ordinary period of limitation had expired. In spite of this lapse of time, the learned Judge presumably in view of the nature of the subject-matter of the suit concluded that it could not be owned either by the Government or by its assignee, inasmuch as the property in its very nature was incapable of being owned.

In A I R 1930 Oudh 245,²⁵ Srivastava J. observed :

Once land has been dedicated for the purpose of a cemetery it must always be regarded as a cemetery unless for any reason the land turns out to be unfit for use as a cemetery. Once a wakf is established either by evidence of dedication or by evidence of user it is an essence of the wakf that it should be permanent.

In arriving at this conclusion the learned Judge referred to a passage in Baillie's Digest which reads as follows :

And being asked with regard to a cemetery in a village where it had gone to decay and there remained in it no traces of the dead, not even bones, whether it was lawful to sow the land and take its produce, answered "No" for in legal effect it is still a cemetery.

In A I R 1931 Oudh 45,⁵⁸ Pullan J. adopted the observations made by Srivastava J. in the case cited above. These two judgments obviously emphasize the permanent nature of a Mahomedan wakf. In 35 Mad 681,³ the suit in which the second appeal had arisen was instituted by the plaintiffs representing the Shafei residents of a place called Pudunagaram against the defendants as representatives of the Hanafis of the same locality, praying for an injunction restraining the latter from enlarging a certain reservoir attached to a mosque which had been found by the Courts below to be in their exclusive management ever since another mosque had been built a long time before by the Shafeis in the same compound, from using some granite stones lying in the compound in the construction of the reservoir and from obstructing a pathway extending from the gate of the older mosque by the side of its reservoir to the mosque which was in the exclusive possession of the plaintiffs. One of the questions that arose for decision was whether the mosque in which the Hanafis generally said their prayers and the reservoir attached thereto which was intended to enable the congregation to perform ablutions were the common properties of the plaintiffs and the defendants. The trial Court found that as the Hanafis had been in exclusive possession of and using the mosque ever since the other mosque was built by the Shafeis, that is for a period of more than 12 years, the latter had lost their right in the older mosque and its reservoir. The Subordinate Judge in appeal confirmed that finding. A further appeal was presented to the High Court and in the

course of their judgment, Abdur Rahim and Ayling JJ. observed :

It seems to us that the finding must be understood with reference to the subject matter of the litigation. It will suffice for us therefore to point out that according to the accepted view of the Sunni Schools which comprise the followers both of Imam Abu Hanifa and Imam Shafie it is in the very conception of a wakf which is the name for a grant by which mosques and similar institutions are dedicated—that all proprietary rights of men should be extinguished in the property so dedicated. The result according to the theory of Muhammadan law is that proprietary rights in the subject matter of wakfs become re-vested in God inasmuch as He is originally the owner of all created things and it is by His permission that men acquire rights therein so that when men's right ceases in a particular thing, it reverts to the proprietorship of God. (See Hamilton's *Hidaya*, Grady's edition, pages 231, 232.) Further as it is the object of a dedication of the nature of a mosque that the public should say their prayers therein, it is not open to those who are charged with the superintendence and management of a mosque to exclude any Mahomedan who wishes to say his prayers in it, except on the ground of misbehaviour.

In arriving at their conclusions, the learned Judges relied on a Privy Council judgment reported in 18 Cal 443⁵⁹ and on two cases from the Allahabad High Court, each decided by five Judges, reported as 12 All 494⁶⁰ and 13 All 419,⁶¹ respectively. This judgment no doubt was between Muslims themselves and may not go a long way to help the appellants; but the principles enunciated therein are (1) that proprietary rights in a mosque are extinguished as soon as it is consecrated, and (2) that so long as a mosque exists as a mosque, every Muslim has a right to offer his prayers in it. In 37 Cal 128,⁶² at p. 161, Mookerjee J. in connexion with the case of a Hindu endowment, states :

The Hindu law recognises dedication for the establishment of the image of a deity and for the maintenance and worship thereof. The property so dedicated to a pious purpose is placed *extra commercium* and is entitled to special protection at the hands of the Sovereign whose duty it is to intervene to prevent fraud and waste in dealing with religious endowments.

In 12 Bom 247,³⁰ which again is a case of a Hindu endowment, West J. observed at p. 264 of the report :

Property dedicated to a pious purpose is, by the Hindu as by the Roman law placed *extra commercium*. Mr. Macpherson admitted for the defendants in this case that they could not sell

59. *Fuzl Karim v. Maula Baksh*, (1891) 18 Cal 448=18 I A 59=6 Sar 19 (P C).

60. *Atahallah v. Azimullah*, (1890) 12 All 494=1890 A W N 179 (F B).

61. *Jangu v. Ahmadullah*, (1891) 18 All 419 (F B).

62. *Bhupati Nath v. Ramlal*, (1910) 37 Cal 128=3 I O 642=10 C L J 355=14 O W N 18 (F B).

58. *Ohhutkao v. Gambhir Mal*, (1931) 18 A I R Oudh 45=130 I C 117=6 Luck 452=7 O W N 1159.

the lands bestowed on the idol Shri Ranchhod Raiji. This restriction is like the one by which the Emperor forbade the alienation of dedicated lands under any circumstances. It is consistent with the grants having been made to the juridical person symbolized or personified in the idol at Dakor. It is not consistent with this juridical person's being conceived as a mere slave or property of the shevaks whose very title implies not ownership, but service of the god. It is indeed a strange, if not wilful, confusion of thought by which the defendants set up the Shri Ranchhod Raiji as a deity for the purpose of inviting gifts and vouchsafing blessings, but, as a mere block of stone, their property for the purpose of their appropriating every gift laid at its feet. But if there is a juridical person, the ideal embodiment of a pious or benevolent idea as the centre of the foundation, this artificial subject of rights is as capable of taking offerings of cash and jewels as of land. Those who take physical possession of the one as of the other kind of property incur thereby a responsibility for its due application to the purposes of the foundation—compare *Griffin v. Griffin*.⁶³ They are answerable as trustees even though they have not consciously accepted a trust, and a remedy may be sought against them for maladministration

It may be remarked that this judgment was confirmed on appeal by their Lordships of the Judicial Committee in 24 Bom 50.⁶⁴ In 52 Cal 809,⁴⁰ the idol in suit was established as a household god and the founder gave funds in order to continue the upkeep and maintenance of the deity. During his lifetime the founder acted as shebait and after his death his widow officiated similarly as a ministrant of the worship. An adopted son of the founder attained the age of 20 years in the lifetime of the widow and became de facto the person charged with the same duties as his adoptive father and mother had performed. He executed a deed of trust providing particular premises for the location and worship of the deities. Some time afterwards the widow died and it came to light that she had made a very large endowment in favour of the family idol and by her will had appointed her adopted son her executor and trustee. In the course of the litigation that ensued after the death of the adopted son, one of the questions that arose was as to the location of the idol. On behalf of one of the litigants it was argued that the testator treated the idols or images which he had set up as his personal property and left them absolutely to his adopted son. This proposition was rejected by the Appellate Court and their Lordships of the Privy Council remarked that they could give no counten-

ance to it and approvingly referred to the following passage from the judgment under appeal:

The inclusion of the idols however among items of property, moveable and immovable, does not show that the testator regarded his interest in them in the same light as his interest in his secular property.

At p. 821 of the report their Lordships observed:

An argument which would reduce a family idol to the position of a mere moveable chattel is one to which the Board can give no support. They think that such an argument is neither in accord with a true conception of the authorities, nor with principle.

And at page 822 the following remarks occur:

Their Lordships do not think that such cases form any ground for the proposition that Hindu family idols are property in the crude sense maintained, or that their destruction, degradation or injury are within the power of their custodian for the time being. Such ideas appear to be in violation of the sanctity attached to the idol, whose legal entity and rights as such the law of India has long recognized.

At page 825 it was remarked:

The true view of this is that the will of the idol in regard to location must be respected. If, in the course of a proper and unassailable administration of the worship of the idol by the shebait, it be thought that a family idol should change its location, the will of the idol itself, expressed through his guardian, must be given effect to. . . .

A fortiori it is open to an idol acting through his guardian, the shebait, to conduct its worship in its own way at its own place always on the assumption that the acts of the shebait expressing its will are not inconsistent with the reverent and proper conduct of its worship.

In 38 Cal 284,³⁹ an old temple in which certain Thakurs were located was blown off by a storm and they were placed in another temple near by. Some disputes arose between the shebait in whose temple the Thakurs had been placed and the shebait of the original temple. Consequent upon these disputes, the old shebait rebuilt the temple which had been demolished and wanted to bring the Thakurs to the new temple. Thereupon a suit was instituted by the Thakurs in their juristic capacity that they might be taken out of the temple of the defendants and placed in their own new temple. The trial Court dismissed the suit under Art. 49, Limitation Act, which applies to suits for specific moveable property not covered by Arts. 48, 48-A and 48-B or for compensation for wrongfully taking or injuring or wrongfully detaining the same. Chatterjee J. who delivered the judgment remarked :

In this view of the case it is not necessary to consider whether the Thakur is to be considered a

63. (1804) 1 Sch & Ref 352=9 R R 51.

64. Chotalal v. Manohar, (1900) 24 Bom 50=26 I A 199=2 Bom L R 516=7 Sar 559 (P C).

moveable property. Besides, a Thakur has been held to be a juridical person, and, considering the claim as it is made in this case, I do not see why it should not be held that the Thakur is a juridical person, and is therefore not amenable in any sense to the mischief of Art. 49.

Richardson J. concurred in the order proposed by Chatterjee J. These authorities have been relied upon by the appellants in support of the proposition that a mosque is not property in the crude sense of the term and it is argued that a mosque, although made of bricks and mortar, cannot be treated as immovable property in the same way as an idol which is made of wood or stone cannot be treated as moveable property. The mosque is as much a juristic person as an idol and similar sanctity attaches to it as attaches to an idol. The respondents contend that these authorities are not in point, inasmuch as a mosque is not placed on the same footing by the Muslims as an idol is by the Hindus. A mosque is only a house of God, while an idol is God himself. It is a personification of God, or, in other words, it is God symbolised. But I do not agree. The ratio decidendi of the judgments alluded to above was not whether an idol as a symbol of God could be treated as moveable property or not but whether as a juridical person it could be held as such and the reason that prevailed with the learned Judges for holding an idol to be outside the description of moveable property was, as appears from the remarks quoted from 38 Cal 284,³⁹ that it was a juridical person.

In 20 I C 78⁴² the allegation of the plaintiff was that the land in dispute was made over to the predecessor of the defendant in order that the income might be applied for the worship of the image established by an ancestor of his more than half a century before the institution of the suit. About 40 years before commencement of the litigation, the site on which the temple stood was washed away and the image itself was broken to pieces. Since then, the broken image had been worshipped by the predecessor of the defendant. The plaintiff however established a new image in a newly constructed temple in the same village. He consequently prayed that the defendant might be compelled to perform the worship of the newly established image and to provide out of the income of the land in his possession the articles necessary for the worship of the image and if the defendant refused to perform the worship or to supply the articles necessary in that

behalf, a decree might be made against him for ejectment. The learned Judges observed :

The question arises whether this trust came to an end when the temple was washed away and the image was broken This text shows that when an image has been mutilated or destroyed, the religious purpose does not come to an end . . . and the endowment is not affected by the destruction or mutilation of the image. The religious purpose still survives and a new image may be established and consecrated in order that it may be worshipped as intended by the original founder.

On the analogy of this case the appellants seek to establish that the religious purpose, for which the mosque was constructed, did not come to an end by the destruction of the mosque and that it still survived. The appellants have further relied on 26 Bom 198,²⁴ 18 All 395,³⁶ 40 Cal 548,³⁷ A I R 1932 Cal 459,³⁸ 138 I C 309⁶⁵ and Reg. Second Appeal 1391 of 1936,⁶⁶ in support of their contention that the sacred character of wakf property is not lost merely by being possessed or owned by persons holding faiths different from those of the original dedicators or from those of the persons for whose benefit the wakf is intended.

In 26 Bom 198,²⁴ certain land at Dharwar, which had formerly been used as a grave-yard by the Mahomedan community residing there but which had not been used as such for 20 or 30 years, was sold by the owner to a Hindu named Ramrao Narayan Bellary who thereupon began to prepare the foundation of a house which he proposed to build upon it. The Mahomedan residents of Dharwar brought a suit alleging that they were accustomed to perform religious rites and ceremonies at the graves in the said land and prayed for a declaration that they were entitled so to do and for an injunction restraining the defendants from obstructing them. Both the Subordinate Judge and the District Judge decreed the suit. Ramrao appealed and the appeal came on for hearing before a Division Bench composed of Fulton and Crowe JJ. Fulton J. in delivering the judgment observed as follows :

The land in dispute, it has been found, is a grave-yard, disused, it may be, for 20 or 30 years, but retaining nonetheless its character as such. By the custom of the country founded on a sentiment which may almost be described as universal, the

65. Lachhman Das v. Arya Pratinidhi Sabha' Punjab, (1932) 19 A I R Lah 603 = 138 I C 309.

66. Imam Bakhsh Munawar Din v. Mandar Nar-singh Puri Parhalad Rai, reported in (1938) 25 A I R Lah 246.

ground in which human remains are interred is regarded as for ever sacred. The members of the families of the dead are in the habit of performing certain religious services at their tombs. The ownership of the soil may be vested in others, but the permission to bury in the land granted as it must be subject to the custom of the community carries with it the right to perform all customary rights. The District Judge may have gone too far in inferring from the facts which he found proved that the land was the property of the Mahomedan community. But those facts certainly justified him in confirming the decree of the Subordinate Judge which directed that the plaintiffs whose relatives have been there buried, have the right of performing all such worship and ceremonies near the *makan* and the graves on the ground in dispute as are enjoined by the Mahomedan custom and religion.

This judgment clearly shows that even if land under graves is sold to a Hindu, he does not acquire such rights of ownership on the graves themselves as he does in connexion with ordinary property. He is bound to keep the graves as they are and cannot in any manner interfere with them. If a purchaser for valuable consideration with notice cannot assert his rights of ownership on the property purchased by him, it is difficult to comprehend that an adverse possessor would be able to exercise the rights of absolute ownership in the sacred property which he has acquired by a wrongful act of his.

In 18 All 395,³⁶ certain persons who had entered upon a burial place and ploughed up the graves were held liable to be convicted of an offence under S. 297, I. P. C., notwithstanding that their entry on the land was proved to have been by the consent of the owner thereof. In 40 Cal 548,³⁷ there existed a visible grave in a disused grave-yard which was claimed by a Hindu owner as his private property. He built a *chabutra* there and caused disturbance of the grave, thus wounding the feelings of the person whose mother was buried there. He was convicted and the matter came before a Division Bench composed of Sharfuddin and Richardson JJ. The contention raised on behalf of the convict was that the land in question was his ancestral land, that it belonged to him and was in his possession, that he was in enjoyment of the fruits of the trees standing upon it and that the land was no more a burial ground or depository for the remains of the dead, inasmuch as it had not been used for burying purposes for a great many years. Sharfuddin J. who delivered the principal judgment observed :

In my opinion however it is not necessary for the purposes of S. 297, I. P. C. that a burial

ground should be in use. If it has been a burial ground and if there are visible graves in it, it becomes a depository for the remains of the dead. It is possible that the bodies in those graves may have disappeared, but the remains of those bodies are still there, although they may have crumbled to dust.

Richardson J. concurred in the view held by Sharfuddin J. and remarked :

It is said that at any rate the petitioner had the possession and custody of the land in which the tomb stood and that the mere entry upon the land would not therefore amount to a trespass. That no doubt is so, but what is found here is that the petitioner did more than merely enter upon this land. It is not contended that he had the right to use the land for all purposes as land in its natural state. It is not suggested, for instance, that he could remove the tombs and plough up the whole surface of the land. It is not denied that the place was at one time lawfully used as a place of sepulture. So far at any rate as it was so used, it was set apart as a depository for the remains of the dead and is entitled therefore to the protection afforded by S. 297.

In A I R 1932 Cal 459,³⁸ Patterson J. in a case in which an owner of the land had demolished certain structures erected over the graves of the complainant's relatives observed :

Although the petitioners have been found by the Civil Court to be the owners of the land in question and although they have been given *khas* possession thereof by the Civil Court, that does not entitle them to disturb any graves that may be found existing in the land or to damage any structure that may have been raised over such graves, if by such act or acts the feelings of any person interested in the graves are likely to be wounded.

In connexion with the three judgments cited above, it is objected that they do not touch the point at issue before us, inasmuch as they relate to criminal law and proceed on different grounds. I am not however impressed by this argument. No criminal Court can ordinarily punish a person for encroachment upon his own land or for exercising his legitimate rights in connexion with a property which he can call his own. It is only when, in spite of his being an ostensible owner, the property cannot be deemed under the law to belong to him that his interference with it can be culpable. These judgments clearly show that whoever the possessor, the sacred character of graves is not lost and to that extent they go a long way to support the case of the appellants. It needs no authority to say that under the Mahomedan law, a mosque is held more sacred than a grave-yard inasmuch as one is the house of God, while the other is a mere depository of mortal remains. In almost all standard works on the Mahomedan law, mosques

have been dealt with separately from every other kind of wakf property merely on the ground of their sanctity. What applies to grave-yards therefore applies with greater force to mosques. If, in spite of the fact that a recognized owner of the land, which has been used as a grave-yard, cannot treat the graves as his personal property, it passes one's comprehension that a person coming into possession of a mosque can be said to be in law entitled to claim it as a private house of his and nothing more. Moreover if the sacred character of a grave-yard is not altered by the lapse of time, how can the sanctity attaching to a mosque vanish in similar circumstances? The possessor in these cases possesses the sacred property, be it a grave-yard or a mosque, subject to all the burdens or privileges attaching to it, and is bound under the law to treat it as such. To hold otherwise would be completely to disregard and override the provisions of the Mahomedan law which the Courts are bound to follow in this respect so long as the guarantee given by the British Government in the shape of proclamations and legislative enactments lasts.

In this connection I may mention that under English law, from which we have mostly derived our notions and conceptions of property, the rule is that even though the title of the former owner is extinguished by the efflux of time, the property remains subject to the rights which are not merely incidental but paramount to his estate. As stated in *The Time Limit on Actions* by Lightwood, 1909 Edn. at p. 80 :

On the other hand, in (1852) 4 H L C 1065,⁶⁷ Lord Cranworth C., suggested that a legal estate got by disseisin would not affect the rights of parties equitably entitled, and this suggestion has recently been embodied in an authoritative decision in (1906) 1 Ch 386 (C A).⁶⁸ It follows from that case that equitable interests rank as independent estates in the land, and continue to be enforceable against the legal owner of the land for the time being, whether he has acquired it by assignment or by disseisin, unless, in the former case, he can claim to be a purchaser for value without notice—a claim which of course cannot be made by a disseisor. The actual point in (1906) 1 Ch 386⁶⁹ related to restrictive covenants. It was decided that these created in favour of the covenantee an interest in the land which was independent of the estate of the covenantor, and that they were binding upon the land in the hands of an adverse possessor who had gained a legal title in conse-

quence of the lapse of the statutory period and the extinction of the title of the covenantor. But the interest in land created by a restrictive covenant is at most equitable, and the same considerations apply with greater force to trusts which confer upon the cestui que trust a direct interest in the land itself.

At p. 117 of the same book the learned author says :

Of this nature are legal easements, and also the restrictions on the use of the land — or negative easements—created by restrictive covenants entered into by the former owner or one of his predecessors-in-title. Such covenants confer upon the covenantee an equitable interest in the land which is binding on all persons to whom the land comes, until there is a purchaser for value without notice. They are binding therefore on persons acquiring a title by possession, and on purchasers from them who have either actual or constructive notice. . . . And upon the same principle apparently, express trusts create interests paramount to the estate of the trustee, and are not necessarily extinguished at the same time as the trustee's title.

These passages have been quoted with the object of showing that law recognizes certain rights which are not extinguished with the extinguishment of the original owner's title and that even where legal title passes to an adverse possessor, he may in certain circumstances, be bound under the law, by those obligations by which the property adversely possessed by him is bound. In the present case, I am not prepared to accept for a moment that any legal title passes to a non-muslim possessor of a mosque merely by virtue of possession or that the rights of Muslims are extinguished unless certain other things happen to which I shall allude later. The rights of a mosque to be treated as such as well as the right of worshippers to use it as such are rights not only incidental but, in the words of the Author, "paramount to the estate," and what appears to me to be deducible from these passages is that such rights stick to the mosque even if it passes into the hands of a non-muslim. It may be urged by the respondents that the rights possessed by the beneficiaries of a mosque are covered by the words "any interest in immovable property" as used in Art. 144 ; but in my view this Article cannot be invoked inasmuch as no suit for possession of such interest as is possessed by beneficiaries of a mosque can be brought.

In 138 I C 309,⁶⁵ a Division Bench of this Court composed of Sir Shadi Lal C. J. and Hilton J. observed :

Finally it was said that there are no idols in the property and that the temple has for a long time been used as a residential house, but there is authority in 20 I C 78⁴² for the view that a temple

67. *Scott v. Scott*, (1852) 4 H L C 1065 = 18 Jur 755.

68. *Re Nisbet & Pott's Contract*, (1906) 1 Ch 386 = 75 L J Ch 238 = 94 L T 297 = 54 W R 286 = 22 T L R 233.

is still a temple even if the idol is thrown away or the building has become dilapidated. In my judgment the use of the property as private property cannot in any way detract from its character as dedicated property.

In R. S. A. 1391 of 1936⁶⁶ the dispute related to a piece of land used as a grave-yard which in the revenue records had been described as the property of an ancient Hindu temple in the city of Multan. The managing body of the temple instituted a suit for a declaration that the temple was owner of the land and the defendants had no right to interfere with its rights. The trial Court found that the land had been established as a grave-yard long before the first land revenue records of 1868 described it as such and it consequently held that the plaintiff temple had no right whatever in the land. The District Judge came to a different conclusion and decreed the suit. On appeal, a Division Bench of this Court reversed the judgment of the District Judge and restored that of the trial Court. Coldstream J. who delivered the judgment, observed :

From the history of the land given in the Settlement records it appears that during the time of the Sikhs a Bairagi applied to be given the land, which was uncultivated and unclaimed, and appropriated it . . . From the fact that the whole area . . . was described as a grave-yard in 1868, it is certain that the grave-yard had been in existence a long time and the admitted fact that since then it has been a kabristan is by itself presumptive evidence that the land had been set apart for use as a burial ground. . . .

The Mahomedans may have been apathetic or, probably enough, were content at that time to live in amity with an important Hindu landlord and such conduct will not alter the nature of the wakf if there was a wakf.

The remarks made in this judgment are clearly helpful to the appellants inasmuch as the facts on which the judgment was pronounced were to some extent similar to those now before us. In the case cited, a Mahomedan grave-yard had during the Sikh regime been attached to a Hindu temple and here too it is contended by the respondents that a similar treatment was meted out to the mosque. In spite of the grave-yard having been attached to the Hindu temple by an act of State so to say, it was held that the sacred character of the grave-yard was not lost. It is true that the grave-yard was being used as such; but, as remarked above user or non-user makes no difference in the matter of sacred places.

On the question of continuing wrong the appellants have relied on 31 P R 1917,⁴⁴

A I R 1935 Cal 405⁶⁹ and A I R 1933 P C 193.⁷⁰ In 31 P R 1917,⁴⁴ the dispute between the parties related to a mosque, over which the defendants had built a balakhana in which they both resided with their families. The plaintiffs sued for a declaration that the defendants had no right to reside there and for a perpetual injunction restraining them from so residing and thereby causing desecration of a place of worship. The Subordinate Judge granted the relief prayed for but the Divisional Judge dismissed the suit on the ground that it was barred by limitation inasmuch as one of the defendants, who was a mutwalli of the mosque in question, had been occupying the balakhana as a private residence for more than six years prior to the institution of the suit. On appeal a Division Bench of the Punjab Chief Court observed as follows :

The occupation by the defendants of the balakhana over the mosque for purposes of private residence is an act of desecration of a place of worship which indisputably amounts to a "wrong" and the wrong is a "continuing wrong" so long as the occupation lasts in the same sense in which for instance a nuisance is a continuing wrong which gives rise to a cause of action *de die in diem*; and therefore under S. 23 aforesaid, a fresh period of limitation began to run in favour of the plaintiffs in this case at every moment of the time during which the defendants' occupation of the balakhana has continued. The plaintiffs' cause of action is not the erection of the balakhana by the defendants in 1903, which took place once and for all in that year; but it is the occupation of the balakhana by the latter for a purpose inconsistent with the use of the mosque as a place of worship after its dedication to Divine service. Their occupation is an actionable wrong which may be objected to at any moment of time by any Mahomedan who has a right to use the mosque as a place of worship; and the circumstance that the balakhana was first erected in 1903 and has, it may be assumed, stood in the same condition ever since, did not give rise to a cause of action which can be said to have exhausted itself; a fresh right to sue accrues to every worshipper at the mosque who objects to the balakhana being used for purpose of private residence and whose objection is disregarded by the person in occupation of that balakhana. In our opinion therefore S. 23, Lim. Act, applies to the present case.

On the strength of this judgment, the appellants urge that the respondents' using the mosque in a manner inconsistent with its sacred character is a continuing wrong and consequently the appellants can avail

69. Sarat Chandra v. Nerode Chandra, (1935) 22 A I R Cal 405=156 I O 390.

70. Hukum Chand v. Maharaj Bahadur Singh, (1933) 20 A I R PO 193=144 I O 346=60 I A 313=12 Pat 681 (P O).

themselves of the benefit of S. 23, Lim. Act. As against this, the respondents contend that inasmuch as the person desecrating the mosque in the judgment cited was the mutwalli himself, and not an outsider, the principles enunciated there are inapplicable to the present case where the desecrators are trespassers. I am however disposed to think that the judgment relied upon does lend support to the appellants' contention. In the first place, one of the defendants there did not occupy any position of trust in relation to the mosque. Secondly, had the case been considered in the light of the desecrators being trustees, S. 10, Lim. Act may have been invoked and not S. 23. Even if it be said that S. 10 was not relied upon as it did not apply to Mahomedan endowments prior to 1929 when the Limitation Act was amended expressly to include the Hindu and Mahomedan endowments, the appellants' position remains unaffected.

In A I R 1935 Cal 405,⁶⁹ S. 23, Lim. Act was held applicable to a case where the plaintiff was found to have a right to use certain land as a passage and the defendants had erected certain sheds which were obstructing him in the exercise of his right. In A I R 1933 P C 193,⁷⁰ the passage on which the appellants have relied, reads as follows :

The charans in the old shrines were impressions of the foot-prints of the saints, each bearing a lotus mark. The Swetambaris who prefer to worship the feet themselves, have evolved another form of charan not very easy to describe This the Digambaris refuse to worship. . . . Both the lower Courts have held that the action of the Swetambaris in placing charans of the description in three of the shrines is a wrong of which the Digambaris are entitled to complain. As regards limitation, the Subordinate Judge held on rather insufficient grounds that the acts complained of took place within six years of suit so that this part of the claim could not be barred by Art. 120, but he also held that it could not be barred under that Article as it was a continuing wrong, as to which under S. 23, Lim. Act, a fresh period begins to run at every moment of the day on which the wrong continues. The High Court on the other hand were of opinion that it was not a continuing wrong and that the claim was barred under Art. 120. In their Lordships' opinion the Subordinate Judge was right in holding that the acts complained of were a continuing wrong and consequently that this part of the claim is not barred.

The respondents contend that the principles enunciated in these judgments do not apply to the present case, but in my view on the question of determining what a continuing wrong is, they do afford a good deal of help to the appellants. Reference has further been made in this connexion

to Salmond on Torts. At page 165 the following passage occurs :

When the act of the defendant is a continuing injury, its continuance after the date of first action is a new cause of action for which a second action can be brought, and so from time to time until the injury is discontinued.

An injury is said to be a continuing one so long as it is still in the course of being committed and is not wholly past. Thus the wrong of false imprisonment continues so long as the plaintiff is kept in confinement ; and a trespass continues so long as the defendant remains present upon the plaintiff's land.

At p. 210 the learned author says :

That trespass by way of personal entry is a continuing injury, lasting as long as the personal presence of the wrong-doer, and giving rise to actions *de die in diem* so long as it lasts, is sufficiently obvious. 'A continuation of every trespass is in law a new trespass.'

The appellants contend that the principles enunciated above apply to this case and that so long as acts of desecration are committed by the defendants, they give rise to a new cause of action at every moment of the day that the desecration continues.

I shall now take up the authorities relied on by the respondents. In 51 All 621,¹⁰ a suit was instituted for a declaration that the house in dispute was trust property and was not alienable. It originally belonged to the ancestor of one Chittaranjan Mukharji but was put to auction and purchased by a stranger in 1878. Sometime afterwards, it was transferred by the auction-purchaser to Mukharji's father and had been held by the family since then. In 1908 Mukharji executed a deed of endowment dedicating the house in dispute in favour of three family idols and appointing his own mother as the shebait of the said idols. No application for change of names in the Municipal Board was however made, nor was any mutation effected in the revenue papers. In 1909 Mukharji and his mother jointly executed a mortgage deed of this house. They purported to mortgage the property in their own right as well as the shebait of the idols. In 1914 a second mortgage of the same property was made in favour of another person. In the meantime a deed of revocation was also executed by Mukharji. When the suit was instituted, the contesting defendant pleaded that there had been no valid dedication, that the deed of endowment had never been acted upon or given effect to, that it had been duly revoked and that in any case there had been adverse possession for more than 12 years against the idols. The

learned Judges upheld the plea of adverse possession and made the following observations :

The view of the Court below that there could not be any adverse possession because the idols themselves remained in the house cannot for a moment be accepted. As a matter of fact there can be adverse possession, not only as against the idols but over the idols themselves. That adverse possession can be acquired against idols in respect of property dedicated in their favour is fully clear from several cases decided by their Lordships of the Privy Council In our opinion the same principle applies whether the adverse possession is exercised by a total stranger or by the donor himself. So long as such possession is exercised to the ouster and knowledge of Chittaranjan's mother, who alone can hold the property on behalf of the idols, it would mature into title after the lapse of the prescribed period.

Counsel for the respondents has urged that this is a clear instance of a case where adverse possession was established against a house of God and that the case was on all fours with the case before us ; but I do not consider that his contention is sound. Neither was the house a temple nor was it treated as such in the case and the remarks made by the learned Judges that adverse possession could be established over the idols themselves were clearly obiter. In 32 Cal 129³² a suit had been instituted to recover possession of land as Shebait of an idol. It was resisted on the ground of limitation. In the course of their judgment their Lordships observed :

There is no doubt that an idol may be regarded as a juridical person capable as such of holding property, though it is only in an ideal sense that property is so held. And probably this is the true legal view when the dedication is of the completest kind known to the law

But assuming the religious dedication to have been of the strictest character, it still remains that the possession and management of the dedicated property belongs to the shebait. And this carries with it the right to bring whatever suits are necessary for the protection of the property. Every such right of suit is vested in the shebait, not in the idol. And in the present case the right to sue accrued to the plaintiff when he was under age. The case therefore falls within the clear language of S. 7, Lim. Act.

In 48 All 348,⁷¹ the decision proceeded on the basis of the authority referred to above and it was held that if property belonging to an idol is alienated by the manager, adverse possession runs against the idol just as against any other person. In 23 Cal 536,¹⁶ the appeal arose out of a suit brought by the plaintiff-appellant in 1892 to recover khas possession of certain immovable property with mesne profits,

and to obtain a declaration that a pottah and a kabala executed in 1857 and 1875, respectively, set up by the defendants, were illegal and collusive, upon the allegation that the property constituted the debutter of an idol. The defence was that the suit was barred by limitation. It was held that the suit coming either under Art. 134 or under Art. 144, Limitation Act, was barred. The learned Judges in the course of their judgment observed as follows :

The idol is a juridical person capable of holding property as has been authoritatively settled by the decision of the Privy Council in 13 M I A 270,⁷² and the possession of the defendants who profess to derive title, not from the idol, but ignoring its rights, must be taken to have become adverse to the idol from the dates of the two alienations which are both more than 12 years before the date of the present suit The succeeding shebait, as was observed in the case just referred to, formed a continuing representation of the idol's property. If we were to hold otherwise, it would lead to a most anomalous result ; for, then it would follow that, although after any alienation of the idol's property, ten successive shebait may not take any steps to recover the idol's property, the eleventh shebait, it may be after a 100 years or more, would still be in time to institute a suit for recovery of possession. Such a result the Legislature could not have contemplated.

In my view, neither this case is in point nor are the previous cases inasmuch as the property involved in all these cases was property attached to a religious institution and not the religious institution itself. It is in fact not disputed by the appellants that so far as the property attached to a religious institution is concerned, there is a mass of authority in support of the view that it is subject to the law of adverse possession.

In 37 Cal 885¹⁷ on which much stress was laid by counsel for the respondents, the mahant of the math of a Hindu deity who was in possession of two maths died leaving two chelas between whom a controversy arose as to the right of succession to the maths and the property annexed to them. The dispute was settled by an arrangement embodied in an ekrarnama, dated 3rd November 1874, executed by the senior chela in favour of the junior chela by which the math at one place was allotted in perpetuity to the elder chela and his successors, while the math at the other place and the properties annexed thereto were allotted to the younger chela and his successors for the purposes connected with

71. Chitar Mal v. Panchu Lal, (1926) 18 A I R All 892 = 93 I C 652 = 48 All 348 = 24 A L J 351.

72. Shibessuree Dabia v. Mothoora Nath Acharjo, (1869-70) 13 M I A 270 = 13 W R 18 = 2 Suth 300 = 2 Sar 528 (P.O).

his math subject to an annual payment of a small sum of money towards the expenses of the first math. Their Lordships of the Privy Council remark :

The learned Judges of the High Court have rightly held that in point of law the property dealt with by the ekrarnama was prior to its date to be regarded as vested not in the mahant but in the legal entity, the idol, the mahant being only his representative and manager. And it follows from this that the learned Judges were further right in holding that from the date of the ekrarnama the possession of the junior chela by virtue of the terms of that ekrarnama, was adverse to the right of the idol and of the senior chela as representing that idol, and that therefore the present suit was barred by limitation.

In my opinion this case instead of helping the respondents helps the appellants, inasmuch as what was conceded to the person alleging adverse possession was mere possession of the property in suit and nowhere was it laid down that he had acquired such rights in the property in suit as to enable him to convert it into his private property. In spite of the adverse possession, the religious character of the math or the waqf nature of the properties attached thereto was not altered in any manner.

In 23 Mad 271,⁷³ a suit was brought by the respondent to establish his right to the management of an endowment connected with a temple situate in Madras and the only question that arose for determination was whether the suit was barred by the law of limitation. Their Lordships of the Privy Council applied Art. 124, Lim. Act, as well as S. 28, and observed :

In 1 Mad 235,⁷⁴ this committee held that an assignment by the managers of a pagoda of the right of management thereof was beyond their legal competence under the common law of India and that no custom to do so had been established. There is no proof of any custom in this case, and consequently these deeds of sale are void and did not give any title to the purchaser. The title remained in C and N and the possession which was taken by the purchaser was adverse to them

Their Lordships are of opinion that there is no distinction between the office and the property of the endowment. The one is attached to the other, but if there is, Art. 144 of the same Schedule is applicable to the property. That bars the suit after 12 years' adverse possession.

Here again the subject-matter of the suit was not such as could claim the same incidents as are attached to a mosque under the Mahomedan law.

In 46 Mad 751,⁷⁵ the suit out of which

the appeal had arisen was instituted to recover, as against a purchaser under an execution sale and those who claimed under him certain property which had by two deeds dated 21st February 1890 and 13th December 1894 been devoted to charitable purposes. The settlor died in 1895 leaving him surviving a widow and an only son. A creditor of the son sued him and obtained a decree in execution of which the endowments of the charity were attached. The settlor's widow, on behalf of the judgment-debtor's son who was then an infant, filed an objection to the attachment, but it was dismissed on the ground that during the lifetime of his father he had no locus standi. In the same year, another suit was instituted by the minor acting through the same next friend seeking to establish the validity of both the deeds, and while this suit was pending, the property was brought to sale under the decree against the judgment-debtor on 22nd March 1898. The sale was confirmed on 11th August 1898 and delivery of possession was made to the purchaser. From the day of the sale until the institution of the suit, the purchaser and his legal representatives remained in uninterrupted possession of the property. On 31st December 1900, it was declared in the second suit brought by the minor that the properties including those seized under the execution sale formed a trust estate for the purpose specified in the deed. In 1910 the minor attained majority and in 1913 he obtained a decree removing his father from the office of trustee, and two days later brought the suit out of which the appeal arose, to recover the property. Their Lordships remarked :

There is no doubt that whatever period of limitation be assigned, the full period had run before these proceedings were instituted.

A further argument was put forward before their Lordships to the effect that the statute of limitation began to run afresh as each new trustee succeeded to the office, but their Lordships did not agree to this contention and held that the suit was barred under Art. 134 or Art. 144, Lim. Act. It is obvious that the property involved in the suit was property attached to a Hindu institution and the same observations as I have made above apply to this case.

In 2 Luck 239,⁷⁵ the headnote reads as follows :

73. *Rajah Vurmah Valia v. Ravi Vurmah*, (1877) 1 Mad 235=4 I A 76=3 Sar 687 (P C).

74. *Subbaiya Pandaram v. Mohamad Mustafa Maracayar*, (1923) 10 A I R P C 175=74 I C 492=50 I A 295=46 Mad 751 (P C).

75. *Parkasdas v. Janki Ballabha Saran*, (1926) 13 A I R Oudh 444=95 I C 27=2 Luck 239=3 O W N Sup 1.

An idol installed in a particular Asthan is a juridical person capable of holding property and getting it managed through its manager, shebait or mahant. Such a manager, shebait or mahant would represent the idol or the institution for the time being completely, and possession, if adverse, against the mahant for the time being must be deemed to be adverse against the idol or the institution, unless the character of the alienation under which possession was taken could be deemed to enure only for the lifetime of a particular manager, shebait or mahant. The adverse possession in such a case begins to run from the date when the alienee takes possession of the property alienated and each succeeding manager, shebait or mahant cannot get a fresh start, so far as the question of limitation is concerned, upon the ground of his not deriving title from any previous manager, the reason being that the succeeding managers, shebait or mahants form a continuing representation of the idol or the institution to which the endowed property has been dedicated.

In 5 Pat 341,⁷⁶ a Division Bench of the Patna High Court held that the possession of a purchaser of the property of a math from its mahant became adverse to the math from the date of the transfer and was not interrupted or affected by the death of the transferor or the succession of a new mahant even though the latter did not derive his title from the previous mahant. The observations made in this case as well as in the previous case are of no use to the respondents in the present case on the grounds stated above.

In 11 Pat 701,⁷⁷ the only passage relied upon by the respondents is at page 737 and reads as follows :

It is well settled that properties vested in an idol may be lost by the adverse possession of another and that the possession of an out-and-out purchaser from the manager of an idol will be adverse to the idol even if the sale be effected for an unauthorized purpose.

This observation was mainly based on 37 Cal 885¹⁷ and 46 Mad 751,⁷⁴ both of which have been discussed above. In 41 Mad 124,¹⁸ it is observed that possession which was adverse to the institution was equally adverse to the disciples who sued on its behalf, but it is apparent that the property involved in the case was not the institution but the property attached to it. In 36 Bom 135,¹³ the plaintiff, a manager of a temple, brought a suit in the year 1908 to recover possession of certain endowed property which the defendant had purchased at a Court sale in 1870 in execution of a decree against the then

manager ; and it was held that the defendant's possession was adverse to the idol. This case is obviously distinguishable on the grounds stated above.

In A I R 1935 Oudh 425,⁵ a representative suit was brought for possession of a house which was alleged to have been built on a part of the land which was used as a grave-yard. The house had stood there since 1912 and its materials had been sold by one Lal Mohammad to one Amir Ali. In 1915 the site of the house too was sold to one Jawad Ali, nephew of Amir Ali. In 1926, Jawad Ali sold the khandhal or the ruined house to the defendant-respondent. On these facts the Subordinate Judge had held that the suit was time-barred under Art. 134, Lim. Act. It was contended before the learned Judges that the lower Court was wrong in applying that Article inasmuch as under certain Privy Council judgments that Article did not apply to Mahomedan wakfs. The learned Judges upheld this contention and applied Art. 142 instead on the following grounds :

This Article is clearly applicable as the plaintiffs or the Muslim community whom they represent were dispossessed of the land in question belonging to the grave-yard by the erection of a house thereon.

It is obvious that there were no graves on the land sold and this case therefore is no authority for holding that the title of an adverse possessor could be perfected on graves in the same manner in which it could be perfected on other mundane holdings. In A I R 1936 Oudh 207,⁶ a takiadar claimed adverse possession over a grave-yard on the ground of his having made certain alienations in respect of certain portions of the grave-yard and also by virtue of his having constructed certain kothris on a portion of the grave-yard. Subsequently another portion of the grave-yard was sold by the takiadar upon which a representative suit was instituted by certain Muslims. King C. J. observed :

The main question is whether the predecessors-in-interest of the defendants had perfected their title to the land by adverse possession. The defendants' case was that eleven kothris had been built on the land in dispute by the predecessors-in-interest of the defendants more than twelve years before the date of the suit. On this point we have a clear finding of fact by the lower Appellate Court to the effect that only four kothris had been built on the land in suit more than twelve years before the date of the institution and those kothris were of a temporary nature. On this finding it seems to me that it is impossible for the appellants to succeed in their claim, based upon adverse possession, in respect of any part of the land in suit which is not covered by the four kothris mentioned.

76. *Badri Narain Singh v. Kailash Gir*, (1926) 13 A I R Pat 289=93 I C 803=5 Pat 341=7 P L T 453.

77. *Ohaturbhuj Singh v. Sarada Oharan*, (1933) 20 A I R Pat 6=141 I C 157=11 Pat 701=14 P L T 509.

It has been argued that the cemetery must be taken as a whole and as it has been shown that the takiadars have been alienating portion of the cemetery from time to time and that certain portions have been permanently alienated more than twelve years before the date of the suit, it must be held that the takiadars had perfected their title by adverse possession over the whole area of the cemetery. I am unable to accept this contention.

It may be mentioned that even in relation to the four kothris referred to above, the learned Judge decreed the suit on the ground that the mere building of kothris would not imply renunciation of the takia-dar's permissive possession or the open and public assertion of a hostile title. In the course of this judgment the learned Judge had further observed :

If a takiadar in possession of a grave-yard sells a portion of it to some other person who builds a house and if the Mahomedan community are apathetic in the matter and allow the encroachment to remain for more than twelve years, then it might well be held that the person in possession had perfected his title by adverse possession for more than twelve years over the portion of the grave-yard sold to him.

Counsel for the respondents has laid much stress on this passage but counsel for the appellants has urged that, in the first instance, it is obiter and, secondly, it does not appear to be the considered opinion of the learned Judge. I am however disposed to think, as I shall explain below, that an encroachment by way of demolition or in the shape of a new construction can be taken to be an act of hostility that may be a determining factor in such cases and that if no suit is brought within twelve years of the assertion of such a hostile title, the right of the interested persons is lost.

In 38 Cal 526,⁷⁸ their Lordships of the Privy Council, basing their judgment on a previous judgment of their own reported in 36 Cal 1003,⁷⁹ discussed Art. 134, Lim. Act, in connexion with a permanent lease of debutter lands and held that that Article did not apply. This judgment is of no use to the respondents.

In support of his contention that a mosque, in spite of its being a juristic person, is immovable property in the ordinary acceptation of the term, counsel for the respondents has referred to two judgments of the Punjab Chief Court.

In 153 P R 1884,¹² the mutwalli of a mosque had, on behalf of and for the bene-

fit of the mosque, purchased a house adjoining the mosque. The house in question adjoined the house of another person who happened to be a Hindu. The Hindu brought a suit for pre-emption alleging that the mosque or its guardian had no right on the ground of the mosque's vicinage, inasmuch as the mosque was the property of the deity and not of any earthly owner and had no right of the kind contemplated by the Pre-emption Act attaching to it. Tremlett and Powell JJ., who heard the appeal, remarked :

As to the second point, we are of opinion that though theoretically wakf property belongs to no human owner, nevertheless a mosque as a concrete example of wakf is an institution, and its possession is legally maintained by its lawful guardian for the time being : in virtue of his position, the guardian can resist trespass, recover debts make purchases and mortgages all in virtue of the right which resides in the institution. In the same way, we think that the mosque, as an institution, might acquire an easement by prescription ; and that being so, we cannot think of any rule or principle by which we could deny to the mosque (as an institution) the same right of preventing strangers approaching its walls by the exercise of a right of pre-emption, as other house-holders have. . . .

We have no hesitation in deciding, on this principle, that the mosque as an institution has practically proprietary rights exercised through the guardian, and that one of the rights is to claim, on the ground of vicinage, a right of pre-emption in the case of sales of adjoining properties. . . .

A mosque is in our opinion as much an estate as a house owned by a private owner.

In 59 P R 1914,¹¹ it was argued that since a Mahomedan mosque was not a juristic person and could not hold property as a Hindu dharamsala or temple can, no right of pre-emption could be exercised by the mutwalli of such a mosque. This argument did not find favour with the learned Judges. After holding that the mosque is a juristic or an artificial person, they observed as follows at page 201 of the report :

Under the said clause [S. 13 (1) clause seventhly] it is not, in our opinion, an essential condition of the valid exercise of the right of pre-emption by the present plaintiff that he should be proprietor of the mosque in the same sense in which he would be, for instance, proprietor of his own private dwelling house ; all that it is necessary for him to establish is, that he is the sole guardian and manager of the mosque, . . . that the legal ownership in the mosque . . . does not vest in any other person, and that he alone deals and is entitled to deal with the outside world on behalf and for the benefit of the mosque in all its legal relations. It is in this sense that the mutwalli of a mosque or the manager of a Hindu religious institution, by whatever name he may be called, can be appropriately said to be "a person whose immovable property," though it is not his private property,

78. *Ishwar Shyam Chand Jui v. Ram Kanai Ghose*, (1911) 38 Cal 526=10 I C 683=38 I A 76 (P C).

79. *Abhiram Goswami v. Shyam Charan Nandi*, (1909) 36 Cal 1003=36 I A 148=4 I C 449=10 C L J 284=14 C W N 1 (P C).

clothes him with a right of pre-emption regarding property contiguous to the mosque or temple.

The learned Judges further approvingly referred to the passage quoted above from 153 P R 1884.¹² In so far as a right of pre-emption could be claimed only on the basis of owning immovable property, these two judgments obviously lend support to the contention of the respondents that, in spite of a mosque being a juristic person, it is immovable property, but it is clear from these judgments that the word "own" in relation to a mosque does not carry the same signification as it does in ordinary cases. In the judgment of 1884 the mosque is throughout described as an institution and inasmuch as the judgment of 1914 merely follows that of 1884, no special significance is attached to the words "immovable property" used therein.

In support of their contention that there could be no continuing injury in this case the respondents have relied on 49 I C 93,⁸⁰ 19 Mad 154⁸¹ and 3 L L J 128.⁸² In 49 I C 93,⁸⁰ the Corporation of Calcutta objected to a certain platform which had been erected on a piece of land claimed by the Corporation as its own. The owner of the platform sued for a declaration of his right to the land upon which the platform stood. It was found that the platform had been in existence for about 50 years. On these facts the learned Judges observed that the Corporation had lost its right to that portion of the land upon which the platform stood from the date of its dispossession or the discontinuance of possession. They further repelled the contention of the Corporation that it was a continuing wrong, on the ground that the injury was complete on the erection of the wall and even though the effect continued, this did not extend the period of limitation.

In 19 Mad 154,⁸¹ the Municipality of Madras sued to recover as forming part of a highway, a strip of land adjoining the house of defendant, on which a "pial" had been erected more than 45 years before the suit. It was held that the defendant had acquired a title by adverse possession against the Municipality. In 3 L L J 128⁸² the defendants had erected a thatched shed

in front of their house and the plaintiffs on the basis of joint ownership asked for a perpetual injunction to issue to the defendants directing them to remove those sheds. It was held that S. 23, Lim. Act, was inapplicable inasmuch as the moment the sheds were erected the injury complained of and sought to be removed by the issue of an injunction was complete and there was no continuing injury within the meaning of the statute.

The principle enunciated in these three judgments is not applicable to the present case as they proceed on their own facts and besides deal with property which is secular and not sacred. As observed in 31 R R 1917⁴⁴ in the case of an encroachment on a mosque, the cause of action does not exhaust itself the moment an encroachment is committed but continues so long as the encroachment continues.

Counsel for the respondents contended that in two of these cases the person against whom judgments were given was a juristic person, but the fact that it was so does not advance his case any further. Reference may also be made to L. P. A. No. 109 of 1935⁸³ decided by the Hon'ble Chief Justice and Monroe J. on 11th December 1935, where relying on the three Privy Council judgments reported in 6 Cal 394,⁸⁴ 1 C W N 96⁸⁵ and 29 I C 385,⁸⁶ it was held that the wrong done by the defendant in constructing a house which obstructed the light and air of the plaintiff was a continuing wrong and that no period of limitation applied. It may be remarked that 49 I C 93⁸⁰ had been relied upon by the learned single Judge of this Court but his judgment was reversed on appeal. In 2 Pat 391⁸⁷ at pp. 402 and 403 the learned Judges observed :

The principle of S. 23, Limitation Act, which deals with continuing wrongs, can have no application to a declaratory suit and there is no recurring cause of action for a declaratory relief.

In 54 Bom 4,⁸⁸ these observations were referred to with approval and reference was

83. *Moti Ram v. Hans Raj*, reported in (1936) 23 A I R Lah 384=162 I C 303.

84. *Rajrup Koer v. Abdul Hossein*, (1881) 6 Cal 394=7 I A 240=7 C L R 529=4 Sar 199 (PC).

85. *Soojan Bibi v. Shamed Ali*, (1897) 1 O W N 96.

86. *Nazimulla v. Wazidulla*, (1916) 3 A I R Cal 738=29 I C 385=21 C L J 640.

87. *Muhammad Fahimul Huq v. Jagat Ballav Ghose*, (1923) 10 A I R Pat 475=74 I C 403=2 Pat 391=4 P L T 675.

88. *Krishnaji Annajee v. Annajee Dhondajee*, (1930) 17 A I R Bom 61=124 I C 778=54 Bom 4=31 Bom L R 1240.

80. *Ashutosh Sadukhan v. Corporation of Calcutta*, (1919) 6 A I R Cal 807=49 I C 93=28 O L J 494.

81. *Municipal Commissioners of Madras v. Sarangapani Mudaliar*, (1896) 19 Mad 154.

82. *Lal Singh v. Hira Singh*, (1921) 8 A I R Lah 242=60 I C 20=3 L L J 128.

further made to 26 Mad 410,⁸⁹ in which it was held that the cause of action for a declaratory relief was the alleged wrongful denial by the defendant in each case of the plaintiff's title and possession and the criterion was not whether the right was a continuing one but whether the wrong was a continuing one within the meaning of S. 23.

A perusal of the two judgments cited above shows that the circumstances in which those remarks were made were dissimilar to those now before us and cannot be utilized in defeating the claim of the present appellants. In cases of continuing wrong, the nature of the subject-matter of the suit as well as the nature of the injury complained of is always material and no hard and fast rule can be laid down as to when a wrong is a continuing wrong. Moreover in the view that I take of the case, the rights of the appellants had not been extinguished and both the right and the wrong were continuing.

I have already observed that most of the cases relied upon by either side do not directly touch the question at issue and those that have any bearing on the facts of the present case can be used only by way of analogy and not by way of direct authority. After giving due weight and full consideration to the cases cited and the arguments advanced before us, I have arrived at the following conclusions :

(1) That under the Mahomedan law, (a) a mosque is a place of worship solely and exclusively dedicated to the worship of God in accordance with the tenets of Islam and it remains as such till eternity ; (b) all proprietary rights of men are extinguished in a mosque as soon as it is consecrated as such and can never be revived or resuscitated afterwards, whatever may happen to the building and whosoever may have its custody ; and (c) it can never be treated as private property by any human being in the world, even if he is a Sovereign of the State.

(2) That British Courts in India cannot ignore the provisions of the Mahomedan law altogether while dealing with a mosque and that the special features which it possesses and the peculiar privileges which it enjoys are always to be determined under the Mahomedan law and under no other law, even though one of the parties to the suit before them may be a non-muslim.

(3) That although S. 5, Punjab Laws Act, contemplates that Mahomedan law can be altered or abolished in certain respects, in regard to the privileged position that a mosque occupies under the Mahomedan law, it has neither expressly nor impliedly been altered or abolished by the Limitation Act, or, for that matter, by any other enactment.

(4) That inasmuch as a mosque is placed 'extra commercium' and is in its very nature incapable of being owned by human beings, it cannot be considered "property" in the sense that it can be the object of a right of ownership. It is possible therefore to argue that a mosque is outside the mischief of the Limitation Act, even though that Act purports to deal with properties comprised in a Hindu or Mahomedan endowment in the circumstances mentioned in Arts. 134-A, 134-B and 134-C. It can also be argued that a mosque as a juristic person is not property and is thus not touched by the Limitation Act ; but for the purposes of this case it is not necessary to decide whether this is so.

(5) That on the assumption that a mosque is covered by the provisions of the Limitation Act, it continues to retain its sacred character wherever it may be and in whatever condition it is placed so long as it retains its original shape and form and that its sacred character is never lost by any act of desecration, however profane and sacrilegious it may be.

(6) That the only act of hostility that the Courts in India can countenance in the case of a religious institution like a mosque is an act of direct physical interference with its building and that anything short of it cannot be taken into account inasmuch as all through the period that a so-called adverse possessor does not throw such an open challenge as is indicated above, he continues to remain under a heavy burden of which he is never relieved. By taking possession of a religious institution and not using it for the purpose for which it is intended, he merely imposes upon himself the duties and obligations of a quasi-manager or a custodian and any breach of those duties in the shape of not using the institution in the manner for which it is intended does not benefit him in any way nor does it extinguish the right of the beneficiaries of that institution just as a breach of duty on the part of a recognized custodian or manager would not entail these consequences. A beneficiary aggrieved

⁸⁹ *Rajah of Venkatagiri v. Isak Palli Subbiah*, (1908) 26 Mad 410.

by his act may seek relief against him if he so chooses to do but his inaction does not prejudice the other beneficiaries.

(7) That so long as the original shape and form of a mosque remain intact, the trespass by a wrongdoer is a continuing injury giving rise to a cause of action at every moment of the day that the trespass continues, and that this cause of action accrues not only to the mosque itself as a juristic person but also to its beneficiaries who in the very nature of the wakf are not confined to any place or period of time but are spread over all places and all ages.

(8) That both the quantity and the quality of the rights of an adverse possessor cannot in law exceed those that exist in the person dispossessed by him and he cannot accordingly prescribe for a title higher than that of the person whom he has dispossessed.

(9) That the rights and obligations attaching to a mosque are paramount to the estate and they cannot be lost merely by the efflux of time and that such rights and obligations follow the property and adhere to it wherever it goes.

(10) That the case of an adverse possessor, who is a wrong-doer, does not stand on the same footing as that of a purchaser for valuable consideration without notice and cannot therefore be considered in the light of those decisions which deal with the latter.

(11) That even if it be considered that the right of beneficiaries of a mosque to offer their prayers in it is an interest in immovable property which I doubt, this right cannot be extinguished under S. 28, Lim. Act, inasmuch as that section deals with the effect of not instituting suits for possession of any property and not with that of not instituting suits for possession of any interest therein as contemplated by Art. 144, Lim. Act, and consequently such rights are never extinguished under the provisions of the Limitation Act.

(12) That to enforce the Mahomedan law to the extent indicated above is in consonance with the principles of justice, equity and good conscience, but the Courts in British India can only go thus far and no further. Where therefore owing to the apathy or inaction of the Muslim community, an adverse possessor alters the outward shape or form of a mosque or destroys its building or replaces it by another building of his own without being challenged within a period of 12 years from the date that he

takes that step, he cannot be ousted from that property after the lapse of that period, as his ouster in those circumstances even though permissible under the Mahomedan law, would be both unjust and inequitable under the law of the land.

(13) That inasmuch as the defendants or their predecessors-in-title had not committed any adverse act of the nature indicated above, their possession never became adverse either to the mosque or to its beneficiaries and that consequently Art. 144, Lim. Act, does not bar the remedy of the present appellants.

(14) That on the grounds stated above the demolition of the building in dispute on the night between 7th and 8th July 1935 gave a valid cause of action both to the institution and the beneficiaries and that the suit of both is well within time.

In the course of arguments, reference was repeatedly made to the awkward situation that might arise if the Hindus also put forward a claim to-day to resume all those temples which had long ago been demolished and converted into mosques by the Muslim Kings, as under the Hindu law too the principle applies that when once a temple is dedicated, it always remains a temple. Apart from the fact that it is an extraneous matter which should not be considered in the determination of this case, no complications are likely to arise if the views set forth above are adopted. If any temples were seized and desecrated by the Muslim Kings, they were not allowed to retain their outward shape and form. They ceased to be temples long ago and no temple exists now in relation to which it can be said that to all appearances it is a temple and that it has been treated as such throughout the period of its seizure.

It follows from the conclusions formulated above that the subject-matter of the suit was nothing but a mosque when it was demolished, irrespective of the vicissitudes of fortune through which it had passed and regardless of the profane uses to which it had been put and it is clearly established on the record that everybody concerned, including the parties to the suit, realized this position full well and treated the building as a mosque right up to the moment it was razed to the ground. So far as the Muslims are concerned, they never ceased to revere it as a mosque and throughout the period of the British Rule made several efforts to regain it. Similarly the defendants' predecessors-in-title never

for once called it by any other name. It was described by them as a mosque in the previous litigation that ensued soon after the annexation of the Punjab by the British Government. In the pleas put in by Ganda Singh in 1855, he clearly stated that the mosque was granted to him along with the khankah, etc., before the reign of Maharaja Ranjit Singh. His witnesses made a statement to the same effect describing the building in suit as a mosque (pages 18 and 19 of Part 3 of the printed record). In the order that was passed in connexion with this mosque in 1850, the words that "the mosque could not be released" are significant. In 1879 Ganda Singh executed a will in which he described the building as a mosque (p. 36 of Part III). In 1883 when a report was submitted by an Extra Assistant Commissioner to the higher authorities, he stated that the mosque was still standing and even went to the length of saying that it was unusual that a mosque which should ordinarily be in the custody of the Mahomedans should remain in the possession of the Akalis and that the Akalis using it in a manner opposed to the tenets of Islam exacerbated the feelings of the Muslims.

In 1885 in a suit instituted by Mt. Khem Kaur, widow of Ganda Singh, against her son Asa Singh, the latter put in his written pleas where he expressly stated that the mosque was wakf property (p. 45 Part III). In his statement before the Court he once more gave the same appellation to the building in suit and stated that ten shops adjoined the mosque and that the mosque was lying vacant (p. 47, Part III). In the Municipal khasra prepared in 1890 (Ex. P. 15) the site in dispute was described as masjid (mosque). In certain applications submitted to the Lahore Municipality by the then mahants, Gian Singh and Lal Singh, the building in dispute was described as a masjid. In the petition submitted by Harnam Singh to the Sikh Gurdwaras Tribunal he described the building in suit as a mosque (pp. 64 and 65, Part III). In the rent deeds produced by the defendants themselves, which were executed in favour of their predecessors-in-title, this building was always mentioned as a mosque. Harnam Singh who was the last mahant in possession of the mosque appeared in this case as a witness for the plaintiffs and made a clear admission to the effect that the building was a mosque. It is noteworthy that the present defendants

themselves described the building in suit as a mosque when they submitted a plan of the property claimed by them before the Sikh Gurdwaras Tribunal. Their own witness Mohar Singh, D. W. 3, in the present case has stated that during the time he lived there, some of the mahants and Sikhs used to call it a masjid (mosque) and that on the night that it was demolished the persons who were engaged in demolishing it said: "It is a mosque of the Muslims, knock it down," (page 85, part I).

Further in the summer of 1935, when the agitation on the part of the Muslim community for the restoration of the mosque took a serious turn, the building demolished was throughout described as a mosque in the various communiques issued by the Government from time to time (pp. 26 to 35, part II). The Deputy Commissioner who was in charge of the city of Lahore in those days and who is shown as a Sikh in the History of Services of Gazetted Officers, has stated as P. W. 25 in this case:

To the Muslim deputation of 3rd July (1935) who complained that the mosque was likely to be demolished any moment, I gave an assurance that I was responsible for the safety of the mosque until the Punjab Government had examined the dispute: page 61, part I.

The obvious fact that those Sikh gentlemen who are said to have seized the mosque by way of resentment never thought for a moment to demolish it and that throughout the regime of Maharaja Ranjit Singh it was allowed to stand as a mosque and that even after the annexation of the Punjab by the British, it never came into the head of any of the mahants in charge of the mosque to alter its shape or form or to demolish it and that not until the time that the mosque came into the possession of the Akalis that the act complained of by the appellants was committed, speaks volumes in favour of the appellants' contention.

That even Mr. Cale, the District Judge, came to the same conclusion is clear from the following passage in his judgment: (P. 141, Part 1)

The cumulative effect of all these documents is to establish that the building in dispute has been regarded throughout as a mosque. In the litigation before the Gurdwaras Tribunal the fact that this building was a mosque, though formally denied in the jawab-i-dawa of the Shiromani Gurdwaras Parbandhak Committee, was apparently accepted without question. Hilton J. in his judgment refers to 'the mosque, the building of which still stands on the disputed property'. Again, in dismissing the petition of the Anjuman Islamia, Hilton J. assumes that the building is a mosque but refused to give the Anjuman Islamia possession

on the same ground that the suits of Nur Ahmad in 1853 and 1855 were dismissed, viz. that the claim was time-barred.

Again, at p. 144, he says :

I am of opinion that the arguments in favour of the building being a mosque remain unimpaired.

The question now arises whether the relief prayed for by the appellants in the form of an injunction can be legally granted to them. The appellants contend that in view of the highhandedness displayed by the defendants in demolishing the mosque, the injunction claimed by them should be granted in the terms prayed for. The respondents, on the other hand, urge that, in the first instance, no suit for injunction lies inasmuch as a suit for possession is the only remedy available to the plaintiffs if aggrieved, and secondly, that the relief by way of injunction should not be granted to the appellants because (a) a person out of possession cannot claim such relief, (b) the relief sought by the appellants is impracticable and unenforceable, and (c) the plaintiffs had in a way acquiesced in the act of demolition and delayed their suit. Both sides have relied on various decided cases and text-books on the subject concerned and I shall discuss below all those authorities which have been cited at the Bar.

The matter of perpetual injunction is governed by Ss. 54, 55 and 56, Specific Relief Act (1 of 1877). S. 54 deals with the circumstances in which a perpetual injunction can be granted. S. 55 treats of mandatory injunctions; and S. 56 enumerates certain cases in which injunction should be refused. While dealing with the subject of injunctions, Salmond in his treatise on "The Law of Torts," at p. 173, observes :

The jurisdiction thus conferred upon the High Court to issue injunctions is discretionary. The general principle however in accordance with which this judicial discretion must be exercised is that an injunction should be granted in all cases of continuing or threatened injury, unless in the particular instance there is some special reason why it should be refused. In other words, an injunction, though not a matter of right, is a matter of course, unless the Court in the exercise of its judicial discretion and on special grounds considers that this remedy would not be just or convenient.

At p. 176 the same learned author says :

Conversely, if the defendant has himself acted with wilful and highhanded disregard of the plaintiff's rights, an injunction will be granted even in cases which would otherwise have been deemed too trivial for this remedy.

In "Kerr on Injunctions", p. 1, a writ of injunction is described as a judicial process whereby a party was required to do a

particular thing or to refrain from doing a particular thing according to the exigency of the writ. At p. 688, the same learned author, while dealing with the consequences of the breach of an injunction, remarks :

A man who does not obey it to the letter so long as it exists, is guilty of contempt.

Woodroffe in "The Law Relating to Injunctions", says at page 23 :

By the Specific Relief Act the Courts are expressly given power to grant injunctions to do substantive acts when such injunctions are necessary to prevent the breach of an obligation.

At page 114 of the same book it is said :

In addition to the preventive jurisdiction there is superadded the power of the Court to grant a mandatory injunction, that is, an order compelling a defendant to restore things to the condition in which they were at the time when the plaintiff's complaint was made.

At page 152 it is remarked :

The remedy for the enforcement of decrees granting permanent injunctions lies in execution of the decrees and the procedure laid down by the Code relating to the execution of decrees is to be observed.

At page 310 the following passage is relevant :

Though the jurisdiction by mandatory injunction to compel the restoration of matters *in status quo* is sparingly exercised, yet a trespass irreparable in its character and of a continuing nature may be restrained by a mandatory injunction, thus restoring things to their original condition.

In "The Principles and Practice of Injunctions in British India" by Basu, the following observations at page 151 are pertinent :

So even in England where the jurisdiction to grant mandatory injunction was formerly questioned is now granted as a matter of fact and in a positive form In British India since the passing of the Specific Relief Act, the mandatory injunction is always in the direct form

And with rare exceptions the mandatory form will not be decreed for other purposes than to restore and maintain a condition that has been wrongfully changed.

In (1875) L R 20 Eq 500,⁹⁰ at page 504, Sir G. Jessel, M. R. observes :

At one time it was supposed that the Court would not issue mandatory injunctions at all. At a more recent period, in cases of nuisance, a mandatory injunction was granted under the form of restraining the defendant from continuing the nuisance. The Court seems to have thought that there was some wonderful virtue in that form, and that extra caution was to be exercised in granting it. To that proposition I can by no means assent. Every injunction requires to be granted with care and caution, and I do not know what is meant by extraordinary caution.

90. *Smith v. Smith*, (1875) L R 20 Eq 500=44 L J Ch 630=32 L T 787=28 W R 771.

Where therefore money could not adequately reinstate the person injured, the Court said, as in cases of specific performance, 'we will put you in the same position as before the injury was done.' When once the principle was established, why should it make any difference that the wrong-doer had done the wrong, or practically done it before the bill was filed. It could make no difference where the plaintiff's right remained and had not been lost by delay or acquiescence.

In (1869) L R 9 Eq 28,⁹¹ a certain company which had undertaken an obligation to make a road was called upon to construct it. Sir W. M. James, V. C., in delivering his judgment, remarked :

Rather than allow such a gross piece of dishonesty to go unredressed, the Court would struggle with any amount of difficulties in order to perform the agreement. I can easily conceive if there were a difficulty about the statutory power that the Court might see its way by ordering the company to permit the plaintiffs to do these works at the expense of the company because the company have got the land and the Court might say, 'You must allow the plaintiff to do so, but you must pay all the costs that the plaintiffs have been put to.'

It may be remarked that in this country no such difficulty arises in view of the provisions of law contained in sub-r. (5) of R. 32 of 21, Civil P. C. If a decree for an injunction has not been obeyed, the Rule says that the Court may in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decrees.

In (1872) 13 Eq 44,⁹² a Railway Company which had agreed to construct and for ever maintain at their expense a siding of specified length alongside the line upon land belonging to the landowner, and to be provided by him for that purpose, for the use and to the reasonable satisfaction of the landowner, was enjoined so to do. In that case too it was pleaded that a decree for damages would meet the ends of justice; but this contention was repelled. In (1922) 2 Ch 1,⁹³ Scrutton L. J., at page 20 of the report, says :

A wrong-doer who has either broken his contract or committed a tort may be ordered by the Court not to pay the damages thereby caused, but to do acts either to fulfil his contract, sometimes

known as specific performance and sometimes by a mandatory injunction to do certain works, or to put right the tortious wrong that he has committed As a matter of jurisdiction it seems that the Court has the right to make any such order, but in practice it does not make certain orders and does make others.

In that case an order had been made requiring the defendants to execute such works as may be necessary to restore the remedial works by clearing out the man-hole at the top of the drain and the order so made was not interfered with on appeal. As indicated above, the respondents' main objection is that inasmuch as a suit for possession lies in the present case, no relief by way of declaration or injunction is permissible. In support of their contention that a suit for possession is competent in the circumstances of this case, the respondents rely on 13 Mad 445,⁵⁰ 33 Mad 452,⁴⁹ 41 Mad 124,¹⁸ 2 Pat 391⁸⁷ and A I R 1932 Lah 394.⁹⁴

In 13 Mad 445,⁵⁰ a suit was instituted for a perpetual injunction restraining the defendant from preventing the plaintiff from entering a house attached to a certain temple. The defendant alleged that he had been in exclusive possession of the house prior to the institution of the suit and that a previous suit by the father of the plaintiff for a declaration of his right to exclusive possession had been dismissed. On these allegations the suit was dismissed as time-barred. The learned Judges of the High Court, after agreeing with the Courts below that the suit was so barred, further remarked that as the plaintiff was out of possession, it was open to him to sue for such possession as he might be entitled to and that the exceptional form of relief by way of perpetual injunction was not open to him.

In 33 Mad 452,⁴⁹ a trustee of a temple on being ousted from possession by his co-trustees sued for a declaration that his dismissal was invalid and for an injunction restraining his co-trustees and the temple committee from interfering with the exercise of his rights as trustee. He claimed no consequential relief in the nature of possession against his co-trustees. It was held that a suit for a mere declaration was not maintainable and that an injunction could not be claimed by a plaintiff out of possession when he did not ask for possession against defendants who were actually in possession. In 41 Mad 124,¹⁸ it was

94. Pir Bakhsh v. Mahomed Ibrahim, (1932) 19 A I R Lah 394=138 I C 69=33 P L R 468.

91. Wilson v. Purness Railway Co., (1869) L R 9 Eq 28=21 L T 553=18 W R 89.

92. Greene v. West Cheshire Ry. Co., (1871) L R 13 Eq 44=41 L J Ch 17=25 L T 405=20 W R 54.

93. Kennard v. Cory Brothers and Co., Ltd. (1922) 2 Ch 1 = 91 L J Ch 452 = 127 L T 137=38 T L R 489.

held that if a mutt property had been alienated, the disciples of the mutt could claim a decree directing possession to be given to the head of the mutt for the time being and that it was immaterial whether the head of the mutt was a trustee or only a life-tenant.

In my opinion, none of these cases is in point. In the earliest Madras judgment the remarks are obiter. Moreover the plaintiff there was suing in respect of a house which could be owned and possessed by him as an owner and not in respect of property which in its nature was incapable of being so owned. In the second Madras judgment the plaintiff was a trustee and could claim possession of the trust properties in his capacity as a trustee. In 41 Mad 124¹⁸ again, the suit was for a decree directing possession to be given to the head of the mutt. The proposition as laid down in the Madras judgments holds good where a person who is bound to sue for possession seeks to circumvent the law and has recourse to this extraordinary remedy. Where however this is not the case, the principles enunciated therein do not apply. Neither did the learned Judges intend to lay down any proposition of universal applicability, nor is it applicable in this case. In 2 Pat 391,⁸⁷ it was held that every Mahomedan who derived any benefit from a wakf was entitled to maintain an action against the mutwalli to establish his right thereto, or against a trespasser to recover possession of the wakf property which had been misappropriated, without joining any other person who might participate with him in the benefit. In the course of their judgment the learned Judges observed:

Where, in such a case, the plaintiff is entitled to consequential relief, he is not entitled to sue for a mere declaration. Even when the only consequential relief which the plaintiff is entitled to ask for is that the Court shall deliver the alienated trust property to the offending mutwalli, a suit for a mere declaration is not maintainable.

In A I R 1932 Lah 394,⁹⁴ the judgment cited above was followed. In both these cases the property trespassed upon was property attached to a mosque and not the mosque itself. A beneficiary in some cases may be entitled to recover endowed property for the benefit of the trustee; but I consider that it is not necessary for the beneficiaries of a mosque to bring a suit for possession of the mosque itself and that they cannot be compelled so to do if they merely seek to establish their right to offer

payers in it. This right they can exercise irrespective of the fact that the mosque is in the custody of a non-muslim, inasmuch as under the Mahomedan law a non-muslim can be a custodian of a mosque. To deny the beneficiaries a relief by way of declaration in the circumstances of this case would be to limit the scope of the substantive part of S. 42, Specific Relief Act, within a very narrow limit and to extend that of the Proviso beyond legitimate bounds. The Proviso to S. 42 comes into play only where the plaintiff being able to seek further relief than a mere declaration of title omits to do so; and, in my view, the beneficiaries of a mosque are not able to sue for possession of the mosque within the meaning of the Proviso.

In 75 I C 549,⁹⁵ the suit appears to have been instituted by a person in the position of a trustee who claimed the gaddi for himself as also a declaration of his right of ownership to certain property known as the Jacobabad tikana to which several shops were attached and a factory too. Evidently that suit is distinguishable from the one now before us. In (1905) 1 Ch 386,⁸⁸ it was held that no mandamus would lie against a local authority to do any particular works, nor would the Court prescribe what particular works were necessary for the maintenance of the roads. Apart from the fact that in almost all the English cases relied on by the appellants in this case and alluded to above this judgment was referred to in the counsel's arguments and not followed, the principles on which it was decided do not hold good in India. In 18 I C 394,⁹⁶ a Division Bench of the Calcutta High Court observed that a person could not sue for a declaration of his right unless he had an existing right and a mere contingent right which might never ripen into an actual existing right, was not sufficient to ground an action for such a declaration. These observations are evidently not in point. Besides, I have already held that the appellants have an existing right and on that ground this ruling will not harm the plaintiffs. I am of opinion therefore that neither were the appellants bound to sue for possession nor are they debarred from claiming relief by way of injunction against the defendants. In fact the beneficiaries of a mosque are entitled only to

95. *Manoherdas v. Ramdas*, (1923) 10 A I R Sind 17=75 I C 549.

96. *Kali Das v. Probal Chandra*, (1913) 18 I C 394=17 C W N 964.

the right of saying prayers in it and to gain that object a relief by way of declaration or injunction is the only relief that they can claim.

In the present case, the beneficiaries have asked for the reconstruction of the building as it originally stood and they can achieve this end only by obtaining a mandatory injunction against the respondents. To this the respondents demur on the ground that it is difficult on the record to determine what the original condition of the building was when it was demolished and that consequently it is impossible for this Court to grant the relief prayed for. I however do not agree. A person who takes upon himself the responsibility of demolishing the building of a mosque cannot escape his liability to restore it to its original shape merely on the ground that it is physically impossible to reconstruct it in the exact shape, form and condition in which the building stood when it was demolished. What the defendants have to restore in this case is abundantly clear from the evidence led by the plaintiffs. The dimensions of the mosque are well known and so are its outward features including the domes and the minarets. It has also been reliably established that if a new building is erected on the same lines as before with the materials now available, it would cost about thirteen to fourteen thousand rupees (page 71, Part 1). As already pointed out, under O. 21, R. 32, sub-r. (5), Civil P. C., if the defendants refuse to obey the injunction issued, this Court can direct even the plaintiffs, or any other person, to do the act required to be done so far as practicable, at the cost of the judgment-debtors, and the expenses incurred thereon can be recovered as if they were included in the decree. In my view therefore there is no substance in the objection raised by the defendants on this score.

Taking into consideration the circumstances in which the mosque was demolished, the conclusion is irresistible that the act of the defendants was most high-handed. They were fully aware of the fact that they would injure the feelings of the whole Muslim community if they demolished the mosque. They knew that His Excellency the Governor was making every possible effort to find the best solution of the difficult situation that had arisen. They were aware of the undertaking given by the Deputy Commissioner that the mosque would be protected until the Punjab Gov-

ernment had examined the dispute. In spite of all this, the mosque was demolished before any decision could be arrived at by the Punjab Government. This act of demolition involved a clear breach of obligation which the defendants owed to the Muslim community in general and there was no delay or acquiescence on the part of the plaintiffs or the community whom they represent, as the circumstances brought on the record clearly show. I would therefore grant an injunction against the defendants to re-construct the building in the same shape and form as it possessed prior to its demolition and to allow the members of the Muslim community to exercise their right of worship in it. I would further restrain the defendants from using the site as it is at present or the building when constructed, in any manner which is inconsistent with its sacred character.

There still remains the question whether the suit is barred by any provision of law relied on by the defendants. As stated above, the bar pleaded was three fold (a) on account of the previous decisions between 1850 and 1883; (b) on account of the decision of the Sikh Gurdwaras Tribunal; and (c) on the strength of Sections 32 and 37 of the Sikh Gurdwaras Act. I shall take up these points in the order in which they are stated above.

The bar pleaded in (a) was based on S. 11, Civil P. C. It was stated that certain suits were instituted by one Nur Ahmed, who claimed to be the mutwalli of the mosque, against the predecessors-in-title of the present defendants from 1850 to 1885, and that inasmuch as his claim for possession of the mosque was defeated on every occasion, the present suit was barred by the rule of *res judicata*. It was also alleged that on a report made by an Extra Assistant Commissioner in 1883 the Government declined to restore the mosque to the Muslims. The material portion of S. 11 reads as follows :

No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Before a suit can be held to be barred under Section 11 therefore several conditions must be satisfied, and it is apparent

that in the suits relied upon, most of the requirements mentioned in the section are lacking. So far as the case of 1850 is concerned, it is stated in Exhibit D-40, which is a robkar, dated 14th November 1885, issued by the Court of the Deputy Commissioner, Lahore, that that was a criminal case in respect of the mosque and the land attached thereto. The order passed therein was that the mosque could not be released. That order was upheld on appeal by the Commissioner, Lahore. That suit clearly is not a suit contemplated by S. 11, Civil P. C. In 1853 a regular civil suit appears to have been instituted by Nur Ahmed, which was dismissed on the ground that his suit of 1850 had been dismissed. On 11th December 1854 Agha Kalb Abid Khan, Extra Assistant Commissioner, Lahore, made an order on the record of the muafi estate measuring 13 bighas of culturable land with a well and a mosque, wherein he remarked that the building was a mosque and the land sued for was attached thereto and that interference by the Akalis or Hindus was most improper. He however declined to interfere on account of some order which had been previously made in the suit of one Muhammad Bakhsh and others.

It appears from a copy of the order, Exhibit D-37, that the subject-matter of the petition before him was culturable land and his decision was that he could not award the applicant the muafi land sued for. Ex. D-39 is a copy of the order made in appeal from the order of Agha Kalb Abid Khan. Besides, there are certain other orders passed by the Appellate Courts in the matter of Nur Ahmed, which have been duly exhibited in the case. It would however appear that in none of these orders had any finding been arrived at as to whether Nur Ahmed was a mutwalli or whether the mosque had ceased to be a mosque or the rights of the Muslims to say prayers therein had been extinguished. All that was decided was that Nur Ahmed could not recover possession of the mosque from the persons in possession on the ground that they had been in possession of the mosque along with the appurtenant building and the other property attached thereto since the time of the Sikh rulers. No decision was consequently arrived at on the questions now in issue, nor were they ever raised in the form in which they have now been raised. All that the defendants' predecessors-in-title contended in those

cases was that they could not be deprived of the possession of the mosque and the other properties attached to it on the ground of their old possession. They never for once denied that the subject-matter of the suit was a mosque. In fact if the plea of res judicata can be allowed to prevail on the basis of those judgments, it would debar the present defendants from denying that the building they demolished was a mosque.

Further, as remarked by the District Judge: "The subject-matter of the suit is not the same as it was in the previous litigation". In all the cases instituted by Nur Ahmed he sought to recover possession from the Sikhs of the property to which he laid claim as mutwalli, while here the suit is by the mosque itself as well as the beneficiaries for the restoration of the mosque to its original shape and form, with the additional prayer that the beneficiaries may be allowed to use it as a mosque. On this ground too the rule of res judicata does not operate. So far as the report of 1883 is concerned, no question of res judicata arises at all, as it was not a decision given in a suit but an order passed in an executive capacity.

We were also referred to 47 P R 1870⁹⁷ where 64 P R 1867⁵¹ was dissented from and it was held that the Civil Code which was in force at the time of the annexation of the Punjab had no legal sanction. On the strength of this judgment it was urged that inasmuch as all the previous decisions were given when the only law in force was that Code and no other Code, they could not operate as res judicata. This argument is not without force. Decisions which are contemplated to operate as res judicata under S. 11, are those which are given after a complete observance of the procedure laid down by the law and not those which are more or less orders passed in an executive capacity. To found the decision of a Civil Court entirely on the findings arrived at in a criminal judgment, in my view, robs it of all its sanctity and binding force, and it is obvious that all the judgments relied upon by the respondents appear to have taken their cue from the criminal judgment alone which was passed in 1850.

In support of his position, counsel for the respondents has relied on A I R 1926 Mad 97. *Mt. Atter Koer v. Atma Singh*, (1870) 47 P R. 1870.

267,⁹⁸ 39 Cal 887,⁹⁹ 12 C W N 739,¹⁰⁰ 46 All 651⁵² and 59 Cal 636.¹⁰¹

In A I R 1936 Mad 267,⁹⁸ Venkatasubba Rao J. observed:

When in a suit, where the trust is properly represented, after real and genuine contest a decision is given, it will be absurd to hold that persons not parties to the previous suit, although they may have an interest in the trust, can ask the matter to be re-opened and the question to be re-tried.

There has been no such contest in the suits relied upon as contemplated in this judgment, nor is the question in the present case the same.

In 39 Cal 887,⁹⁹ the headnote says:

The widow of a shebait of a certain temple, who succeeded her deceased husband in that office, mortgaged some land, as also her interest in the temple income to one J, who obtained a decree on his mortgage on 24-9-1880. In execution thereof he put up the temple income for sale, purchased it himself and obtained delivery of possession in 1892. The widow and the next reversioner then brought a suit to set aside the sale on the ground that the property sold was not saleable. That suit was withdrawn with liberty to bring a fresh suit. The widow alone then brought another suit which was dismissed on the ground that it was barred by S. 244, Civil P. C. She having died, the reversioner brought a suit against the said J, on 3rd January 1910, for a declaration that he was entitled to the temple income inasmuch as it was not saleable. On objections taken by the defendant that the suit in so far as it related to the temple income was barred by the rule of *res judicata* and by limitation: Held that inasmuch as there was no collusion or dishonesty about the former suits, and as in one of them the plaintiff himself was a party, the decree passed in the suit against the shebait would bind her successor, the plaintiff, and that therefore the present suit was barred by the rule of *res judicata*.

A mere perusal of the headnote shows that the facts of that case were clearly distinguishable from those of the present case. In 12 C W N 739,¹⁰⁰ the respondents relied on the following passage appearing at p. 742 of the report:

It is sufficient to hold that in 1883, when the previous litigation was commenced, S. K. under the arpannamah of 1879, had authority to represent the debutter estate and that as a matter of fact she did represent that estate. She undoubtedly sued in her capacity as representative of the estate and there can be no question that the Court of Wards who carried on the suit as her next friend, held possession on her behalf and was in fact and in law the administrator of the estate. Under such circumstances it is impossible to hold that

the estate in the hands of the appellant is not bound by that judgment. If the previous litigation had been brought by the then shebait, there could not have been any possible controversy that the decision would be binding upon the present appellant as shebait, on the principle explained by their Lordships of the Judicial Committee in 2 I A 145,⁴¹ and by this Court in 11 C W N 489¹⁰² that the successive shebaites formed in effect a continuing representation of the property of the idol.

Apart from the fact that the circumstances of that case are different, it is noteworthy that the learned Judges have appended a condition to the observations made by them in the following terms:

This is of course subject to the qualification that the judgment relied on is untainted with fraud and collusion and that the necessary and proper issues were raised, tried and decided in the suit.

It is obvious that none of the issues which have now been raised by the appellants, were ever raised, tried or decided in the previous suits.

In 46 All 651,⁵² which is based on 2 I A 145,⁴¹ it was observed:

A decree obtained by one of the trustees on behalf of a trust against the other trustees, either for a declaration that the property in dispute was trust property or for rendition of accounts in a suit brought in the interests of the trust or for the protection of the trust property, is binding as much on the trustees who are parties to the suit as on all persons interested in the trust; for, as observed by their Lordships of the Privy Council in *Prosunno Kumari Debya v. Golab Chand Baboo*⁴¹ the shebaites of a trust form a continuing representation of the idol's property. Each of the above suits was instituted by Mt. S. K. not in her private right but on behalf of the trust, and as such the decision arrived at in those suits is conclusive between the parties thereto within the meaning of Explan. 6 to S. 11, Civil P. C.

The principle enunciated in this judgment however does not advance the case of the respondents any further.

In 59 Cal 636,¹⁰¹ the following proposition was laid down:

Where the plaintiff or the defendant sues or is sued in a representative capacity, which attaches to him under the general law, the decision binds the entire body whom he represents. These are cases of administrators, trustees, shebaites, mutwallis

It is no doubt true that in certain circumstances decrees made in favour of or against a mutwalli may bind the beneficiaries; but those circumstances do not exist in the present case. Besides, Nur Ahmed had all along been claiming that his ancestors were mutwallis of the mosque, but his status as such was never recognized in the orders referred to above. Inasmuch as it was never denied that the building was a

102. *Gora Chand v. Makhan Lal*, (1907) 11 C W N 489=6 C L J 404.

98. *Narasimha v. Lakshminarasimham*, (1926) 13 A I R Mad 267=91 I C 924=49 M L J 746.

99. *Jharula Das v. Jalandhar Thakur*, (1912) 39 Cal 887=14 I C 142.

100. *Ranjit Sinha Bhadur v. Basunta Kumar*, (1908) 12 C W N 739=9 C L J 597.

101. *Lal Mohan Dhupi v. Ram Lakhmi Dassya*, (1932) 19 A I R Cal 271=137 I C 46=59 Cal 636=35 C W N 1203.

mosque, the present appellants are not affected by the principle laid down in this judgment even if it be admitted that it applied to their case.

For the reasons given above, I consider that the judgments relied upon by the respondents do not bar the present suit. Even if those decisions carry any binding force, they will not operate as *res judicata* as the issues involved in the present case were never raised or decided by them against the Muslim community. The decision that the mosque cannot be released does not, as explained above, extinguish the rights of the Muslim community to use it as a place of worship or deprive the mosque of a right to continue as such.

The respondents have next urged that the judgment of the Sikh Gurdwaras Tribunal, in the petition of the Anjuman Islamia operates as *res judicata* and that inasmuch as the decisions of the Tribunal are as binding as the decisions of a Civil Court and that the issues now under controversy were raised before the Tribunal and decided there, the present suit of the appellants based on the same facts and raising the same questions is barred. The appellants on the other hand contend that the decision of the Sikh Gurdwaras Tribunal does not operate as *res judicata* because (a) it is a special Tribunal not contemplated by the Code of Civil Procedure; (b) the issues which have been raised in the present case were not raised and decided in that form by the Tribunal; and (c) even if grounds (a) and (b) were decided against them, (1) the Anjuman Islamia, on whose petition the decision was given did not hold a representative capacity despite the fact that it purported to make the petition on behalf of the entire Muslim community, and the community could not be bound by the decision inasmuch as the formalities laid down by O. 1, Rule 8, Civil P. C., were not observed; and (2) the only order that the Gurdwaras Tribunal could pass was that of rejecting the petition under Section 5 and it could not confer any title on the Sikhs.

The petition of the Anjuman Islamia was made under S. 5, Sikh Gurdwaras Act under which any person claiming any right, title or interest in any property included in the list submitted under S. 3 is empowered to put forward a counter claim. It was stated therein that the petition was being presented on behalf of the Mahomedans and it was prayed that the property

included in the list be excluded. Hilton J. who delivered the principal judgment, while disposing of this petition remarked :

The claim is based on the allegation that all this property was waqf of the mosque and that the Sikhs took forcible possession of it. Similar claims were made on behalf of the Mahomedan community in 1852, 1855 and 1883. These claims failed on the ground that the Sikhs had adverse possession. The learned counsel for the petitioners based his argument before us on the claim that the mosque having been built as a mosque by Mir Mannu about 1750 must always remain a mosque and that property once dedicated to waqf can never be lost by adverse possession. He did not, however, cite before us any authority to support this proposition, and in my judgment there is not sufficient ground upon which we can depart from the view which was taken in the suits of 1852, 1855 and 1883, which are relevant under S. 42 of the Act. In my judgment the claim of the Anjuman Islamia has no valid foundation and the mere fact that the building is shaped as a mosque does not justify us in granting them a decree. I would therefore dismiss petition No. 1282.

I shall deal first with the point (c) raised by the appellants inasmuch as if the decision on that point goes in their favour, no other question arises. It is admitted that no such action was taken by the Tribunal on the petition of the Anjuman Islamia as is laid down under O. 1, R. 8, Civil P. C. By S. 12 (11), Sikh Gurdwaras Act, it is provided that the proceedings of a Tribunal shall, so far as may be, and subject to the provisions of the Act, be conducted in accordance with the provisions of the Code of Civil Procedure 1908, and it is clear therefore that in order to make its decision binding on the entire Muslim community, the Tribunal was bound to follow the procedure laid down in respect of representative suits in the Code of Civil Procedure. The respondents refer to S. 15, Sikh Gurdwaras Act, and urge that inasmuch as by that section power is conferred on the Gurdwaras Tribunal to inquire if any person desires to be made a party to any proceeding and to join in any proceeding any person who it considers ought to be made a party thereto, O. 1, R. 8, does not apply to the proceedings before the Sikh Gurdwaras Tribunal and that if no action under S. 15 is taken by the Gurdwaras Tribunal, no person, however aggrieved he may be by its decision, can re-agitate the same matter. This however does not appear to me to be a true exposition of law. No doubt S. 15 empowers the tribunal to summon any person and join him as a party in the proceedings, but that section does not in any way make the tribunal independent of the provisions of O. 1, R. 8, in those suits

there the decision is likely to affect persons other than those who are not before it. It will be seen that power to strike out or add parties is conferred upon all Civil Courts by O. 1, R. 10 (2), Civil P. C., yet they are bound to take action under O. 1, R. 8, whenever a suit purports to have been instituted in a representative capacity. The power conferred on the Tribunal under S. 15, Sikh Gurdwaras Act, is similar to the one conferred upon the Civil Courts by O. 1, R. 10 (2) and does not absolve it from the necessity of following the procedure as laid down in O. 1, R. 8. It was incumbent therefore upon the Tribunal to observe all the formalities laid down there in order to make its decision binding on the general Muslim community. As the Tribunal failed to do so, its decision cannot bind the present appellants.

It may be remarked that a suit by a beneficiary to establish the right of offering prayer is not a representative suit. In 7 All 178,⁵⁴ a case decided by five Judges of the Allahabad High Court, it was held that every Mahomedan who had a right to use a mosque for purposes of devotion was entitled to exercise such right without hindrance and was competent to maintain a suit against anyone who interferes with its exercise, irrespective of the provisions of S. 30 and S. 539, now corresponding to O. 1, R. 8, and S. 92, Civil P. C. 1908, respectively. It was further decided that S. 30, Civil P. C., applied only to cases in which many persons were jointly interested in obtaining relief, and not to cases in which an individual right had been violated. Petheram C. J., who delivered the principal judgment, observed as follows :

The question has arisen in consequence of the peculiar way in which property of this kind is held. According to Mahomedan custom, the property in a mosque and in the land connected with it is vested in no one. It is not the subject of human ownership, but all the members of the Mahomedan community are entitled to use it for purposes of devotion whenever the mosque is open. . . . Every one who has such a right is entitled to exercise it without hindrance, and has a right of action against anyone who interferes with its exercise. It is not a joint right ; it is a right which belongs to many people.

In this connexion our attention was further drawn to the remarks made by the learned Judges of the Punjab Chief Court in their judgment under appeal before their Lordships of the Privy Council in 27 P R 1913.²¹ At p. 101 of the report they say :

Plaintiffs sue as members of the Mahomedan community each and every member of which is

entitled to bury his dead anywhere in the whole grave-yard . . . It is not necessary for such a member to shew that he has used the grave-yard ; a newcomer, for instance, if a Mahomedan, has an equal right with the oldest resident.

In A I R 1931 Oudh 45⁵⁸ Pullan J. in a case relating to a grave-yard remarked :

Any Mahomedan interested in the burial of the dead on this plot was at liberty to bring a suit objecting to the sale of the property This property is inalienable and whether it belongs to the public or not, there is no bar to the present objector filing a suit to contest the sale even if it be held that as a party he is debarred from making an objection under S. 47, Civil P. C.

It follows from these judgments that the right of a Muslim to use a mosque is an individual right and can be exercised whenever he chooses so to do, so long as the mosque exists.

In 56 Mad 657⁵³ it was held by their Lordships of the Privy Council that in a representative suit instituted under O. 1, R. 8, Civil P. C., the decision in a former suit did not operate as *res judicata* by force of S. 11, Expln. 6, if the former suit was not instituted in compliance with the above rule, namely by permission of the Court; the Court giving notice as therein prescribed to all persons interested. The only possible exception that their Lordships contemplated was where the former suit had been litigated bona fide on behalf of the plaintiff and others with a common right and the omission to comply with the rule had been inadvertent and no injury therefrom had been sustained by the plaintiff in the second suit. This exception however would not be applicable in this case in view of the observations made by Petheram C. J. in 7 All 178⁵⁴ to the effect that a right exercisable by a Mahomedan in connexion with a mosque is not a joint right in the ordinary sense of the term. The District Judge while dealing with this judgment of their Lordships of the Privy Council referred to the interpretation put upon it by a Division Bench of this Court in a judgment reported in A I R 1936 Lah 13,¹⁰³ but the same Bench in a later judgment, reported in 18 Lah 629,¹⁰⁴ had thrown further light on the matter and after discussing the judgment of their Lordships at length had come to the following conclusion :

A decision in a representative suit binds all persons other than the plaintiffs expressly named in

103. Bishan Singh v. Bakhshish Singh, (1936) 23 A I R Lah 13=158 I C 540=38 P L R 785.

104. Mehr Mahomed Khan v. Jamadar Adalat Khan, (1937) 24 A I R Lah 425=I L R (1937) 18 Lah 629=39 P L R 707.

the plaint only when, (a) if the suit relates to a private right, the formalities as laid down in O. 1, R. 8, are observed and (b) if the suit relates to a public right, the formalities laid down in S. 91, Civil P. C., are observed.

Both the judgments were delivered by me and in the later judgment I explained what was laid down in A I R 1936 Lah 13.¹⁰³ The view expressed in 18 Lah 629,¹⁰⁴ therefore, represents the considered view of this Court so far as the interpretation of 56 Mad 657⁵³ is concerned.

If a suit ceases to be a representative suit, it does not operate as *res judicata*. It was remarked by their Lordships of the Privy Council in A I R 1928 P C 16¹⁰⁵:

In so far as the nature of the suit was changed by the amendments mentioned, viz., by adding strangers to the trust as defendants and by prayers for relief not covered by S. 92, the suit ceased to be one of a representative character and the decree based on the compromise such as it was, viz. by six only out of the seven plaintiffs in the suit, however binding as against the consenting parties, cannot bind the rest of the public. S. 11, Explan. 6, has no application to such a case.

In 12 Lah 497,¹⁰⁶ the principle of *res judicata* was not applied to a case where there had been a change in the parties. Johnstone J. who delivered the judgment in concurrence with Broadway J., observed:

In view of the difference in personnel between the plaintiffs in the suit and the parties in the present appeal, I do not think that the principle of *res judicata* can be properly applied.

On the grounds stated above, I am satisfied that the judgment of the Sikh Gurdwaras Tribunal does not bar the present suit. Firstly even if the Tribunal be held to be a Court within the meaning of S. 11, inasmuch as it failed to take any action in accordance with the provisions of O. 1, R. 8, Civil P. C., its judgment cannot be treated as a judgment in a representative suit. Secondly, a suit instituted by a beneficiary for the exercise of his right of devotion in a mosque is, as laid down in 7 All 178⁵⁴ and the other judgments alluded to above, a suit for the enforcement of an individual right and is not covered by the provisions of O. 1, R. 8. The Anjuman Islamia can at best be treated as a beneficiary and no more. This being so, the present appellants cannot be said to be claiming under the Anjuman as contemplated by S. 11, so as to be bound by the decision in its petition.

105. *Abdur Rahim v. Abu Mahomed Barkat Ali*, (1928) 15 A I R P C 16=108 I C 361=55 I A 96=55 Cal 519 (P C).

106. *Ram Prasad v. Shiromani Gurdwara Parbandhak Committee*, (1931) 18 A I R Lah 161=185 I C 657=12 Lah 497=32 P L R 910.

In this view of the matter it is not necessary to determine whether the Sikh Gurdwaras Tribunal is a Court within the meaning of S. 11, or whether the issues raised before it were the same as are raised in this suit.

Before I leave this subject, I may refer to 16 Lah 968,¹⁰⁷ where a Division Bench of this Court held that on the hearing of a petition under S. 10, which is analogous to S. 5, the Tribunal had no power to make a declaration that the property in suit belonged to a Sikh Gurdwara, and that all that it could do was to reject the claim as put forward in the petition. On this ground too the decision of the Tribunal would not be of much use to the respondents.

The third ground on which it is contended that the present suit is barred is based on the provisions of the Sikh Gurdwaras Act itself. For facility of reference it will be necessary to reproduce here these sections on which this objection is founded. The material portion of S. 30 (ii) reads as follows:

If any right is claimed for any person in connexion with a Notified Sikh Gurdwara and the Court finds that the right might have been made the subject of a claim in a petition forwarded to the Local Government under the provisions of S. 5, . . . and that no such claim was duly made within time, the Court shall decide the claim against the person claiming the right:

Provided that in the case of a claim that might have been made under the provisions of S. 5 or S. 10, the Court need not so decide, if it is satisfied that the failure to make the claim was owing to the fact that the person who might have made the claim . . . had no knowledge of the fact that the right, title or interest had been included in a list published under the provisions of sub-s. (2) of S. 3 . . . and could not by the exercise of reasonable diligence, have come to know . . . of the fact that such right, title or interest, was so included.

The relevant part of S. 32 reads as follows:

Where in any suit or proceeding pending at the commencement of this Act or instituted after its commencement, in a Civil or Revenue Court it has become or becomes necessary to decide any claim in connexion with a Notified Sikh Gurdwara which the Court finds might be made under the provisions of S. 3, 5, . . . within the time prescribed therein, the Court shall frame an issue in respect of such claim and shall forward the record of the suit or proceeding to a Tribunal.

Section 37 reads as follows:

Except as provided in this Act, no Court shall pass any order or grant any decree or execute wholly or partly, any order or decree, if the effect

107. *Shiromani Gurdwara Parbandhak Committee, Amritsar v. Jagat Ram*, (1935) 22 A I R Lah 279=156 I C 1042=16 Lah 968=38 P L R 44.

of such order, decree or execution would be inconsistent with any decision of a Tribunal, or any order passed on appeal therefrom under the provisions of this part.

Relying on the provisions which have been reproduced above, the respondents contend that inasmuch as the present appellants failed to put in a claim under S. 5, Sikh Gurdwaras Act, the present suit cannot but be decided against them under the substantive part of sub-s. (ii) of S. 30 and that even if they are entitled to claim the benefit of the proviso to that sub-section, the proceedings must be referred to the Sikh Gurdwaras Tribunal under S. 32. They finally urge that at any rate no decision favourable to the appellants can be made in the present suit inasmuch as such decision would offend against the provisions of S. 37, Sikh Gurdwaras Act. The appellants resist these propositions of law and contend that the Proviso to S. 30 (ii) is clearly applicable to their case inasmuch as, firstly, they had no knowledge of the fact that the right, title or interest in the property in suit had been included in any list published under the provisions of S. 3 (2) and, secondly, they could not by the exercise of reasonable diligence have come to know of the existence of the fact that such right, title or interest was so included. In the list put in by the Shromani Gurdwara Parbandhak Committee the property claimed by the committee, so far as it relates to the present suit, was described as Shahid Ganj Singhian and no member of the Muslim community could ever guess that this appellation was intended for the mosque in suit. The Shromani Gurdwara Parbandhak Committee had intentionally used this mysterious appellation so as to lead the Muslims astray and that they cannot now be allowed to take advantage of this wrongful act of theirs. They further urge that the Proviso to S. 30 (ii) was not controlled by S. 32, inasmuch as S. 32 applies to the transfer of those suits only which were pending in Courts at the time that the Sikh Gurdwaras Act came into force and does not apply to suits which may subsequently be instituted. So far as S. 37 is concerned, the appellants' position is that the section itself makes an exception in favour of suits contemplated by the Proviso to S. 30 (ii) and that consequently it does not affect their case.

On giving due weight to the arguments advanced on both sides, I am of opinion that the case of the appellants is covered

by the Proviso to S. 30 (ii). It is not denied by the respondents that the description of the property given in the list was as stated by the appellants. They, however, urge that by the exercise of due diligence, the Muslims in general could come to know of the fact that that description referred to the mosque in suit and that, in fact, the Anjuman Islamia was apprised of it and did put in a petition under S. 5. I am not, however, impressed by this argument. The Anjuman Islamia may have utilized its own resources claiming as it does several resourceful members, but the community in general had no such resources at their disposal and could not be put on their guard in view of the wrong description of the property claimed. The cases relied upon by the respondents in this respect are not in point. In A I R 1930 Lah 717,¹⁰⁸ it was observed :

The publication of the list and notifications is undoubtedly intended to give notice to the general public of what was being claimed and the Proviso to S. 30 (ii) can only be availed of on proof of what is therein required.

This does not in any way militate against the position of the appellants, inasmuch as the list here did not mention the mosque in suit at all and the publication of such list can in no manner defeat the claim of the present appellants.

In A I R 1933 Lah 828,¹⁰⁹ Addison J. who delivered the principal judgment remarked :

Gurbakhsh Singh was in full physical possession of the bunga and service upon him was proper service within the meaning of S. 3. Nor can it be said that in this case Proviso 1, S. 30 (ii) of the Act can be applied. . . .

The defendants other than Gurbakhsh Singh were entered as in possession of 31 kanals 17 marlas of land and a muafi in the same list as the list in which the bunga was entered. There was an entry as regards the muafi and as regards the land in the revenue papers so that with respect to them the defendants other than Gurbakhsh Singh were given notice under S. 3 of the Act and a complete list was sent to them in which of course the bunga was also entered. They knew that action had been taken as regards all land attached to the Golden Temple. It is true that they only directly received notice with respect to the muafi and the land but if they had exercised any diligence at all they would have seen that the bunga was entered in the list.

This case is clearly distinguishable from the case now before us as the recital of the facts stated above would indicate. The

108. Dial Singh v. Gurdwara Tahli Sahib, (1930) 17 A I R Lah 717=123 I C 543.

109. Gobind Singh v. Managing Committee of Gurdwara, (1933) 20 A I R Lah 828=147 I C 54=15 Lah 55=36 P L R 438.

persons who were held to be barred under the substantive part of S. 30 (ii) were those to whom the lists had actually been despatched and the mere fact that they, being interested in the land only did not notice that the bunga was also mentioned in the list, could not serve as an excuse for not making a claim under S. 5. In the case before us, there is no allegation that any notice was sent to the Muslim community in general or that the property claimed by the Sikhs was even remotely described as a mosque.

Reference in this connexion may be made to 15 Lah 66.¹¹⁰ There the property claimed by the Sikhs was shown in possession of two persons who were servitors of the Gurdwara. No mention was made of the land being shamilat nor was a copy of the relevant entry of the Record of Rights attached thereto. Notice was accordingly issued to the two persons said to be in possession and as they made no claim, a notification by the Government was issued under S. 5 (1). The village proprietary body then instituted a suit and the trial Court found that the land belonged to them and was in their possession. On these facts it was held by a Division Bench of this Court that as the village proprietary body had no knowledge of the fact that their shamilat land had been included in the list and as they could not by the exercise of reasonable diligence have come to know of the fact that their land had been so included, the Proviso to S. 30 (ii) applied. The case of the appellants is much stronger than the case cited above.

The question now arises whether under S. 32 it is necessary to forward the proceedings to the Sikh Gurdwaras Tribunal. In this matter also the contention of the respondents, as stated above, does not appear to me to be in consonance with law. The language of the section is unambiguous. It is intended to apply only to those suits which were pending at the commencement of the Act or in which, though instituted after its commencement, the claim could be made under the sections mentioned therein within the time prescribed. It does not obviously cover such suits as are instituted long after the time during which the petitions could be made has expired. A comparison of the language employed in S. 30 (ii) and S. 32, respectively, would

lend support to this conclusion. In both sub-ss. (i) and (ii) of S. 30 the words used are "might have been made the subject of a claim," while in S. 32 the words are "might be under the provisions;" and interpreted in their plain grammatical sense, the words "might have been made" refer to the time that has passed, while the words "might be made" contemplate that the time is still running during which the claim can be made. It is true that the interpretation put by the respondents upon S. 32 is in accordance with the construction put upon the section in a judgment reported in 15 Lah 66;¹¹⁰ but with all respect I venture to differ from the conclusion arrived at there. In a later judgment also, to which I was a party, the section was interpreted in the same manner; but it appears that the point was conceded by the opposite side and not discussed at all. The Full Bench judgment, reported in A I R 1931 Lah 85,¹¹¹ does not advance the case of the respondents any further, inasmuch as in that case S. 32 was applied to a pending suit as would appear from the referring order at p. 86, col. 2 of the report. In my opinion therefore it is not necessary to refer these proceedings to the Sikh Gurdwaras Tribunal under S. 32.

Section 37, Sikh Gurdwaras Act, too is no bar in the way of pronouncing a judgment favourable to the appellants in this case. That section begins with the words "Except as provided in this Act", and inasmuch as the appellants bring their case under the Proviso to Section 30 (ii), it is permissible under the law to decide the case in their favour in spite of the decision of the Sikh Gurdwaras Tribunal, even if that decision runs counter to their interest. But here this question does not arise, as the Sikh Gurdwaras Tribunal did not pronounce any decision which can come into conflict with the reliefs now claimed by the appellants. The Tribunal merely decided that the mosque was adversely possessed by the Sikhs. Neither was it called upon to adjudicate upon the rights of the worshippers, nor did it hold that the Sikhs were entitled to treat it as a private house of their own or to deny the Muslims the right of offering prayers. Having decided all the points raised at the Bar in favour of the appellants, I would accept

110. *Bishna v. Committee of Gurdwara Sudhal*, (1934) 21 A I R Lah 390=151 I C 890=15 Lah 66=36 P L R 426.

111. *Committee of management for Gurdwara Punja Sahib v. Fazal Khan*, (1931) 18 A I R Lah 85=131 I C 89=12 Lah 204=32 P L R 967 (F B).

the appeal, set aside the decree of the District Judge and grant the appellants a decree in terms of the reliefs prayed for. In view of the peculiar circumstances of the case however I would leave the parties to bear their own costs.

K.S./R.K.

Appeal dismissed.

*** A. I. R. 1938 Lahore 425**

YOUNG C. J. AND MONROE J.

Bilas Rai — Convict — Petitioner.

v.

Emperor.

Criminal Revn. No. 204 of 1937, Decided on 3rd November 1937, referred by Abdul Rashid J., D/- 7th April 1937.

*** Police Act (5 of 1861), Ss. 30 and 32— License given to take out procession — Procession led by accused not licensees — Magistrate ordering procession to move faster while passing mosque — Order deliberately disobeyed by accused and riot taking place as a result — Accused charged under S. 32 with refusing to obey order passed by competent authority — Conviction held to be proper — Every processionist held to be governed by license.**

A license was given to certain persons under S. 30, Police Act, to take out a procession. The procession was led by the accused who was not one of the licensees. Order had been given by the Additional District Magistrate to the procession to move faster while passing a mosque. The order met with deliberate disobedience by the accused with the result that a riot took place. The accused was charged under S. 32, Police Act, with refusing to obey an order passed by a competent authority, and was convicted, no reference being made about the license :

Held that the accused was properly convicted under S. 32. The license applied to the processionists generally and every processionist was governed by the terms of the license and as there was disobedience to a lawful order, the ordinary law applied : *A I R 1929 Lah 404, Disting.*

[P 426 C 2]

Sham Lal and Faqir Chand Mittal —
for Petitioner.

Vasheshar Nath Sethi for Advocate-
General — *for the Crown.*

Order of Reference.

Abdul Rashid J. — On 19th September 1935, the Superintendent of Police Rohtak granted a license under S. 30, Police Act, to four persons, namely Baij Nath, Chandan Lal, Raja Ram and Lachhman Sarup, authorizing them to take out a procession on the day of the Bharat Milap through the streets of Rohtak. On 8th October 1935 the Hindus of Rohtak took out the Bharat Milap procession, and at about 6 P. M. this procession reached near the Gashtian mosque. Bilas Rai petitioner

was leading a music party in this procession and this party stopped in front of the Gashtian mosque. As the time of the evening prayers was fast approaching, Sardar Partap Singh, Deputy Superintendent of Police (P. W. 4) asked the petitioner to move his party onward so as to pass the mosque before the beginning of the evening prayers. The accused refused to comply with the order and stated that he would not move until the Dola which had been taken to Mandir Bhawan had rejoined the procession. The Deputy Superintendent of Police brought this fact to the notice of Rai Sahib Lala Izzat Rai, Additional District Magistrate (P. W. 5). Lala Izzat Rai went ahead and asked the petitioner to move on. The petitioner told the Additional District Magistrate that he was needlessly alarmed to which the Additional District Magistrate replied that he was a responsible official and could not take any risk, and that if the petitioner refused to move he would order his arrest. The petitioner however offered the flags which he was holding to the Additional District Magistrate with the remark that the Additional District Magistrate could lead the procession himself. In the words of the Additional District Magistrate the bandsmen also shared the reluctance of the petitioner to move. The District Magistrate then came to the place and pushed the accused forward. Shortly afterwards the procession was attacked in the rear and this led to a riot which was not quelled till the police had opened fire.

After going through the evidence I am of the opinion that the accused deliberately refused to obey the orders of the Deputy Superintendent of Police and the Additional District Magistrate. The question for determination therefore is whether in these circumstances the accused is liable under S. 32, Police Act. The lower Courts have held him to be liable and have sentenced him to a fine of Rs. 100. It must be remembered that the petitioner Bilas Rai is not one of the licensees. Two of the conditions printed on the license are in the following terms :

(1) This license is issued subject to the condition that all the terms embodied therein shall be implicitly obeyed.

(2) The licensees and other persons in the procession shall obey any such order as may be issued by the Magistrate or other officer in charge of the procession relating to the speed of the procession.

It was contended by the learned counsel for the petitioner that if any of the proces-

sionists disobeys the terms of the license he cannot be punished under S. 32, Police Act, and that only the licensee is liable to be sentenced under this section for the breach of the conditions of the license committed by any processionist. It was urged that S. 32, Police Act, implies that every person violating the conditions of any license granted to him by the police shall be liable on conviction to a fine not exceeding Rs. 200. The words "to him" do not occur after the word "granted" in S. 32, of the Police Act. It was however maintained that the grant of a license implies a "grantee" or a "licensee" and that it is such grantee or licensee alone who can be punished if any processionist violates the conditions of any license granted by the police. Reference was made in this connexion to Division Bench ruling of this Court reported in 10 Lah 852¹ where it was held that it is only the licensee to whom a license for the formation of a procession is given under S. 30, Police Act, who is bound by the license and liable to be prosecuted if any member of the procession is guilty of a breach of the conditions of such license, and not the persons who signed the license as sureties, there being no legal sanction for requiring an applicant to produce sureties. The question involved in the present case was not expressly dealt with in the Division Bench ruling alluded to above. Moreover condition (2) of the present license did not appear in the license that was considered in the reported case.

On behalf of the Crown it was contended that under the provisions of S. 32, every processionist who violates the conditions of the license is liable to a fine not exceeding Rs. 200 and that the liability is not confined only to the licensee. It was urged that the word "granted" in S. 32 is not followed by the words "to him" and therefore once a license has been granted every person who forms part of the procession taken out in pursuance of the license becomes liable if the conditions of the license are violated. Reliance was also placed by the learned counsel for the Crown on condition (2) of the license issued in the present case.

The question involved in the present case is one of importance, and it is desirable that it should be authoritatively decided by a Division Bench. Subject to

the orders of the Hon'ble the Chief Justice, I refer this case to a Division Bench.

Order.—This application in revision was referred to a Bench by a Judge sitting alone, as he was under the impression that there was a Division Bench decision dealing with the matter. The facts are that a license was given under S. 30, Police Act, to take out a procession. The procession was led by the man who has been convicted. Orders were given by the Additional District Magistrate to the procession to move faster while passing a mosque. This order met with deliberate disobedience by the petitioner with the result that a riot took place. The accused was charged under S. 32, Police Act. When the charge was read out to him, not a word was said about the license. The accused was merely charged with refusing to obey an order by the competent authority. Mr. Sham Lal in this Court argues however that he was charged with disobeying the conditions of the license. The first point taken is that as the accused was not himself the licensee, he could not be convicted on this charge. Against this argument is the fact that the accused was not charged with disobeying the conditions of the license. He was charged under S. 32, Police Act, and perfectly properly convicted under that section. But even supposing that he was charged with disobeying the conditions of the license, there is nothing in counsel's point. The Division Bench case alluded to, reported in 10 Lah 852,¹ has nothing to do with this point. In that case it was decided that sureties, under the circumstances of that case, could not be responsible for non-compliance with the conditions of the license by the licensee. That case clearly has no bearing on the point we are now considering. This license itself applied to the processionists generally. Under the law every person in the procession would be behaving illegally in taking part in the procession if there had not been a license. Therefore, every processionist was governed by the terms of the license and if there was disobedience to a lawful order the ordinary law would apply. Under no circumstances is the point raised by counsel good. The application in revision is dismissed.

R.M./R.K.

Application dismissed.

1. *Emperor v. Hot Ram*, (1929) 16 A I R Lah 404=114 I O 716=10 Lah 852=30 Or L J 371=30 P L R 261.

A. I. R. 1938 Lahore 427

JAI LAL J.

Naru Ram — Convict — Petitioner.

v.

*Executive Officer, Cantonment Board,
Multan Cantonment — Respondent.*

Criminal Revn. Petn. No. 765 of 1937,
Decided on 6th September 1937, from
order of Dist. Magistrate, Multan, D/-
10th April 1937.

Cantonments Act (1924), Ss. 210 (g) and 213
—Person served with notice prohibiting him
from selling fruit—Person allowed to continue
business on representation—Person applying
for license without paying prescribed fee—No
license issued — Person summarily tried and
convicted under Ss. 210 (g) and 213—Con-
viction held could not be interfered in revision
— Case held should not have been tried
summarily.

A person was served with a notice by the Can-
tonment Authority prohibiting him from selling
fruit in his shop. The person represented to the
authority that he had been carrying on business
for a long time whereupon he was allowed to
continue business. He then applied to the autho-
rity for a license but did not pay the prescribed fee
and no license was issued. He was tried summarily
under Ss. 210 (g) and 213 and was convicted :

Held that the conviction could not be interfered
with in revision as under the circumstances the
person could not take advantage of S. 210 (3)
owing to his own conduct in applying for license
and not taking it out subsequently. [P 427 C 2]

Held further that the case should not have
been tried summarily as the question of compen-
sation might have arisen under certain circum-
stances. [P 427 C 2]

Kahan Chand for M. L. Sachdeva —
for Petitioner.

Mohammad Monir, Assistant Advocate-
General and Chuni Lal Vohra—
for Respondent.

Order.—This is a petition for revision
by Naru Ram against his conviction by a
Magistrate of the 1st Class with enhanced
powers under S. 30, Criminal P. C., under
Ss. 213 and 210 (1) (g), Cantonment Act.
The petitioner has been sentenced to a fine
of Rs. 5 on conviction. The offence charged
against him is that he has been selling fruit
within the limits of Cantonment of Multan
without a license.

The objection of the petitioner is that
he has been carrying on business in the
shop in question for 50 or 60 years and
therefore does not need a license. In this
contention he is obviously wrong because
S. 210 (3) provides that no person who
was, at the commencement of the Canton-
ment Act of 1924, carrying on his trade,
calling or occupation in any part of a
Cantonment, shall be bound to apply for a

licence for carrying on such trade, or
occupation in that part until he has
received from the Cantonment authority
not less than three months' notice in
writing of his obligation to do so, and if
the Cantonment Authority refuses to
grant him a license, it shall pay compensa-
tion for any loss incurred by reason of
such refusal. It appears that when the
Cantonment Authority first served a notice
upon him prohibiting him from selling
fruit in the shop in question, the petitioner
represented to the Authority that he had
been carrying on business for 50 or 60 years
whereupon he was allowed to continue his
business. Whether the Cantonment Autho-
rity required him then to take out a license
or not, is not clear but it does appear that
in May 1936 the petitioner applied to the
Cantonment Authority for a license. I am
informed by the learned Assistant Advo-
cate-General that the Cantonment Autho-
rity was and is prepared to grant the
license but the petitioner has not paid the
prescribed fee for the license and therefore
no license has been issued to him. Under
the circumstances, it is doubtful whether
sub-s. (3) of S. 210, Cantonment Act, can
be taken advantage of by the petitioner
owing to his own conduct in applying for a
license and not taking it out subsequently.
It is not denied by the learned counsel for
the Crown that if, under the circumstances
the Cantonment Authority refuses to grant
a license to the petitioner, it shall be
bound to pay compensation to him.

I am not therefore prepared to interfere
on revision with the conviction of the
petitioner or with the sentence. The whole
trouble has been invited by the petitioner
first by applying for a license and then not
taking it out on payment of the prescribed
fee. At the same time I wish to remark
that this is not a case which should have
been tried summarily by the Magistrate.
As I have already stated above, the ques-
tion of compensation might have arisen
under certain contingencies and but for the
fact that the facts of this case are stated
in the written statement of the accused
and have been supplemented before me by
the information supplied by the learned
Assistant Advocate-General, it would have
been difficult to ascertain them on the
present record. With these remarks I
dismiss the petition.

S.C./R.K.

Petition dismissed.

A. I. R. 1938 Lahore 428

BLACKER J.

Emperor

v.

Khuda Bakhsh—Accused—Respondent.

Criminal Revision No. 1537 of 1937,
Decided on 4th January 1938, reported
by District Magistrate, Montgomery, D/-
29th October 1937.

Criminal P. C. (1898), S. 110—Previous conviction is not necessary for order of security being passed — Magistrate must consider and weigh evidence produced by prosecution.

A previous conviction is not necessary for an order of security being passed in proceedings under S. 110 and it is incumbent on the Magistrate, before whom the proceedings are started, to consider and weigh the evidence produced by the prosecution to prove that the person against whom proceedings are started is an habitual thief, before he proceeds to pass any order. [P 428 C 2]

M. A. Majid for Advocate-General —
for the Crown.

Faqir Ullah — *for Respondent.*

Facts. — The police instituted proceedings under S. 110, Criminal P. C. against Khuda Bakhsh and he was served with a notice to show cause why he should not be bound down under Ss. 110/118, Criminal P. C. for being a habitual thief, a robber, and a receiver of stolen property, as well as for being a dangerous character. After recording the evidence of 19 witnesses out of 35 entered in the challan, the Sub-Divisional Magistrate discharged the respondent. In doing so the only ground which he put forward in his order is that there was not a single conviction on record against the respondent.

Order of Reference.

The Sub-Divisional Magistrate has stated that before any question of habit can arise, it must be clearly proved that the person proceeded against has at least on one occasion been convicted for some offence. This proposition seems to be unwarranted. It is nowhere laid down that before a person can be shown to be a habitual thief, it should be proved that he had any previous conviction. In fact, S. 117 (4), lays down that the fact that a person is a habitual offender may be proved by evidence of general repute or otherwise. The latest ruling on this point seems to be A I R 1936 Oudh 238.¹ It has been clearly laid down in this Division Bench

ruling that it is not necessary to prove any previous conviction. There are, no doubt, rulings to the effect that where there is no previous conviction, the Magistrate must weigh the other evidence with extreme caution. It may be that in this case after recording the full evidence the Magistrate might have been justified in arriving at a conclusion that there was insufficient evidence to warrant an order of security being passed; but the Magistrate has not said so in his judgment. In fact he has not considered or applied his mind to the other evidence. He did not proceed to record the remaining evidence that the prosecution wanted to produce and his only ground for discharge is the one mentioned above. A perusal of his order will make this clear. Since this proposition, if accepted, is bound to have a far-reaching effect, it is necessary that the High Court should authoritatively rule, as has been done in the past, that a previous conviction is not necessary for an order of security being passed. The records are forwarded for issuing a direction to the Magistrate to proceed with the evidence of the remaining witnesses and arrive at a decision on this case on its merits. The original file of the case is also submitted.

Order. — The learned Magistrate in this case is clearly incorrect in his supposition that a previous conviction is necessary for proceedings under S. 110, Criminal P. C. There is no such provision in the law itself which on the other hand lays down in S. 117 (4) that the fact that the man is an habitual offender can be proved by evidence of general repute or otherwise. In the judgment referred to by the learned District Magistrate (A I R 1936 Oudh 238¹) the following words occur which are worth quotation in full :

Where in a proceeding under S. 110, Criminal P. C., there was evidence showing that the accused had been suspected of complicity in certain thefts and had been mentioned in each case in the reports made in the police station at the time of each theft and there was further unrebutted evidence of the residents of the village that he had the general repute of being a burglar and a thief an order under S. 110, Criminal P. C., requiring him to execute a bond with sureties to be of good behaviour was a proper order.

The learned Magistrate, therefore, has erred in law in refusing to consider and weigh the evidence produced by the prosecution to prove that the respondent in this case was an habitual thief. I see from the calendar put up that the evidence is not only evidence of various occasions in which

1. *Emperor v. Bachu*, (1936) 23 A I R Oudh 238 = 1936 Cr C 385 = 160 I C 1039 = 37 Cr L J 390 = 1936 O W N 247 = 12 Luck 36.

he has been suspected of theft but also evidence of his general reputation as a thief and also evidence of association with bad characters. I accordingly accept the reference and setting aside the order of discharge send the case back for further enquiry according to law.

R.M./R.K.

Order set aside.

A. I. R. 1938 Lahore 429

COLDSTREAM J.

Jahan Khan — Accused — Appellant.
v.

Emperor.

Criminal Appeal No. 708 of 1937, Decided on 7th October 1937, from order of Dist. Judge, Attock at Campbellpur, D/- 3rd March 1937.

(a) Criminal P. C. (1898), Ss. 476, 476-A — Application for making complaint under S. 476 dismissed in default — Applicant taking no steps to get order of dismissal set aside—It is not open to superior Court to entertain another application by same applicant and to make complaint — "Rejection" in S. 476-A includes rejection on ground of failure to prosecute application.

Where an application asking a Court to make a complaint under S. 476 is dismissed in default by the Court and the applicant takes no steps to get the order of dismissal set aside, which he could have done either by asking the Court to set aside its ex parte order and restore his application or by appeal to the superior Court under S. 476 of the Code, it is not open to the superior Court to entertain another similar application made to it by the same applicant and make a complaint. The term "rejection" in S. 476-A includes rejection on the ground that the applicant did not appear to prosecute the application as he ought to have done. So long as the procedure is regular, the superior Court is not concerned with the reasons for which the application was dismissed under S. 476-A. The Court can take action only if the lower Court had neither made a complaint itself nor rejected the application for making one.

[P 430 C 1]

(b) Criminal P. C. (1898), S. 476 — It is not necessary that action under S. 476 must be taken before close or in strict continuation or within any particular time after termination of proceedings in which perjury has been committed — Application need not necessarily be prompted by high motives (*Obiter*).

Although a Court may properly hesitate to make a complaint on an application which is presented long after the proceedings, in which perjury is alleged to have been committed, have ended and which is obviously not prompted by any other motive than personal grudge, there is nothing in the statute to warrant the proposition that an action under S. 476 is only to be taken before close of the proceedings, or in strict continuation with them or within any particular time after their termination. Nor is there any justification for the

view that only applications prompted by high motives are to be entertained. [P 430 C 1]

Mukand Lal Puri — *for Appellant.*

L. M. Dutta — *for Complainant.*

Judgment.—On 5th July 1934 a mutation was sanctioned in the land revenue records of Nakka Kahut, a village in Attock District, recording a partition of land between Nawab Khan and his brother Fateh Khan. The Naib Tehsildar's order stated that the parties had been identified by the lambardar Jahan Khan. On 16th December 1935, Muhammed Yar, son of Fateh Khan, filed a suit against Nawab Khan and Fateh Khan for a declaration that the private partition between Nawab Khan and Fateh Khan was not binding on him. The parties had agreed that they would be bound by an oath taken by Jahan Khan, the lambardar. Jahan Khan on 19th February 1936 stated in Court on oath that he had not appeared in any mutation proceedings between the parties before the Naib Tehsildar and Patwari. On this statement the suit was at once decreed, the Sub-Judge recording at the same time that Nawab Khan confessed judgment after the oath was taken.

Nearly three months after the decree, on 8th May 1936, Nawab Khan put in an application in the Subordinate Judge's Court asking the Court to make a complaint of perjury against Jahan Khan in exercise of its powers under S. 476, Criminal P. C. This application was dismissed in default on 18th August 1936. Nawab Khan took no steps to have this order of dismissal reversed as he could have done either by asking the Court to set aside its ex parte order and restore his application, or by appeal to the superior Court under S. 476 of the Code. Instead of doing so Nawab Khan on 1st October 1936 put in an application before the District Judge. This application, it is to be noticed, was not within limitation for an appeal against the Subordinate Judge's order. Notwithstanding the fact that the lower Court's order of dismissal was still in force the District Judge accepted the application and made a complaint. Against this order of the District Judge, Jahan Khan has submitted the present appeal. As notice was issued by the Court to Nawab Khan, I have allowed the latter's counsel to address the Court opposing the appeal. The Crown does not oppose it.

It is contended by the appellant's counsel that the District Judge's order must be

set aside firstly because the application to him was belated, being made nearly eight months after the termination of the proceedings to which it related, secondly because it was not made in good faith but to vent spite, thirdly because the District Judge acted without jurisdiction under S. 476-A as the lower Court had rejected an application for the making of the complaint, and fourthly because the prosecution could not possibly in this case be successful. The District Judge's order was not an appellate order and it is not disputed that an appeal lies against it.

While, no doubt, a Court may properly hesitate to make a complaint on an application which is presented long after proceedings have ended and which is obviously not prompted by any other motive than personal grudge, as is presumably the case here, I can see nothing in the statute (and I say it with great respect to the learned Judges who have expressed a different view) warranting the proposition that action under S. 476 is only to be taken before the close of the proceedings in which the perjury is alleged to have been committed, or in strict continuation of them, or within any particular time after their termination. Nor is there justification for the view that only applications prompted by high motives are to be entertained. In the present case there is no necessity however to discuss this aspect of the case, or the argument that the complaint should not have been made in a case which was most likely to fail, for in my opinion the order of the District Judge was without jurisdiction. Under the provisions of S. 476-A, he could take action only if the lower Court had neither made a complaint itself nor rejected an application for the making of one. The learned District Judge has entertained this application on the ground that the dismissal of Nawab Khan's application on 18th August 1936 in default was not a rejection of the application. In my opinion, he was wrong to entertain it. He was not concerned with the reasons for which the application was dismissed (so long as the procedure was regular) and had it been the intention of the legislation that 'rejection' in S. 476-A should not include rejection on the ground that the complainant did not appear to prosecute the application as he ought to have done, it would presumably have made this clear.

I accept the appeal, set aside the order appealed against and dismiss the application by Nawab.

R.M./R.K.

Appeal allowed.

A. I. R. 1938 Lahore 430

DALIP SINGH AND BHIDE JJ.

Peoples Bank of Northern India, Ltd.

— *Plaintiff* — *Appellant.*

v.

Malik Ram Kishan and others —
Defendants — *Respondents.*

Second Appeal No. 442 of 1936, Decided on 16th December 1937, from preliminary decree of Senior Sub-Judge, Multan, D/- 31st July 1936.

Mortgage—Suit on—Prior mortgagee assigning his rights under mortgage decree — Assignment is invalid unless registered — Want of registration has not effect of extinguishing rights of prior mortgagee so as to entitle subsequent mortgagee to claim decree free of mortgagee rights of prior mortgagee.

An assignment of a mortgage decree requires registration and such an assignment is invalid unless registered but the want of registration will not have the effect of extinguishing the original rights of the assignor mortgagee and a subsequent mortgagee bringing a suit on his mortgage, and whose mortgage is admittedly subject to the mortgagee rights of the prior mortgagee, cannot claim a decree free of the mortgagee rights of the prior mortgagee. His rights cannot be held to have disappeared merely because the assignments by him have been found to be invalid for want of registration. [P 431 C 1, 2]

D. C. Ralli and Bhagwat Dayal—
for Appellant.

Achhru Ram and Inder Dev Dua—
for Respondent (Defendant No. 2).

Bhide J.—This appeal arises out of a suit for recovery of Rs. 13,368-1-3 by the Peoples Bank of Northern India (now in liquidation) on the footing of a mortgage. In Para. 6 of the plaint it was stated that a house included in the mortgage had been the subject of a previous mortgage in favour of one Lekh Raj but that the mortgagee rights of Lekh Raj had become extinguished inasmuch as the plaintiff had not been impleaded in the previous arbitration proceedings by Lekh Raj against the mortgagor Ram Kishan. It transpired that Lekh Raj had obtained a decree against Ram Kishan on the basis of an award and after his death the decree had been transferred by his widow Mt. Khillo Bai to Gurdial. Mt. Khillo Bai and Gurdial were accordingly impleaded as defendants and put in their pleas. The

plaintiff Bank disputed the assignment of the decree in favour of Gurdial and also pleaded that the assignment, if any, was invalid for want of registration. The trial Court has found the issues in favour of Gurdial and granted a decree to the plaintiff subject to his rights. From this decision the plaintiff Bank has appealed.

Various points had been taken by the plaintiff Bank against Gurdial, but the learned counsel for the appellant has confined himself to one of them only, namely that the assignment of decree by Mt. Khillo Bai in favour of Gurdial was invalid for want of registration. In support of the contention that the assignment was invalid, he relied on Cl (e) of S. 17 (1), Registration Act, which was introduced in that Act by an amendment of the year 1929. He also referred to the Commentary at page 71 of Mulla's Registration Act (Edn. 2) in which it is pointed out that there was a conflict of decisions among the High Courts in India and that the amendment gave effect to the view of the Bombay High Court, that the assignment of a mortgage decree required registration. The learned counsel for the respondents contended on the other hand that Cl. (e) of S. 17 (1) was not applicable because the decree in this case did not create any new rights and the rights, such as they were, were created by the mortgage. This contention was not supported by any authority in point and does not seem to have force. Although the mortgage may have created the original rights, the decree did certainly declare the rights of the mortgagee after deciding the point in dispute and stated the amount which was due to the mortgagee and the manner in which it could be realised by him. The contention of the appellant that the assignment was invalid for want of registration, must therefore prevail. However, the only effect of this contention is that the original rights of Mt. Khillo Bai must be held to remain intact.

The learned counsel for the appellant contended that the rights of Mt. Khillo Bai, widow of Lekh Raj, had come to an end because Gurdial had applied to the executing Court under O. 21, R. 16, for execution of the decree on the basis of the assignment and he had been substituted in place of Mt. Khillo Bai as the decree-holder. We are however not concerned in this case with the effect of this substitution on the execution of the decree. That question will be decided in due course by the exe-

cuting Court when it is raised. The only point which arises here for decision in this case is whether the plaintiff is entitled to get a decree free of the mortgagee rights of Lekh Raj. The mortgage in favour of the plaintiff was admittedly subject to the previous mortgagee rights of Lekh Raj and these rights cannot be held to have disappeared merely because the deed of assignment in favour of Gurdial has been found to be invalid. The appeal must therefore be accepted and the decree of the trial Court modified by declaring that the plaintiff can realize the amount due to him by sale of the mortgaged property, that is, the equity of redemption of the house referred to in para. 6 of the plaint subject to the previous mortgage rights of Lekh Raj, or his successor-in-interest. As the appellant has failed on the other grounds raised by him, I would leave the parties to bear their costs.

Dalip Singh J.—I agree.

R.M./R.K.

Appeal allowed.

A. I. R. 1938 Lahore 431

ABDUL RASHID J.

Nawab Din and others — Defendants
— Appellants.

v.

Maula Bakhsh and others — Plaintiffs
— Respondents.

Second Appeal No. 523 of 1937, Decided on 18th October 1937, from order of Dist. Judge, Gurdaspur, D/- 17th February 1937.

(a) Custom (Punjab)—Alienation—Ancestral property—Husband can alienate ancestral land in favour of wife in lieu of reasonable dower debt.

Under Mahomedan law dower is to be regarded as a debt due from the husband to the wife. This debt is payable on demand. Such debt being a just antecedent debt arising out of the contract of marriage the husband is fully entitled to alienate ancestral land in favour of his wife in lieu of this debt provided it is not unreasonably high : 60 P R 1900 and 40 Cal 288 (F B), Rel. on ; 7 P W R 1910, Disting. [P 432 C 2]

(b) Mahomedan law — Dower—Reasonable amount—Question is one of custom—Custom must be pleaded and proved—Point of custom cannot be raised in appeal for first time.

The question as to what is regarded as a reasonable amount of dower is a question of custom and it is incumbent on the party to raise this point in its pleadings and to lead evidence thereon. Where a person wants to show that a custom does not permit the alienation of a good deal of ancestral property in lieu of dower, it is open to him

to get an issue framed on this point and to lead evidence to prove the custom. If he fails to do so, such point cannot be raised in appeal for the first time : *A I R 1917 P C 181, Rel. on.*

[P 433 C 1]

(c) Custom—Proof of — Party must prove custom and that it governs him.

If a party relies on custom it must prove firstly that it is governed by custom and secondly what that custom is.

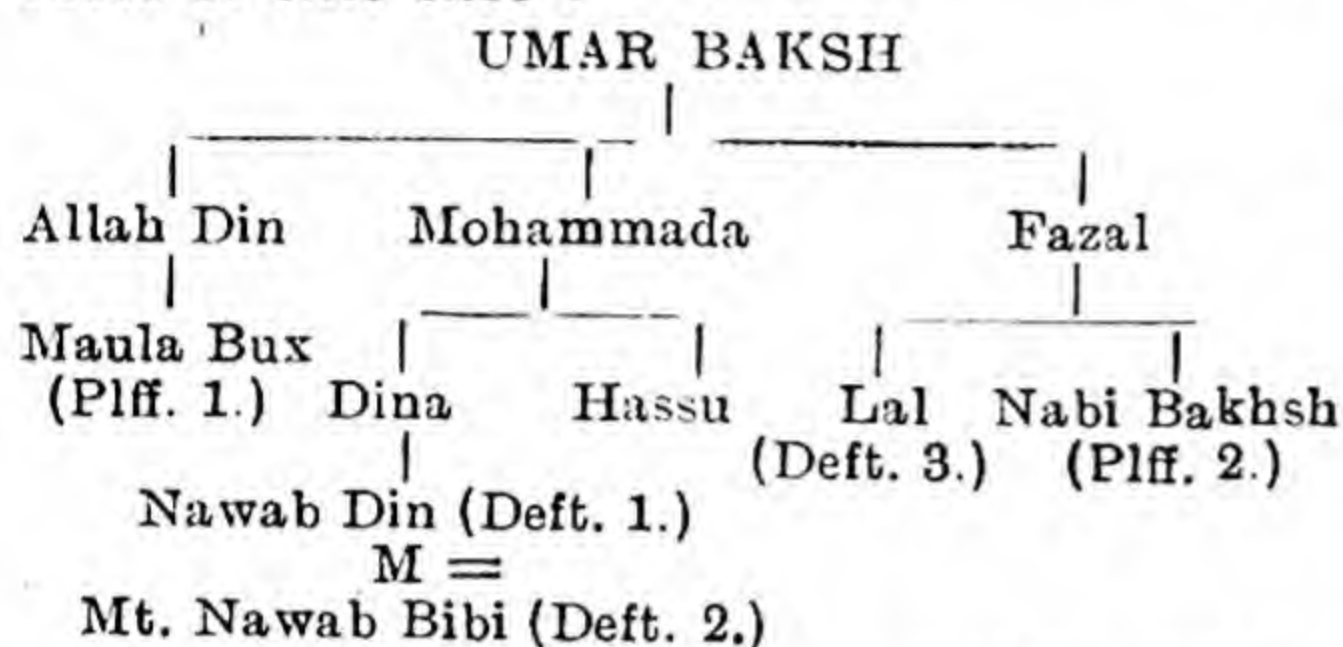
[P 433 C 1]

Mehr Chand Mahajan — *for Appellants.*

Mohammad Amin Malik —

for Respondents.

Judgment. — The following pedigree-table will be helpful in understanding the facts of this case :



On 22nd June 1924, Nawab Din, defendant 1, got married to Mt. Nawab Bibi, defendant 2. A kabinnama (Ex. D-1) was executed at the time of the marriage stating that the dower of Mt. Nawab Bibi had been fixed at the sum of Rs. 4000. It was further stated that in lieu of dower, Nawab Din had given land measuring 119 kanals to his wife and that he would get this land mutated in her name whenever she makes a request to that effect. On 10th May 1934, a mutation was effected in favour of Mt. Nawab Bibi in respect of 119 kanals 10 marlas of land. On 10th May 1935, the plaintiffs instituted the suit out of which the present appeal has arisen, for a declaration to the effect that the sale by Nawab Din in favour of his wife, Mt. Nawab Bibi, dated 10th May 1934, was without consideration and necessity and shall not affect their reversionary rights after the death of the alienor. Only two issues were framed by the trial Court :

(1) Was the dower of defendant 2 fixed at Rs. 4000 and did defendant 1 transfer the land to her in lieu thereof ?

(2) Relief.

The trial Court held that the sum of Rs. 4000 was in fact fixed as the dower of Mt. Nawab Bibi at the time of the marriage and that the plaintiffs' version that dower was fixed at the sum of Rs. 32 did not represent the facts correctly. The dower was fixed at the sum of Rs. 4000 as the parents of Mt. Nawab Bibi were not

prepared to give their daughter in marriage to Nawab Din unless their demand for a high dower was acceded to because Nawab Din's grandfather had been suffering from leprosy. On these findings the plaintiffs' suit was dismissed. Against this decision the plaintiffs preferred an appeal in the Court of the learned District Judge, Gurdaspur. The learned District Judge affirmed the findings of the trial Court and held that the dower of Rs. 4000 was agreed to at the time of the marriage. The learned Judge was however of opinion that as the land was ancestral qua the plaintiffs and as the amount of dower was unreasonably high, Nawab Din was not entitled to alienate this land in favour of his wife on account of dower. The appeal of the plaintiffs was accepted and they were given the declaratory decree prayed for. Against this decision Mt. Nawab Bibi and Nawab Din have preferred a second appeal to this Court.

The marriage between Mt. Nawab Bibi and Nawab Din took place on 22nd June 1924. Under Mahomedan law dower is to be regarded as a debt due from the husband to the wife. This debt is payable on demand. It must therefore be held that on 10th May 1934 a sum of Rs. 4000 was due from Nawab Din to Mt. Nawab Bibi. This debt was a just antecedent debt arising out of the contract of marriage that took place in 1924. Nawab Din was therefore fully entitled to alienate the land in favour of his wife in lieu of the debt due from him. It was held by a Full Bench of the Punjab Chief Court in 65 P R 1900¹ that just debts are debts which are actually due and are not immoral, illegal or opposed to public policy and have not been contracted as acts of reckless extravagance or of wanton waste or with the intention of destroying the interests of reversioners. This view was approved by their Lordships of the Privy Council in 26 P R 1913².

The learned District Judge has relied on a Single Bench ruling of the Punjab Chief Court reported in 71 P W R 1910.³ The facts of that case were however very different from the facts of the present case. In that case an Arain had alienated the

1. *Debi Ditta v. Saudagar Singh*, (1900) 65 P R 1900=322 P L R 1900 (F B).

2. *Kirpal Singh v. Balwant Singh*, (1913) 40 Cal 288=17 I C 666=26 P R 1913=17 C W N 302=17 C L J 137 (P C).

3. *Murad v. Ghulam Fatima*, (1910) 71 P W R 1910=6 I C 931.

entire ancestral property possessed by him in favour of his wife in lieu of a dower of Rs. 300. It was held that the amount of dower, in the circumstances of that case, was unreasonably high and that in any case the transaction fixing the dower at a very high amount was of a suspicious character. There was no finding in the reported case that the dower had been genuinely fixed at the sum of Rs. 300. In the present case, the District Judge has observed in his judgment that Nawab Din, defendant 1, is admittedly a man of property and that he must arrange to satisfy the dower with other property against which the reversioners will not be liable to object. There is no finding in the present case that in view of the property possessed by Nawab Din the amount of dower is unreasonably high.

It was contended by the learned counsel for the respondents that Nawab Din, defendant 1, had acted in a reckless manner in June 1924 in fixing the dower at the sum of Rs. 4000. No such plea was ever taken in the trial Court, the case of the respondents throughout being that the sum of Rs. 32 was actually fixed as the amount of dower. Moreover, the question as to what is regarded as a reasonable amount of dower amongst the Jats of Gurdaspur District is a question of custom and it was incumbent on the plaintiffs to raise this point in their pleadings and to lead evidence thereon. No exception was taken to the amount of dower in the trial Court on the ground that it was unreasonably high. The learned District Judge has therefore made out an entirely new case for the plaintiffs. If a party relies on custom, it must prove firstly that it is governed by custom and secondly what that custom is. If the plaintiffs wanted to show that custom does not permit the alienation of a good deal of ancestral property in lieu of dower, it was open to them to get an issue framed on this point and to lead evidence to prove the custom: *vide* 45 Cal 450.⁴

The learned counsel for the respondents also contended that the alienation in favour of Mt. Nawab Bibi really took place at the time of the nikah in June 1924 and that therefore the alienation was not in lieu of an antecedent just debt. This argument cannot be entertained in

view of paras. 1 and 6 of the plaint where it is definitely stated that the sale in favour of the wife took place on 10th May 1934, and that this sale should be set aside as being fictitious and without consideration and necessity. If no sale took place on 10th May 1934, as contended by the learned counsel for the respondents, then the present suit would be liable to dismissal as no cause of action had arisen to the plaintiffs in May 1934.

For the reasons given above, I accept this appeal, set aside the judgment and the decree of the learned District Judge dated 17th February 1937, and restore that of the trial Court dismissing the plaintiffs' suit. In view of all the circumstances of the case, I order that the parties shall bear their own costs throughout.

B.D./R.K.

Appeal allowed.

A. I. R. 1938 Lahore 433

BHIDE J.

*Firm Jinda Ram Guranditta Mal —
Decree-holder — Appellant.*
v.

*Bur Singh — Judgment-debtor —
Respondent.*

Second Appeal No. 6 of 1938, Decided on 7th March 1938, from decision of Dist. Judge, Lyallpur, D/- 17th November 1937.

Punjab Debtors Protection Act (2 of 1936), S. 4—Decree amount made charge on property by decree—S. 4 does not apply to execution of decree.

If property is already subjected to a mortgage or charge by the decree itself the Legislature perhaps did not intend to interfere with the operations of the decrees and allow the Collector to exclude any portion of the property for the maintenance of the judgment-debtor. S. 4 is not applicable to the execution of such decrees.

[P 434 C 1]

Achhru Ram — for Appellant.

Amar Nath Chopra — for Respondent.

Judgment.—The sole point for decision in this case is whether the proceedings for temporary alienation of the land of the judgment-debtor in execution proceedings ought to be transferred to the Collector under S. 4, Punjab Debtor's Protection Act (2 of 1936). The decree was one for payment of Rs. 1850 by certain instalments and directed that this amount would be a charge on certain property of the judgment-debtor, and that he would not be competent to alienate it by mortgage, sale, etc.

4. Abdul Hussein Khan v. Bibi Sona Dero, (1917) 4 A I R P C 181=43 I O 306=45 I A 10=45 Cal 450=12 S L R 104 (P C).

As a result of this provision in the decree, no attachment of the said property in execution was necessary and this point is not disputed. S. 4 of the Punjab Debtor's Protection Act runs as follows :

Notwithstanding anything contained in any other enactment for the time being in force whenever a Civil Court orders that land be attached and alienated temporarily in the execution of a decree for the payment of money the proceedings of such attachment and alienation shall be transferred to the Collector.

According to the plain wording of the section, it would apply only to those cases in which the land has to be attached and then temporarily alienated ; in the present instance no attachment being necessary, it is contended on behalf of the appellant that S. 4 will not apply. The learned counsel for the respondent on the other hand urges that the intention of the Legislature was that the provisions should apply to the execution proceedings in case of money decrees and the use of the word "attached" does not necessarily show that the section will not apply, when attachment is not necessary. The presumption however is that every word used by the Legislature has a significance and it is possible that the wording in question was intended to exclude from the operation of the section mortgage decrees or decrees of the kind passed in the present instance whereby a charge is created on the land. If property is already subjected to a mortgage or charge by the decree itself, the Legislature perhaps did not intend to interfere with the operations of the decrees and allow the Collector to exclude any portion of the property for the maintenance of the judgment-debtor. The Courts have to interpret the language of an enactment as it stands. If the intention of the Legislature was different, it of course is open to it to make it clear by a suitable amendment of the Act. In view of the language of S. 4, it seems to me that the section was not applicable to the execution of the decree in the present case. I accordingly set aside the order of the learned District Judge and direct the executing Court to proceed with the execution according to law. In view of the fact that the point of law is not covered by any authority I leave the parties to bear their costs throughout.

K.S./R.K.

Order set aside.

A. I. R. 1938 Lahore 434

ADDISON AND DIN MOHAMMAD JJ.

Teja Singh and others — Defendants
— *Petitioners.*

v.

Atma Singh, Plaintiff and another,
Defendant — Respondents.

Civil Revn. No. 246 of 1937, Decided on 8th November 1937, from decree of Sub-Judge, First Class, Amritsar, D/- 1st December 1936.

Arbitration—Award—Revision—Powers of Court are confined by S. 115, Civil P. C.

The powers of a Court of revision are strictly confined within the limits prescribed by S. 115, Civil P. C., and, unless a judgment is vitiated by any of the defects specified therein, no interference with it can be made by the revising Court. This principle is all the more applicable in cases of revision from an order making an award a rule of Court.
[P 435 C 1, 2]

J. G. Sethi and M. L. Sethi —

for Petitioners.

Dev Raj Sawhney and R. P. Khosla —
for Respondent (Plaintiff).

Din Mohammad J. — The circumstances in which this petition has been presented are as follows: A champertous agreement was entered into between the petitioners and the respondent under which the latter had to finance the petitioners in their attempt to regain the property alienated by a female relative of theirs and to share the property thus recovered half and half. It was provided in the agreement that if any differences arose between the parties, they were to be referred to the sole arbitration of one Atma Singh. Relations between the parties became strained after some time and the financier made an application to the Court of the Subordinate Judge, Amritsar, under Para. 17, Sch. 2, Civil P. C. that the agreement be filed in Court. The petitioners strenuously resisted this application, but the Subordinate Judge made the order prayed for. The petitioners preferred an appeal from the order of the Subordinate Judge which, however, was dismissed by a single Judge of this Court on 8th April 1935. Thereupon, an order of reference was made to the arbitrator appointed in accordance with the provisions of the agreement. The arbitrator made a thorough enquiry into the matter. The parties were allowed to make detailed statements of their case on which no less than six issues were framed. On 8th July 1936, the arbitrator made his award and filed it in Court. The

Subordinate Judge gave sufficient opportunity to the parties to raise any objections they liked and, after disposing of the objections raised by the petitioners on 1st December 1936, he ordered that the award be made a rule of the Court. This order is being attacked in revision.

Several preliminary objections were taken to this petition; but, in our view, it can be disposed of on the short ground that it does not come within the ambit of S. 115, Civil P. C. Reference in this connexion may be made to the following remarks of their Lordships of the Privy Council in a judgment reported in 25 P R 1902:¹

Their Lordships are inclined to agree with the view of Clark J. in 84 P R 1901,² that in the case of an award revision would be more objectionable than an appeal. If an application in revision were admissible in a case like the present the finality of any award would be open to question. * * * * * They (the arbitrators) may have erred in law, but arbitrators may be judges of law as well as judges of fact, and an error in law certainly does not vitiate an award. The award having been duly made, and not having been corrected or modified, and the application to set it aside having been refused, the Subordinate Judge had no option but to pronounce a decree in accordance with it. The Subordinate Judge does not appear to have exercised a jurisdiction not vested in him by law, or to have failed to exercise the jurisdiction so vested, or to have acted in the exercise of his jurisdiction illegally, or with material irregularity. He appears to have followed strictly the course prescribed by the Code.

Counsel for the petitioners has urged that, inasmuch as effect has been given to an unregistered award, which was further extortionate and unconscionable and hence unenforceable, partial partition has been allowed and the award affects some property outside the jurisdiction of the Subordinate Judge who had taken cognizance of the case, the award was bad in law and without jurisdiction and so is the judgment of the Subordinate Judge that makes it a rule of the Court. These objections however were never raised either before the arbitrator or the Court below, and it cannot be said that either the arbitrator or the Subordinate Judge committed any illegality or any irregularity in not attending to those objections which were never taken before them. The powers of a Court of revision are strictly confined within the limits prescribed by S. 115, Civil P. C., and, unless a judgment is vitiated by any of

the defects specified therein, no interference with it can be made by the revising Court. Counsel for the petitioners has been unable to show that, besides the objections that he has taken for the first time in revision before us, any such defect exists in the order of the Court or the award of the arbitrator as would bring his case within the purview of S. 115, Civil P. C. We accordingly hold that this petition is not competent. In this view of the case, it is not necessary to dispose of the other preliminary objections taken by the respondent. We accordingly dismiss this petition with costs.

B.D./R.K.

Petition dismissed.

A. I. R. 1938 Lahore 435

ADDISON AND DIN MOHAMMAD JJ.

Mt. Atte (Atto) w/o Hako —

Plaintiff — Appellant.

v.

Faiz Mohammad and others —

Defendants — Respondents.

Letters Patent Appeal No. 136 of 1937, Decided on 3rd January 1938, from decree of Bhide J., Lahore, D/- 18th June 1937.

Punjab Tenancy Act (16 of 1887), S. 59 (c) — Word "occupied" — Meaning — Mere mention of name of co-sharer as co-owner in shamilat-deh does not denote occupation of such co-owner.

The word "occupied" in the Punjab Tenancy Act implies some control over the land by whatever name it may be expressed in law. It may not necessarily be actual possession and may include constructive possession. But a cosharer whose name is merely mentioned along with other co-sharers as a co-owner in the shamilat-deh may neither have physical control over the property nor be in constructive possession thereof. His contact with the land by virtue of such entry alone is too remote to be dignified by the name of possession even in the literal sense of the term.

[P 436 C 1, 2]

Mohammad Amin (Malik) —

for Appellant.

Ghulam Rasul Khan —

for Respondents.

Din Mohammad J. — The facts bearing upon the question of law involved in this case may shortly be stated. One Imam Din, who was an occupancy tenant of the land in suit, died on 3rd December 1934. Thereupon Faiz Mohammad and others took possession of the land and later, on 7th June 1933, mutation was sanctioned in their favour by the revenue authorities. Consequent upon this, one Mt. Atto claiming to be the landlord instituted

1. Ghulam Jilani v. Mahomed Hassan, (1902) 25 P R 1902=29 Cal 167=29 I A 51=8 Sar 154 (P C).

2. Jhangi Ram v. Mt. Budho Bai, (1901) 84 P R 1901=112 P L R 1901 (F B).

the suit out of which the present appeal has arisen for possession of the said land. The principal question that arose for decision by virtue of S. 59, Tenancy Act, was whether the common ancestor of the defendants and the deceased Imam Din ever occupied the land. The Subordinate Judge who tried the suit came to the conclusion that, inasmuch as the common ancestor of the defendants and the deceased occupancy tenant happened to be recorded as one of the cosharers in shamilat-deh of which the land in suit formed a part, the plaintiff's suit could not succeed. On appeal, the Senior Subordinate Judge, holding that it had not been proved that the common ancestor of the defendants and the deceased tenant had occupied the land within the meaning of S. 59, Tenancy Act, in spite of his having been entered as a co-sharer in the shamilat, decreed the suit with costs throughout. The defendants presented a further appeal to this Court which came for hearing before Bhide J. He agreed with the trial Court in its interpretation of the word "occupied" as used in S. 59, Tenancy Act and accepted the appeal. He however in view of the peculiar circumstances of the case left the parties to bear their own costs throughout. The sole question that falls to be determined in this case is what is the true construction to be put on the word 'occupied' as used in the proviso to S. 59, Tenancy Act.

On behalf of the appellant it is strenuously contended that the mere mention of a cosharer's name in the revenue papers in relation to shamilat-deh does not connote such occupation on the part of that cosharer as is contemplated by the framers of the Tenancy Act and that, in order to satisfy the requirements of the proviso to S. 59, some definite contact with or apparent control over the land is necessary. The respondents on the other hand have urged that the word 'occupied' is wide enough to include such possession as existed in this case. There is no direct authority on the point at issue but after giving full consideration to the matter, we are disposed to think that whatever interpretation the word 'occupied' may have in different legislative enactments in the Tenancy Act, it implies some control over the land by whatever name it may be expressed in law. It may not necessarily be actual possession. For instance, if a person cultivates the land through his tenants, in legal parlance

his possession would not be actual but constructive, but even if so, it cannot be denied that the said person is in occupation of the land. The person in question has dominion over the property and can oust trespassers, realise rents and even eject the tenants and himself assume physical control over the said property. But where neither he has physical control over the property nor is he in a position to exercise any dominion over the property through his tenants or servants or in a position to assume physical control over it, he cannot be said to be in occupation of the land. A cosharer whose name is merely mentioned along with other co-sharers as a co-owner in the shamilat-deh may neither have physical control over the property nor be in constructive possession thereof. His contact with the land by virtue of such entry alone is too remote to be dignified by the name of possession even in the literal sense of the term. In fact in the present case Ex. D.5 on which reliance was mainly placed by the trial Court clearly indicates that the land was in physical possession of two different persons, namely Pir Bakhsh, son of Umar Khan and Sandal Khan, son of Bahar Khan, who though included among the owners of this land were holding the land in their own right and not under the other co-owners. They were the only persons who could be said to be in occupation of the land. We have no hesitation therefore in holding that neither on general principles nor on the particular facts of this case the common ancestor of the defendants and the deceased tenant ever occupied the land in suit within the meaning of S. 59, Tenancy Act.

The learned Judge of this Court referred to certain rulings of the Punjab Chief Court, namely 20 P R 1871,¹ 22 P R 1876,² 4 P R 1881 (Rev.)³ and 26 P R 1895,⁴ in support of his conclusion, but all that those rulings have laid down is that a person is held to be in occupation of the land even if he does not cultivate it himself but gets the land cultivated through others. This proposition however is of no use in the present case as here that circumstance does not exist. For the appellant reliance

1. Kanh Singh v. Wuzeera, (1871) 20 P R 1871.

2. Shian Singh v. Khushia, (1876) 22 P R 1876.

3. Mahla Khan v. Hakim Khan, (1881) 4 P R 1881 (Rev.).

4. Nihal Singh v. Hari Singh, (1895) 26 P R 1895.

has been placed on 100 P R 1908,⁵ A I R 1933 Lah 1010⁶ and 65 P R 1909⁷ and though those authorities also are not exactly in point, they are of some help in interpreting the word "occupied" generally. In 100 P R 1908⁵ one of the questions that arose for decision was whether upon the assumption that the tenancy of the three mortgagees was joint, the constructive possession of Khan Singh over the whole land could be said to amount to "occupation" of the land actually occupied by Kishen Singh within the meaning of S. 59 and the learned Judges remarked :

We have grave doubts upon this point and as at present advised we are inclined to hold that the word "occupied" means actually occupied and that it does not include an occupation which is merely such by implication of law.

No doubt no definite opinion was given upon that question as the case was decided on a different point but the interpretation of the word "occupied" was given after consideration and not in an off-hand manner. In A I R 1933 Lah 1010,⁶ Dalip Singh J. observed in connexion with a case under the Provincial Insolvency Act where also the word "occupied" has been used that "that word seems to be a physical fact." In 65 P R 1909⁷ Johnstone J. remarked that :

In the expression "belonging to and occupied by agriculturist" the words "belonging to" are not synonymous with "occupied by" and that the term "occupied by" means "lived in by" or "used for agricultural purposes by".

We have already explained above that occupation in some cases may not necessarily mean physical contact and it may include constructive possession in the technical sense of the term, but as we are not prepared to hold that the mere mention of the name of a co-owner in the column of owners in relation to land which is in the cultivating possession of somebody else who does not hold the land under the co-owners denotes occupation of such co-owner, we accept this appeal, set aside the order of the learned Judge of this Court and decree the plaintiff's suit. As the question was not free from difficulty we order that the parties will bear their own costs throughout.

D.S./R.K.

Appeal accepted.

5. Khan Singh v. Hardit Singh, (1908) 100 P R 1908=46 P W R 1907.

6. Rahiman v. Nagar Mal, (1933) 20 A I R Lah 1010=147 I C 640=35 P L R 143.

7. Attar Singh v. Bhagwan Das, (1909) 65 P R 1909=2 I C 983=104 P W R 1909.

A. I. R. 1938 Lahore 437

ADDISON AND DIN MOHAMMAD JJ.

Ishar Das — Plaintiff — Appellant.

v.

*Rallia Ram and another — Defendants
— Respondents.*

First Appeal No. 455 of 1936, Decided on 4th January 1938, from order of Sub-Judge, First Class, Amritsar, D/- 8th December 1936.

Limitation—*R* and other partners obtaining contract from Municipality and depositing with it certain amount by way of security — Suit by *S* against *R* in his individual capacity—Deposit money attached and sold to *B*—Suit by *B* beyond period of limitation for recovery of deposit amount on basis of his purchase of *R*'s rights in it—*B* held stood in *R*'s shoes and could not claim extension of period of limitation merely on basis of order of executing Court which referred him to regular suit if so advised.

Anything done behind the back of a debtor does not tend to extend the period of limitation originally provided for the recovery of a debt under the Limitation Act. [P 439 C 2]

One *R*, along with three other persons obtained a contract from the Municipal Committee and the firm in whose name the contract stood deposited certain sum with the Municipality by way of security. Subsequently one *S* instituted a suit for recovery of some money against *R* in his individual capacity and obtained a decree in execution of which he attached and sold the amount lying in deposit with the Municipality. The amount was purchased by *B*. In the meanwhile the other partners of the firm in whose name the contract had been obtained instituted a suit against the Municipality for recovery of the deposit money and obtained a decree. Throughout the pendency of this suit *B* made no attempt to be brought on record as plaintiff. *B* however instituted a suit for recovery of certain amount against the Municipality on the basis of his purchase of *R*'s rights in the deposit money. The suit was beyond the period of limitation:

Held that *B* could not claim extension of limitation period. Had *R* put forward a claim against the Municipal Committee for recovery of the deposit amount he could sue only within period prescribed for the suit. His rights were in execution of his decree purchased by *B* who as assignee from *R* stood in his shoes and could not by the mere fact of his purchase override the provisions of the Limitation Act. It could not be argued that once attachment of the amount was made, the Limitation Act ceased to operate and that *B*, the auction-purchaser, was at liberty to recover the amount at any time he liked in complete disregard of the provisions of the Limitation Act. Moreover, *B* could not claim fresh period of limitation merely on the basis of an order of the execution Court which referred him to a regular suit if so advised. [P 439 C 2]

Held further that there was other defect in *B*'s suit. The very sale relied upon by *B* was illegal inasmuch as it obviously disregarded the clear provisions of law as laid down in O. 21, R. 49, Civil P. C. [P 439 C 2]

J. G. Sethi—*for Appellant.*

Dev Raj Sawhney and Behari Lal—
for Respondents.

Din Mohammad J.—The suit out of which this appeal has arisen was instituted in the following circumstances: One Rallia Ram along with three other persons, who are not on the record, obtained a contract from the Municipal Committee, Amritsar, and the firm in whose name the contract stood deposited Rs. 2000 by way of security in the first instance and in the course of the execution of the work Rs. 8000 were further deducted from the amounts due to the contractors on that account. Subsequently, one Salig Ram instituted a suit for recovery of some money against Rallia Ram in his individual capacity and obtained a decree against him. In execution of that decree, he made an application for attachment and sale of the amount lying in deposit with the Municipal Committee, Amritsar. That amount was sold in favour of Billa Mal, father of Ishar Das, on 18th July 1931. In the meantime, on 22nd June 1931, the four partners of the firm in whose name the contract had been obtained instituted a suit against the Municipal Committee, Amritsar, for recovery of a certain amount, including Rupees 10,000 mentioned above.

On 16th December 1933, the suit was partially decreed and on 22nd January 1936, the decree made by the trial Court was upheld by this Court with certain modifications. It may be mentioned here that throughout the pendency of the suit or the appeal, the plaintiff or his predecessor-in-interest never made an attempt to be brought on the record as a plaintiff in the case. He however instituted the present suit for recovery of Rs. 7343.12.0 against the Municipal Committee, Amritsar, on the basis of the alleged purchase of Rallia Ram's rights in Rs. 10,000 lying in deposit with the said Committee. Rallia Ram too was impleaded as a defendant in the case, but it was expressly stated in the plaint that the plaintiff prayed for a decree against the Municipal Committee alone and the plaintiff further amplified this statement before the framing of the issues that Rallia Ram was a pro forma defendant only and that no relief was being claimed against him. Both Rallia Ram and the Municipal Committee resisted the suit on various grounds and on the pleadings of the parties the following issues were framed :

(1) Whether Sain Das, Prem Das and Sundar Das are necessary parties in the suit? (2) Whether the suit is within limitation? (3) Whether the amount in suit has since been forfeited and what is its effect? (4) Whether plaintiff purchased this amount in the auction proceedings in the decree in favour of Salig Ram against Rallia Ram? (5) What is the share of Rallia Ram in the amount of Rs. 10,000? (6) Relief.

The Subordinate Judge came to the conclusion that the three persons mentioned in Issue 1 were necessary parties to the suit and inasmuch as they had not been joined as defendants in the case, the suit failed on that ground alone. He further held that the suit was barred by limitation. Issue 3 was not pressed before him and hence it was not decided. On Issue 4 the decision went in favour of the plaintiff and Issue 5 was decided against him on the ground that it had not been established that Rallia Ram had any share in the money in suit. On these findings, the Subordinate Judge dismissed the suit, leaving the parties to bear their own costs on the ground that the plaintiff had failed on a question of law. The plaintiff has appealed.

Counsel for the appellant has mainly stressed the question of limitation before us. He has contended that as stated in the plaint the cause of action arose to the plaintiff on 1st June 1933, when he was directed by the executing Court to institute a regular suit if so advised and has referred to 18 Bom 260,¹ 30 Bom 115,² 35 Bom 79³ and 38 Bom 631⁴ in support of his contention. These authorities however are not in point. They deal with a different matter and proceed on facts which are apparently distinguishable from the facts of the present case. In 18 Bom 260,¹ the plaintiff obtained a decree against one Ishvar and in execution attached the property in dispute. The defendants intervened and obtained an order for the removal of the attachment on 11th August 1888. On 13th August 1889, the plaintiff instituted a suit for a declaration that the property belonged to the judgment-debtor and as such was liable to attachment and sale. The defendants pleaded that they had been in possession of the property for more than

1. Hari Shankar v. Naran Karsan, (1894) 18 Bom 260.

2. Krishnaji v. Kashibai, (1906) 30 Bom 115=7 Bom L R 667.

3. Vasudeo v. Eknath, (1911) 35 Bom 79=8 I C 639=12 Bom L R 956.

4. Tayabali Ghulam Husein v. Atmaram Sakharam, (1914) 1 A I R Bom 299=25 I C 375=38 Bom 631=16 Bom L R 520.

12 years prior to the institution of the suit and that the suit was therefore barred. The learned Judges who heard the appeal held that it was a suit to set aside the order of 11th August 1888, and should be determined by ascertaining the rights of the parties at the date of that order. As the defendants had not at that date acquired a title to the property by adverse possession for 12 years, the plaintiff was entitled to a decree. In 30 Bom 115,² the defendant's husband Vishnu sold certain land to Vithal on 1st June 1889, and passed to him a rent-note the period of which expired on 20th March 1890.

Subsequent to the expiry of the period, Vishnu, and after his death his widow, the defendant, continued in possession. Afterwards the plaintiffs to whom the land had been sold, having obtained a decree for possession against the sons of Vithal, Vithal's widow Kashibai, caused obstruction to delivery of possession in execution of the decree. The plaintiffs thereupon on 22nd January 1902, applied for the removal of the obstruction and the Court, on 26th July 1902 ordered that their application be registered as a suit between the decree-holders as plaintiffs and the claimant as defendant. It was held that the claimant was not entitled as against the decree-holders to count the time up to 26th July 1902 when the application was numbered as a suit, as the period of his adverse possession. The 12 years of adverse possession expired in March 1902, and prior to that the proceedings had been taken. In 35 Bom 79,³ it was held that the suit having been brought by the plaintiff under S. 283, Civil P. C. of 1882 (O. 21, R. 63, Civil P. C. of 1908) to establish his right to attach and sell the property in dispute as that of his judgment-debtors R and D in execution of his money decree, all that he had to prove was that on the date of attachment the judgment-debtors had a subsisting right to the property; and that the suit must therefore be tried as if it were a suit for possession by the judgment-debtors. In 38 Bom 631,⁴ it was held that it was not open to the garnishee to plead a defence which had already, in an execution enquiry, been unsuccessful, except in a suit instituted within one year from the date of the adverse order, that the property attached could be regarded as property in the possession of the garnishee in trust for the judgment-debtor, and therefore could be

attached. It may be remarked that in the present case the Municipal Committee Amritsar had not been unsuccessful in its objections.

We cannot persuade ourselves to believe that anything done behind the back of a debtor tends to extend the period of limitation originally provided for the recovery of a debt under the Limitation Act. Had Rallia Ram put forward a claim against the Municipal Committee for recovery of the amount lying in deposit with it, he could sue only within the period prescribed for the suit under the Limitation Act. His rights were in the execution of a decree purchased by the plaintiff. The plaintiff as an assignee from Rallia Ram stood in his shoes and could not by the mere fact of his purchase override the provisions of the Limitation Act. We are not at all impressed by the argument advanced on behalf of the appellant that once an attachment of debt is made, the Limitation Act ceases to operate and that an auction-purchaser is at liberty to recover the amount at any time that he likes in complete disregard of the provisions of the Limitation Act. We agree with the Subordinate Judge therefore that the plaintiff's suit was long time barred when it was instituted. At best the cause of action for recovery of the amount in suit accrued to Rallia Ram when the contract was broken, and as counsel for the appellant has not relied on any acknowledgment whatsoever for the extension of the period of limitation and as the plaintiff did not take proper steps open to him under the law to recover the amount, he cannot escape the consequences of his laches and claim a fresh period of limitation merely on the basis of an order which refers him to a regular Court of law if so advised.

In our view, this is not the only defect in the plaintiff's suit. It fails on several other grounds too. For instance, the very sale relied on by the plaintiff was illegal inasmuch as it obviously disregarded the clear provisions of law as laid down in O. 21, R. 49, Civil P. C. The amount in suit was part of a partnership property and consequently it could not be sold in the manner in which it was done. It was incumbent upon the Court to observe the procedure provided for the attachment of such property. Similarly, the plaintiff cannot obtain any relief in the absence of the three persons whom he did not choose to implead even when the defect was pointed

out to him. They are interested in the amount in suit and no action prejudicial to their interest can be taken behind their back. It is also not proved on the record that Rallia Ram has any share in the property in suit. Counsel for the appellant has mainly relied in this connection on a statement made by Rallia Ram on 26th November 1936, but firstly this statement even if admissible, which is doubtful, is insufficient to prove the appellant's contention and secondly it has been contradicted by Rallia Ram himself on this record on several occasions. In his written statement, he pleaded unequivocally that he had no concern with the amount in suit and in his statement in Court on 19th August 1936, he adhered to the averment made in the written statement. On all these grounds, we maintain the order of the Court below and dismiss this appeal with costs.

D.S./R.K.

Appeal dismissed.

A. I. R. 1938 Lahore 440

ADDISON AND DIN MOHAMMAD JJ.

Jassa Ram — Defendant — Appellant.
v.

Puran Bhagat, Plaintiff and others,
Defendants — Respondents.

Second Appeals Nos. 590 and 762 of 1937,
Decided on 10th December 1937, from
decree of Dist. Judge, Rawalpindi, D/- 6th
March 1937.

(a) **Adverse Possession—Plaintiff mentioned only as tenant in previous suit—Property in dispute sold in execution—No assertion of hostile title by plaintiff—Plaintiff's possession held only that of licensee.**

In a suit for adverse possession, there was no evidence that the plaintiff had ever asserted a hostile title, though such occasions arose, e. g. when the plaintiff was mentioned only as a tenant in a suit to which he was a party, and when the property in suit was attached and sold as belonging to a third person :

Held that the suit could not succeed. A belated assertion of title on plaintiff's part would not be sufficient to clothe him with a status higher than that of a licensee : *A I R 1918 Lah 308 and A I R 1924 Pat 341, Disting.* [P 441 C 2]

(b) **Evidence Act (1872), S. 35—Copies of Shajra and Khasra of Municipal Committee are documents under S. 35 and admissible in evidence, though no presumption of correctness attaches to them.**

The copies of Shajra and Khasra of the Municipal Committee are documents falling under S. 35 having been prepared by the employees of the Municipal Committee in the discharge of their official duties and it is well known that under

S. 19, Municipal Act every officer or servant employed by the Committee is deemed to be a public servant within meaning of S. 21, I. P. C. It is true that no presumption of correctness attaches to these documents; but this is a different matter altogether from holding them inadmissible in evidence. [P 441 C 2]

Dev Raj Sawhney and M. C. Mahajan —
for Appellant.

J. G. Sethi and M. L. Sethi —
for Respondents.

Din Mohammad J. — This judgment will dispose of Second Appeals Nos. 590 and 762 of 1937. The facts of the case giving rise to these appeals are as follows: On 14th July 1934, one Amar Singh obtained a decree for Rs. 7800 against the estate of Captain Damodar Singh deceased. On 19th May 1935, the house in dispute was sold in execution of the said decree and was purchased by one Jassa Ram for Rs. 3510. On 30th May 1935, one Puran Bhagat instituted a suit against the decree-holder, Amar Singh, the auction-purchaser Jassa Ram, Mt. Mino, widow of Captain Damodar Singh, and two other persons, who are said to be Sher Singh's reversioners, for a declaration that the house in dispute was in his possession as an owner and was consequently not liable to attachment and sale in execution of the decree of Amar Singh against Damodar Singh's estate. In the plaint, it was alleged that one Sher Singh, who was the father of Gurmukh Singh, the adoptive father of Damodar Singh, had gifted the house to the plaintiff in lieu of medical services rendered to him and that since then the plaintiff had been in possession thereof as an owner.

This suit was resisted by all the defendants concerned who denied the factum of gift and pleaded that the plaintiff was in occupation of the house as a tenant and not as an owner. It was further stated that in a suit instituted by defendants 4 and 5 against Captain Damodar Singh and others, the plaintiff too was impleaded as a defendant in the capacity of a tenant of the house in suit, that at the instance of the then plaintiffs a notice was issued to him requiring him not to pay rent to Captain Damodar Singh, and that as he did not then assert his right of ownership in the house in suit, he was now debarred by his conduct and acquiescence from maintaining the suit. It was next urged that the plaintiff was estopped also on account of the fact that he had not pro-

tested at the time of attachment and sale of the house. On the pleadings of the parties the necessary issues were framed. The Subordinate Judge came to the conclusion that the alleged gift was not proved and that as the plaintiff in spite of his being present at the time of the attachment and sale of the house, had not objected to the attachment of the property and had stood by at the time of sale, he was estopped by his own conduct from instituting this suit. Holding that the possession of the plaintiff was permissive at its inception and that its character had never been altered since, he dismissed the plaintiff's suit.

On appeal, the District Judge agreed with the Subordinate Judge that the alleged gift had not been proved but finding that the possession of the plaintiff had been proved to be for more than 12 years and that there was no evidence to establish that it was permissive at its inception, he allowed the appeal and decreed the plaintiff's suit as laid. Dissatisfied with this decision, the auction-purchaser Jassa Ram has filed Appeal No. 590 of 1937, while Mt. Mino has filed Appeal No. 762 of 1937. Counsel for the appellants contends that the remark made by the District Judge that 'it seems to have been accepted' by both sides before him that the expression "a large number of years" was intended to mean a period longer than the period of 12 years, does not represent the true state of affairs, that his further remark that "practically no evidence is forthcoming" is not warranted by the record, and that his exclusion of khasra and shajra from consideration is illegal. They further urge that the District Judge has failed to take into consideration the effect of the plaintiff's inactivity at the time when he was served with a notice at the instance of defendants 4 and 5, wherein his status was defined to be that of a tenant. On these grounds, they argue that the judgment of the District Judge is vitiated and cannot stand. As against this, counsel for the respondent contends that the plaintiff having been found to be in possession of the house for more than 12 years and that the story of his being a tenant having been rejected by both the Courts, no conclusion could be arrived at, other than that at which the District Judge had arrived.

After hearing counsel on both sides, we have come to the conclusion that these appeals must succeed. There is evidence

on the record that the plaintiff was put into possession of the house in suit by Sher Singh. It is even admitted by the plaintiff himself that he used to attend on Sher Singh as his medical adviser and that the house was given to him by Sher Singh on that account. He based his claim of ownership on an alleged gift from Sher Singh and that gift he has not been able to prove. The house, in these circumstances, would revert to its original owner unless and until the plaintiff succeeds in establishing that he had perfected his title in any other manner permissible by law. The onus of proving the circumstances in which he had acquired a right of ownership in the house would lie very heavily on him. The only question that falls to be judged therefore is whether the plaintiff has succeeded in discharging that burden. There is clear evidence on the record that on two different occasions when this right was denied to him, he kept quiet: first when in the suit instituted by defendants 4 and 5 he did not protest against his being considered a mere tenant, and secondly when the house was actually attached and put to auction as Captain Damodar Singh's property. This would show that on the two occasions mentioned above when he should have asserted a hostile title, if he had any, he did not assert it and there is not an iota of evidence on the record to prove that he had asserted a hostile title at any period prior to the happening of those events. A belated assertion of his title therefore would not be sufficient to clothe him with any status higher than that of a licensee.

The conclusion that the house in suit was not owned by the plaintiff, is strengthened by entries in the copies of shajra and khasra of the Municipal Committee produced by the appellants, which have not been considered by the District Judge on the ground that they were irrelevant. These documents, in our view, fall under S. 35, Evidence Act, having been prepared by the employees of the Municipal Committee in the discharge of their official duties and it is well known that under S. 19, Municipal Act every officer or servant employed by the Committee is deemed to be a public servant within the meaning of S. 21, I. P. C. It is true that no presumption of correctness attaches to these documents; but this is a different matter altogether from holding them inadmissible in evidence. In the latter case

they are excluded from consideration altogether while in the former they can be used as corroborative evidence. The appellants were therefore clearly prejudiced by these documents not having been considered by the District Judge at all. The District Judge has further observed that even if these documents were admissible, the remark of the lower Court based on them that the house in suit was in the possession of a Tarkhan in 1900, in no way excludes the Tarkhan's possession being in the capacity of a tenant of the plaintiff; but this observation of the District Judge is obviously wrong inasmuch as if once those documents are admitted in evidence they do exclude the possibility of the plaintiff being the owner of the house. In the column of owners the names of Chaudhri Gurmukh Singh, son of Chaudhri Sher Singh and of Mt. Narain Devi widow of Chaudhri Sher Singh have been mentioned and not that of the plaintiff.

In support of his contention indicated in the earlier part of his judgment, counsel for the respondent has relied on 46 I C 964¹ and 73 I C 41.² In 46 I C 964,¹ a Division Bench of this Court has held that the criterion of adverse possession is whether a person possesses land claiming it as his own and if he does, he must be held to be in adverse possession. This principle will not, however, help the plaintiff in this case inasmuch as it is not proved that prior to the institution of this suit, he had ever claimed the house in suit as his own. Moreover, in that case the persons claiming adverse possession were not plaintiffs but defendants in the suit and had for a period of more than 12 years been shown as co-owners in the shamilat. This has never been the case here. In 73 I C 41,² a single Judge of the Patna High Court held that when the defendant failed to prove the gift relied on by him, the conclusion to be drawn was not that his possession was permissive but that it was that of a trespasser. This case too is distinguishable as in the first place it is remarked in the judgment that permissive possession was not the case of either party and secondly the person relying on adverse possession was there, too, a defendant in the case and not a plaintiff. No doubt, in the present case, the story put forward by

the appellants that the respondent was paying rent for the occupation of the house has not been believed, but this finding does not exclude the possibility of the plaintiff occupying the house with the permission of the original owners as a friend and not as a tenant, or in other words being a mere licensee. On these grounds we allow the appeals, reverse the judgment of the District Judge and dismiss the plaintiff's suit with costs throughout.

V.B.B./R.K.

Suit dismissed.

A. I. R. 1938 Lahore 442

SKEMP J.

Amar Singh and others — Plaintiffs —
Petitioners.

v.

Secretary of State and others —
Defendants — Respondents.

Civil Revn. Petn. No. 175 of 1937, Decided on 15th July 1937, from order of Senior Sub-Judge, Lyallpur, D/- 9th February 1937.

Revision—No revision lies from interlocutory orders—Powers are limited by S. 224 (2), Government of India Act, 1935.

Section 224 (2), limits the High Court's powers to question judgments of inferior Courts to those given under the ordinary law. Hence High Court cannot entertain a revision from an interlocutory order which is not a decided case. [P 442 C 2]

Bishen Narain for M. L. Puri —
for Petitioner.

Mohammad Monir Asst. Advocate General — *for Secy. of State.*

Wazir Chand Varma for Karm Singh —
for Respondent.

Order.—I must accept a preliminary objection by Mr. Wazir Chand that no revision lies, as the order objected to is interlocutory and there is no decided case. Mr. Bishen Narain relies on Section 107, Government of India Act 5 and 6 Geo. V, Ch. 61 etc., but that is now replaced by the Government of India Act 1935 which came into force on 1st April 1937. S. 224 (2) of the later Act limits the High Courts powers to question judgments of inferior Courts to those given under the ordinary law. I dismiss this petition with costs. The question must be agitated in appeal.

B.D./R.K.

Petition dismissed.

1. Allah Dad v. Fazal Dad, (1918) 5 A I R Lah 303=46 I C 964.

2. Gayani Sahu v. Balchand Sahu, (1924) 11 A I R Pat 341=73 I C 41.

A. I. R. 1938 Lahore 443

BHIDE J.

Gobind — Plaintiff — Appellant.
v.*Narain Singh and others — Defendants*
— Respondents.

Second Appeal No. 1018 of 1937, Decided on 3rd February 1938, from decree of Senior Sub-Judge, Gurdaspur, D/- 19th July 1937.

Res Judicata—Constructive — House sold in execution of decree against certain members of family — Suit by another member challenging sale on ground that house, on partition of joint family, belonged to him — Suit dismissed — Subsequent suit challenging sale on ground that debts in connexion with which decree was obtained were incurred for illegal purpose is barred by res judicata.

Certain house was sold in execution of a decree against certain members of a family. Another member brought a suit challenging the execution sale on the ground that the house could not be sold as it had, on partition of the joint property, fallen to his share. The suit was dismissed. He brought a subsequent suit challenging the same sale on the ground that the debts in connexion with which the decree had been obtained were incurred for illegal purposes and hence the house was not liable to be sold in execution of the decree :

Held that the relief claimed in the subsequent suit ought to have been raised in the previous suit. The subsequent claim could not be considered to be so dissimilar that its union with the claim in the previous suit would have led to confusion. The suit was therefore barred by constructive res judicata : 20 Cal 79 (P C), *Applied* ; 29 All 331 *Disting* ; 11 M I A 50 and 18 W R 163, *Rel. on.*
[P 444 C 1, 2]

C. L. Aggarwal — *for Appellant.*H. R. Mahajan — *for Respondent 5.*

Judgment. — The material facts of the case giving rise to this second appeal were briefly as follows : In execution of a decree against defendants 1 and 2 two houses were attached and sold. The plaintiff, Gobind, who is a son of defendant 1 and brother of defendant 2, thereupon instituted the present suit for a declaration that the debts in connexion with which the decree was obtained had not been incurred for the benefit of the joint family consisting of himself and defendants 1 and 2, that the debts were in fact incurred for illegal and immoral purposes and, therefore the house property in question was not liable to be sold in execution of the decree. A preliminary objection was raised on behalf of the defendants that the suit was barred by the rule of res judicata. This objection was upheld by the Courts below

and the suit was dismissed. The plaintiff has preferred a second appeal. The learned Senior Sub-Judge in dismissing the appeal before him has also held that the plaint disclosed no cause of action inasmuch as there was no allegation in the plaint that the auction-purchasers had any notice that the debts for which the decree was passed had been incurred for immoral or illegal purposes. There was however no issue on this question and I do not think that the judgment of the learned Senior Sub-Judge can be supported on that ground.

The only point which requires decision in the present case, therefore is that of res judicata. It is admitted that the plaintiff had previously brought two suits to challenge the same sale but in those suits he had pleaded that there had been a partition of the joint property of the family and the house property in dispute in the present case had fallen to his share. The first suit was dismissed owing to plaintiff's failure to produce evidence on the date fixed by the Court. The second suit, which was also based on the alleged partition was dismissed on the ground of res judicata. Thereafter the present suit was instituted by the plaintiff basing his claim on the allegations stated above. The learned counsel for the appellant has urged that the principle of res judicata in S. 11, Civil P. C., was not applicable as the plaintiff was suing on a different title, namely as a member of a joint family, while in the previous case he had alleged partition and claimed that the property in dispute had fallen to his share and he was the sole owner thereof. The learned counsel for the respondents on the other hand contended that the plaintiff was bound to put forward the present claim in the previous suit in view of Explan. 4 to S. 11, Civil P. C. The learned counsel for both the parties have cited a number of authorities, but it seems to me that it would be sufficient to refer to the decisions of their Lordships of the Privy Council which have been relied on, namely 29 All 331,¹ 11 M I A 50,² 20 Cal 79³ and 18 W R 163.⁴

1. Deputy Commr. of Kheri v. Khanjan Singh, (1907) 29 All 331=34 I A 72=4 A L J 232=10 O C 117 (P C).

2. Muthu Raghunadha Periya Oodiyat Taver v. Kattama Nachiar, (1866) 11 M I A 50=10 W R 1=2 Suth 212 (P C).

3. Kameswar Pershad v. Raj Kumari Rattan Koer, (1893) 20 Cal 79=19 I A 234=6 Sar 241 (P C).

4. Woomatara Debea v. Kristokaminee Dossee, (1872) 18 W R 163=11 Beng L R 158 (P C).

The first ruling, namely 29 All 331¹ has been relied on by the learned counsel for the appellant. But it appears to be clearly distinguishable as in that case the first suit was for pre-emption while the second suit was based on the right of reversion. The two claims being of different character it was held that the first suit was not a bar to the second. The other three rulings, which were relied on by the learned counsel for the respondents appear to me to support the decision of the Courts below. In 11 M I A 50,² the plaintiff had first of all based his claim on the ground that the property was undivided. He had also relied on a will but this claim was eventually abandoned. The first suit having failed he instituted the second suit on the basis of the will. It was held that the second suit was barred by the rule of res judicata as it was open to the plaintiff to rely on the will in the alternative in the first suit also: see remarks at page 73. In 18 W R 163,⁴ the plaintiff had claimed that she had acquired title to certain land as 'towfeer.' That claim was dismissed and then a second suit was instituted in which he claimed that she was entitled to the same land as "talookdar." The second suit was held to be incompetent on the ground that it was open to the plaintiff to rely upon the second ground in the first suit also. The third ruling, 20 Cal 79,³ also takes the same view. In the course of their judgment, their Lordships made the following remarks with reference to S. 13, Civil P. C. of 1882 which corresponded to S. 11 of the present Code of 1908:

That it (claim) 'might' have been made a ground of attack is clear. That it 'ought' to have been, appears to their Lordships to depend upon the particular facts of each case. Where matters are so dissimilar that their union might lead to confusion, the construction of the word 'ought' would become important; in this case the matters were the same. It was only an alternative way of seeking to impose a liability upon Run Bahadur, and it appears to their Lordships that the matter 'ought' to have been made a ground of attack in the former suit, and therefore that it should be deemed to have been a matter directly and substantially in issue in the former suit and is res judicata.

This principle appears to me to apply to the circumstances of the present case. The plaintiff challenged the sale in execution in both the suits as an infringement of his right of ownership; in the first suit he maintained that he was the sole owner while in the present suit he claims to be a

member of a joint family. According to O. 2, R. 1, Civil P. C. the plaintiff was bound to frame his suit so as to get a final decision on the subject-matter in dispute and prevent further litigation as far as practicable. The present claim cannot in my opinion be considered to be so dissimilar that its union with the claim in the previous suit would have led to confusion. I therefore hold that the decision of the Courts below was correct and dismiss the appeal with costs.

D.S./R.K.

Appeal dismissed.

A. I. R. 1938 Lahore 444

BLACKER J.

Ghulam Mohiyyud-Din — Accused
— Petitioner.

v.

Sardara and others — Respondents.

Criminal Revn. No. 1365 of 1937, Decided on 22nd December 1937, from order of Addl. Sess. Judge, Ferozepore, D/- 13th September 1937.

Criminal P. C. (1898), S. 252 (2)—Magistrate is bound to summon under S. 252 (2) at Government expense such of complainant's witnesses as he considers necessary—Mere fact that same case was investigated by police and no challan was put is no ground for refusing to summon such witnesses.

A Magistrate is bound to summon under S. 252 (2) at the expense of Government such of the complainant's witnesses as he considers necessary. Mere fact that the same case was investigated by the police and no challan was put up by them against the accused is no ground for refusing to summon the witnesses unless the Magistrate considers any of the witness as to be unnecessary. He can refuse to summon the witnesses on the latter ground but not on the former. [P 445 C 1]

Facts. — Ghulam Mohiyyud-Din has put in a ~~complaint~~ against Sardara and others under Ss. 307, 325, 107 and 109 Indian Penal Code. The accused were summoned for an offence under S. 325, Indian Penal Code. The case is pending in the Court of Khan Iftikhar Hussain Khan, Honorary Magistrate Second Class, Jalalabad. The complainant put in an application on 13th August 1937, requesting that his witnesses (who numbered fifteen) should be summoned at Government expense. The Magistrate made an order that the complainant should pay the travelling expenses and the diet money of his witnesses, otherwise proceedings would be taken for a discharge of the accused under S. 253, Criminal Procedure Code.

The Magistrate's order is based on the ground that this very case was investigated by the police and no challan was sent up against the accused.

Grounds. — S. 252 (2), Criminal Procedure Code lays down that the Magistrate has to summon such of the complainant's witnesses to give evidence before himself as he thinks necessary. In the present case, the Magistrate has not said that he considers any of the witnesses to be unnecessary. The case is a cognizable one and according to Para. 1, Ch. 9 (a) of the High Court Rules and Orders (Vol. 3), the Magistrate is authorized to pay the expenses of the witnesses in a case similar to the present one. I therefore recommend to the Honourable Judges of the High Court that they be pleased to order the Magistrate to summon the complainant's witnesses at Government expense. I also recommend that the Magistrate's discretion should not be fettered because one of the witnesses is shown as being resident of Aden. He may be simply ordered to summon such of the witnesses at Government expense as he considers necessary.

Order. — I agree with the learned Additional Sessions Judge and accepting the petition direct the Magistrate to summon under S. 252 (2) of the Criminal Procedure Code, at the expense of Government such of the complainant's witnesses as he considers to be necessary.

R.M./R.K.

Petition accepted.

A. I. R. 1938 Lahore 445

ADDISON AND DIN MOHAMMAD JJ.

*Ghulam Mohammad and others —
Plaintiffs — Appellants.*

v.

*Secretary of State — Defendant —
Respondent.*

Letters Patent Appeal No. 67 of 1937, Decided on 3rd November 1937, from decree of Skemp J., D/- 12th February 1937, reported in *A I R 1937 Lah 410*.

(a) Second Appeal — Question of fact.

Whether a statutory presumption was rebutted by the rest of the evidence or not is a question of fact: *A I R 1930 P C 91, Foll.*

[P 446 C 2;
P 447 C 1]

(b) Custom (Punjab) — Persons described as Jat Dadds in regular settlements — Subsequent entries recording them as Sheikh Dadds for inexplicable reasons — Documentary evidence considered by first Appellate Court — Finding arrived at would be finding of fact which

could not be reversed in second appeal: 39 *P L R 668 = A I R 1937 Lah 410=173 I C 768 Reversed.*

At two Regular Settlements and for many years parties had been described as Jat Dadds. In some unexplained way and at some time not known these entries were changed and they were described as Sheikh Dadds. The effect of the documents was considered by the District Judge, the effect of all the entries in the revenue papers was considered by him and there were still certain other persons left in this village who were described in the revenue papers of 1931-1932 as Jat Dadds. On that evidence the first Appellate Court held and it was competent to hold that it had been established that the persons were Jat Dadds:

Held that this being a finding of fact, it could not be disturbed in second appeal: 39 *P L R 668 = A I R 1937 Lah 410=173 I C 768 Reversed.*
[P 447 C 1]

Khursaid Zaman—for Appellants.

Chaudhri Nazir Hussain, (Asst. Legal Remembrancer — for Respondent.)

Addison J.—Twelve plaintiffs, describing themselves as Dadd Jats, sued the Secretary of State for a declaration that they were Dadd Jats by caste and not Sheikh Dadds. The trial Judge dismissed their suit but the District Judge on appeal decreed it. There was a second appeal to this Court which was heard by a single Judge. He reversed the decision of the District Judge and restored the decision of the trial Court. Against his decision this Letters Patent appeal has been preferred on a certificate granted by the single Judge. It was contended before the single Judge that the matter was concluded by a finding of fact. The Judge admitted that prima facie this was so but in his opinion the District Judge had disregarded certain legal presumptions and for that reason he thought that a second appeal was competent. These wrong presumptions were that the District Judge had treated the earlier and later revenue records as entitled to equal weight while it was also held that the District Judge drew a wrong presumption from the admissions of the plaintiffs in certain deeds.

In the Settlements of 1860 and 1880 the plaintiffs' predecessors-in-interest were described as Jat Dadds. According to the single Judge the revenue records of 1900 and those subsequent thereto all showed the plaintiffs as Sheikh Dadds. This latter assertion is however not correct. There is no copy of the settlement record of 1900 of this village on the record. There are two copies of revenue entries however on the record, namely those of the years 1917 and 1929. These two records do show the

plaintiffs as Sheikh Dadds but this is very different from asserting that they were recorded as Sheikh Dadds in the Regular Settlement of 1900. The plaintiffs produced three Jat witnesses who stated that the plaintiffs were their relatives with whom they inter-married, while the defendant placed on the record 14 documents in which the plaintiffs or their predecessors described themselves as Sheikh Dadds. This along with the settlement and revenue entries is all the material evidence. The District Judge did not regard the evidence of the documents as at all conclusive on the ground that naturally the persons in whose favour the mortgages and sales were made were money-lenders who would insist on the persons with whom they were dealing, describing themselves as anything but members of a statutory agricultural tribe.

The learned single Judge said that that was not a correct way of approaching the matter as those documents proved the admissions of the plaintiffs or their predecessors in interest. He admitted that those admissions were not conclusive but it was in his opinion for the plaintiffs to take away their weight by producing some evidence. He further stated that six of the documents were prior to 1900 when the Punjab Alienation of Land Act was passed and that the remarks of the District Judge could not be correct as regards them. He then went on to say that the District Judge did not consider whether greater weight should be attached to the earlier or the later settlements whereas there was authority that the later settlements should be preferred to the earlier settlements. Reference was also made to Rose's Glossary of Tribes and Castes in the Punjab which gives Dadds as an agricultural clan found in Shahpur whereas this case refers to District Jhelum which, however, is near to the Shahpur District. For these reasons, the learned single Judge accepted the appeal. According to S. 44, Land Revenue Act, 17 of 1887 an entry made in the record of rights in accordance with the law for the time being in force, or in an annual record in accordance with the provisions of this Chapter and the rules thereunder, shall be presumed to be true until the contrary is proved or a new entry is lawfully substituted therefor. It has already been pointed out that it is not known how the plaintiffs were described in the Regular Settlement of 1900 and that only copies of

the revenue records of 1917 and 1929 have been placed on the record. It has not been shown how or why the description of the plaintiffs in the two Regular Settlements of 1860 and 1880 came to be changed from Jat Dadds to Sheikh Dadds. It is thus not established that a new entry has been lawfully substituted for the old entry and it should have been easy to produce the mutations which effected this change while it was also easy to produce a copy of the settlement record of 1900 of this village. But this question scarcely arises as will be seen later.

Further, as regards eight of the documents there can be no question that money lenders would insist that the persons who executed them should describe themselves as not being members of a statutory agricultural tribe as these eight documents are subsequent to 1900. The other six are prior to 1900, it is true, but even then under the Customary law it would have been necessary for the money lenders to prove necessity in case of any dispute with the heirs of the persons who executed the documents, if the persons with whom they were dealing were described as belonging to a caste which was a well-known agricultural tribe. Jats are probably the most numerous tribe in the Punjab and it would be impossible for anyone in their case to say that they did not follow custom; whereas if they were described as Sheikh Dadds it would be easy to put forward this plea and, if they followed Mahomedan law, the question of necessity would not arise. These six documents therefore do not appear to us to have that value which the single Judge placed upon them.

The District Judge thus considered the oral evidence; he considered the entries in the revenue records of 1917 and 1929; he considered the fact that in the 1860 and 1880 Settlements they were shown as Jat Dadds; he considered the effect of the documents put in and he then came to the conclusion that it had been established that the plaintiffs were Jat Dadds. This is a finding of fact and in our opinion he was competent to come to this finding, which could not be disturbed in second appeal. In 11 Lah 199¹ at p. 208 their Lordships of the Privy Council said that the question whether a statutory presumption was rebutted by the rest of the evi-

1. *Wali Muhammad v. Mohammad Bakhsh*, (1980) 17 A I R P C 91=122 I C 316=57 I A 86=11 Lah 199 (P C).

dence was a question of fact. There is also another decision of theirs on a similar matter, namely 57 Mad 652.² Their Lordships further went on to say that the Appellate Court held that many of the entries, notwithstanding the presumption under S. 44, were incorrect. The entries relied on by the appellants were not the foundation of their title but were mere items of evidence adduced by them to prove the sale. The only question as regards the entries was their evidentiary value on the fact in issue.

These remarks apply with equal force in this case. At two Regular Settlements and for many years the plaintiffs had been described as Jat Dadds. In some unexplained way and at some time not known these entries were changed and they were described as Sheikh Dadds. The effect of the documents was considered by the District Judge, the effect of all the entries in the revenue papers was considered by him and he further noted that there were still certain other persons left in this village who were described in the revenue papers of 1931-32 as Jat Dadds. On that evidence he held, and he was competent to hold, that it had been established that the plaintiffs were Jat Dadds. This being a finding of fact, it could not be disturbed on second appeal. We accept the appeal, set aside the decision of the single Judge and decree the plaintiffs' claim with costs throughout.

B.D./R.K.

Appeal allowed.

2. Secy. of State v. Rameswaram Devasthanam, (1934) 21 A I R P O 112=148 I C 778=61 I A 163=57 Mad 652 (P C).

A. I. R. 1938 Lahore 447

TEK CHAND J.

Notan Das — Decree-holder —
Petitioner.

v.

Karam Hussain Shah —
Judgment-debtor — Respondent.

Civil Revn. Petn. No. 416 of 1937, Decided on 27th October 1937, from order of Dist. Judge, Dera Ghazi Khan, D/- 10th February 1937.

(a) Custom (Punjab) — Succession — Sayeds of Dera Ghazi Khan District follow Mahomedan law.

In the Customary law of the Dera Ghazi Khan District, Sayeds are described as following Mahomedan law in matters of succession. [P 447 C 2]

(b) *Riwaj-i-am* — Entries in, are presumed to be correct.

The entries in the *riwaj-i-am* are to be presumed to be correct, and the onus lies heavily on the party who wishes to prove the contrary.

[P 447 C 2]

(c) Custom—Proof—Few instances of recent times are not sufficient.

A custom can be established only by proof of 'ancient' instances and a few instances of recent times are not sufficient: A I R 1937 Lah 451 (FB), Foll.

[P 448 C 1]

J. L. Kapur — *for Petitioner.*

Arjan Dev Bagai — *for Respondent.*

Order.—The petitioner obtained a money decree against one Jiwan Shah, a Sayed of Dera Ghazi Khan district. After Jiwan Shah's death, his son Karam Hussain Shah was brought on the record and the land in dispute was attached as the property of Jiwan Shah deceased. Karam Hussain Shah objected that the land was ancestral and that as the family was governed by custom, the land was not liable to attachment in execution of a money decree against his father. The decree-holder replied that the judgment-debtors being Sayeds were governed by Mahomedan law and not by custom. During the pendency of the proceedings in the executing Court, Act 2 of 1936 was enacted, which lays down that where custom is the rule of decision in regard to succession, ancestral property is exempt from attachment in execution, unless the case is brought within certain specified exceptions mentioned in the section. The crucial point in the case therefore is, whether custom is the rule of decision in regard to succession to immovable property in the tribe or family of the respondent.

In the "Customary Law of the Dera Ghazi Khan District" compiled by Mr. Wilson in the course of the second revised settlement of 1917-1920, in answer to Question 28 at p. 24, Sayeds are described as following Mahomedan law in matters of succession, and at pp. 25-26 three instances of succession in this tribe are given in which Mahomedan law was followed. It is unfortunate that in his judgment the learned District Judge does not refer to this entry at all. It is settled law that entries in the *riwaj-i-am* are to be presumed to be correct and the onus lies heavily on the party who wishes to prove the contrary. It is not clear from the record whether the judgment-debtor had set up a general custom prevailing among Sayeds generally in the Dera Ghazi Khan dis-

strict, or a special custom in his own family only. His counsel has stated before me that the custom relied upon was a special family custom, and he contended that in support of this two recent instances of succession contrary to Mahomedan law have been proved on the record. These instances were considered sufficient by the learned District Judge. Counsel concedes, however, that in view of the recent Full Bench decision of this Court in A I R 1937 Lah 451,¹ these instances cannot be considered to be sufficient. It has been held by the Full Bench that a custom can be established only by proof of "ancient" instances and that a few instances of recent times are not sufficient. Following the Full Bench case, it is not possible to hold on the present record that the rule of succession in this tribe or family is different from that mentioned in the *riwaj-i-am*. As however the Full Bench decision was delivered only recently, and a different view had prevailed before its pronouncement, I do not think it fair to the respondent to decide the case without giving him an opportunity of establishing the alleged custom by proof of "ancient" instances, in accordance with the decision of the Full Bench.

I accordingly accept the petition for revision, set aside the judgments of the Courts below and remand the case to the Court of first instance with the direction that the judgment-debtor-respondent be given an opportunity of producing ancient instances to prove the alleged custom contrary to the entry in the *riwaj-i-am*. The decree-holder will be entitled to give evidence in rebuttal. Costs will abide the event. Both counsel have been directed to cause their clients to appear before the Junior Subordinate Judge, Dera Ghazi Khan on 6th December 1937.

D.S./R.K.

Case remanded.

1. Bahadur v. Mt. Nihal Kaur, (1937) 24 A I R Lah 451=169 I O 909=I L R (1937) Lah 594=39 P L R 349 (F B).

A. I. R. 1938 Lahore 448

BHIDE J.

Thakar Das — Plaintiff — Appellant.
v.

Jai Kishen Das — Defendant —
Respondent.

Second Appeal No. 1570 of 1936, Decided on 12th July 1937, from decree of Addl. Dist. Judge, Lahore, D/- 14th August 1936.

(a) Evidence Act (1872), S. 115—Representation — Acting upon—*B* pleading estoppel by representation against *A* — *A* is not precluded from showing that representation was due to mistake and it cannot operate against him till *B* proves that he acted upon it and changed his position to his prejudice.

Where *B* pleads that *A* made certain representations to him as regards his title to certain property and in a suit by *A* with respect to such property against *B*, *B* pleads that *A* is estopped by his representations and he cannot therefore bring the suit, *A* is not precluded from showing that the representation was due to a mistake and that it cannot operate against him till *B* establishes that he acted upon such representation and changed his position to his prejudice. [P 450 O 1]

(b) Transfer of Property Act (1882), S. 52—Applicability—Suit by *A* to recover lease money of certain property from *B*—*B* pleading that *A* represented to him that *C* owned half share in such property—*B* further pleading payment of half lease money to *C* — Contention by *B* that he having taken mortgage from *C* of his half share on *A*'s representation, *A* was estopped from denying his title as mortgagee—Mortgage taken by *B* from *C*, on repudiation by *A* of *C*'s title and on institution of suit for declaration of his title against *C* as well as *B*—Mortgage held affected by doctrine of *lis pendens*—*A* held not bound by mortgage.

A brought a suit against *B* to recover lease money of certain property. *B* pleaded that *A* had represented to him that *C* had half share in such property and that on such representation he paid half the lease money to *C* and took a mortgage of his half share from *C*. *B* therefore contended that *A* was estopped from denying his title as mortgagee and that he was bound by his mortgage. It was found that *B* took his mortgage from *C* after repudiation by *A* of *C*'s title to the property and after the institution of the suit by *A* against *C* for declaration of his title to the property. To this suit *B* was also made a party:

Held that even though *B* was aware of the fact that the title of his mortgagor *C* was in dispute he took the mortgage from *C*. The mortgage was therefore affected by the doctrine of *lis pendens* and *A* could not be held bound by such mortgage. [P 451 C 1]

(c) Practice—Adjournment—Process fee paid late but summons returned with report that witness could not be found—Witness important one — Refusal to adjourn case for producing such witness is not justified.

Where the Court refused to grant a further adjournment to the defendant to produce a witness on the ground that the process fee for such witness was deposited late but it appeared from the record that the summons to him was returned with the report that he could not be found and when he was undoubtedly an important witness:

Held that the refusal by the Court to grant an adjournment to the defendant to produce the witness under the circumstances was not justified. [P 451 O 1]

J. N. Aggarwal — for Appellant.

M. C. Mahajan and Sant Singh —
for Respondent.

Judgment.—Second Appeals Nos. 1570 and 1602 of 1936 are connected and will be disposed of together. These arise out of a suit for recovery of Rs. 1800/- as rent by one Thakar Das against Jai Kishen Das. It was alleged that the shops were originally leased by Mt. Karam Devi to the defendant at a rent of Rs. 80/- p. m. Mt. Karam Devi died on 15th March 1932 and the plaintiff claimed to be her sole heir. He further alleged that he had given a notice to the defendant on 10th April 1935 to vacate the shops within one month and that as he had not done so he was liable to pay double the rent, as stated in the notice. Allowing for Rupees 1400 received from the defendant the plaintiff claimed the balance of Rs. 1800 due on account of rent for the period from 16th March 1932 to 16th June 1935. The defendant raised a number of pleas which will appear from the following issues which were framed in the case:

* 1. Is the suit of the plaintiff not maintainable without a succession certificate? O. P. on defendant. 2. Were any rent deeds executed after the death of Karam Devi in favour of plaintiff's sons and Tara Chand and, if so, how does that affect plaintiff's rights? O. P. on defendant. 3. Is the plaintiff entitled to claim double rent on the strength of notices D-1 and D-2 and if not, at what rate is he entitled? O. P. on plaintiff. 4. Can the defendant challenge plaintiff's right to sue notwithstanding the fact that he paid rent to him? O. P. on defendant. 5. Is plaintiff an heir of Karam Devi and can that plea be taken up in view of the conduct of the defendant? O. P. on parties. 6. Whether plaintiff ever gave up the rights that accrued to him, if any, under notices D-1 and D-2? O. P. on defendant. 7. What is the effect of the former litigation by Tara Chand on this suit? O. P. on plaintiff. 8. Relief?

The trial Court found all the issues against the defendant and decreed the suit. On appeal by the defendant only three points were raised before the learned Additional District Judge, viz. (1) that the learned Judge of the trial Court had erred in not giving sufficient opportunity to the defendant to produce his witnesses; (2) that plaintiff was not the heir of Mt. Karam Devi, and (3) that certain leases in favour of Tara Chand and the sons of the plaintiff were executed on the representation of the plaintiff and the plaintiff being bound by the representation was not entitled to claim the rent sued for.

On the first point the learned Additional District Judge held that the trial Court was justified, in the exercise of its discretion, in refusing to grant an adjournment to the defendant as he had not paid the

process fee in time and had not appeared on the date which was fixed for scrutiny of service. On the second point he held that the plaintiff was the sole heir of Mt. Karam Devi according to law. On the third point he found that certain leases had been executed in favour of the plaintiff's sons and Tara Chand, his nephew, by various tenants including the present defendant with the consent of the plaintiff and he was therefore estopped from claiming more than one half of the rent of the shops; for according to these leases the plaintiff (or his sons?), had only one half share in the shops. He further found that the alleged notice in which the plaintiff had intimated that he would charge double the rent if the shops were not vacated within the period of one month had been cancelled as alleged by the defendant and the plaintiff was therefore not entitled to claim double the rent for any contumacious holding. According to the learned Additional District Judge, plaintiff was only entitled to Rs. 1440 as half share of the rent for the shops till 15th March 1935. On the latter date, a compromise was effected in a suit instituted by Tara Chand against the present plaintiff Thakar Das by which Thakar Das was acknowledged by Tara Chand as the sole owner of the shops. The learned Judge, was therefore of opinion that the plaintiff was entitled to full rent from the date of the compromise. On this basis, he modified the decree of the trial Court and granted plaintiff a decree for Rs. 280 only. As the defendant had succeeded on the main points he allowed costs to the defendant throughout. From this decision both parties have appealed.

I shall take up the plaintiff's appeal first. This appears to be concluded mostly by findings of fact. The learned counsel for the plaintiff sought to challenge some of the findings of the learned Additional District Judge, viz. (i) that the leases in favour of Tara Chand and plaintiff's own sons had been effected with plaintiff's own consent and were binding on him at least upto the date of the compromise in Tara Chand's suit, and (ii) that the notice dated 10th April 1935, on the basis of which the plaintiff claimed double rent had ceased to have force owing to a subsequent agreement between the parties by which it was cancelled. But these are findings of fact and the learned counsel was unable to point out in respect of these findings any point of law which could be properly raised

in second appeal. The execution of the lease in favour of plaintiff's sons and Tara Chand may have been due to uncertainty as regards the legal position and other circumstances, as deposed to by the defendant's witnesses whose evidence has been accepted by the learned Additional District Judge. As regards the cancellation of the notice dated 10th April 1935, the circumstances are undoubtedly very suspicious. The parties gave conflicting versions. The learned Additional District Judge has, however, accepted the defendant's version and this finding again, being purely one of fact, is final.

The only point of law which the learned counsel for the plaintiff was able to urge was that even if the lease in favour of Tara Chand was executed on the basis of plaintiff's representation as held by the learned Additional District Judge, he was not precluded from showing that the representation was due to a mistake and that it cannot operate as an estoppel, unless and until the defendant was able to establish that he had acted on that representation and his position had been prejudiced. The defendant's position was that he had paid rent to Tara Chand and that he had also accepted a mortgage of Tara Chand's share as a result of plaintiff's representations at the time when the lease in favour of Tara Chand was executed and that the plaintiff was therefore estopped from denying that Tara Chand was entitled to half share in the shops. This point arises in connexion with the defendant's appeal also and it will be convenient to consider it in dealing with that appeal.

Coming now to the defendant's appeal, the main point stressed on his behalf was that the plaintiff had instituted this suit in the capacity of a landlord, on the basis of a lease executed by the defendant in favour of Mt. Karam Devi, of whom plaintiff claimed to be the sole heir but that he had failed to prove that the relationship of landlord and tenant existed between him and the defendant. The finding of the Courts below that plaintiff is the sole heir of Mt. Karam Devi according to Hindu law by which the parties were governed, was not challenged. But it was urged that according to the finding of the learned Additional District Judge plaintiff had himself got leases executed in favour of his sons and of Tara Chand in equal shares after the death of Mt. Karam Devi and as there was no subsequent lease

in his own favour, he had no right to sue as a landlord for recovery of the rent of the shops. It was contended that according to these leases, the plaintiff's sons and not the plaintiff could sue. This contention might have had force, had it not been for the fact, that the defendant himself appears to have recognized the plaintiff as a landlord at least to the extent of half share in the shops and has on his own showing paid rent to him on that basis. It appears from the evidence, that although a lease was executed in favour of the plaintiff's sons and Tara Chand the lease in favour of plaintiff's sons was practically treated as 'benami' and the plaintiff himself was treated as the landlord. The defendant paid rent to the plaintiff and the receipts taken do not show that plaintiff purported to act as an agent of his sons. In view of this fact, there seems to be no force in this contention. It is significant that the point was not even pressed before the learned Additional District Judge.

The next point urged was that defendant had paid rent in good faith to Tara Chand as owner of half of the shops on the basis of the representation made by the plaintiff and he was therefore entitled to claim deduction for it. It was urged that the defendant had not been able to produce Tara Chand as a witness as the learned Judge of the trial Court refused to give him an adjournment for the purpose and that this action of the trial Court was illegal and has prejudiced him. As to this point, it may be noticed that the learned Additional District Judge has only allowed plaintiff half rent for the shops up to 15th March 1935, the date of the compromise in the suit filed by Tara Chand and Thakar Das. Full rent has been allowed to the plaintiff only for the three succeeding months, viz. 16th March 1935 to 16th June 1935. It is not urged that any rent was paid to Tara Chand for this latter period. The only fact which was laid stress on in this connexion was the mortgage executed by Tara Chand in favour of the defendant on 25th February 1934. If this mortgage (with possession) is held to be binding on the plaintiff the plaintiff will of course, not be entitled to any rent for half share of the shops from the date of the mortgage.

As I have noted above, the plaintiff has been held to be the sole heir of Mt. Karam Devi and this finding is not disputed, but

the defendant's contention was that the plaintiff was estopped from denying the defendant's title as a mortgagee as the plaintiff had represented at the time of the execution of the lease in favour of Tara Chand that Tara Chand was owner of half share in the shops and the defendant had acted upon that representation in accepting a mortgage of Tara Chand's share. The learned counsel for the plaintiff however pointed out that this mortgage was effected after the plaintiff had repudiated Tara Chand's title and Tara Chand had sued for a declaration of his own title. The defendant was made a party to this suit and was aware that the title of Tara Chand was in dispute. Yet, he seems to have accepted the mortgage of Tara Chand's share during the pendency of the suit. In the circumstances, the doctrine of *lis pendens* laid down in S. 52, T. P. Act, will, in my opinion, apply and the mortgage cannot be held to be binding on the plaintiff.

On the above finding, the question of payment of rent to Tara Chand is not material as far as the defendant's appeal is concerned but it is material so far as plaintiff's appeal is concerned. As pointed out above in connexion with that appeal, the only point of law which was raised in that appeal was that even if plaintiff be held to be bound by his representation, he cannot be estopped from claiming full rent from the outset unless the defendant could show that he had actually paid rent to Tara Chand for half share in the shop which was believed by him to belong to him. The defendant has not established that he did so. But it was contended on his behalf that he was unable to do so as the trial Court refused to give him opportunity to produce Tara Chand, who was his most important witness in this connexion. The learned Additional District Judge has held that the trial Court was justified in refusing to give an adjournment, as process fee was not deposited in time. But it appears that summonses were in fact returned with the report that Tara Chand could not be found. In the circumstances, the mere fact that process fee was deposited late was hardly sufficient to justify the trial Court's order refusing further adjournment to the defendant for producing Tara Chand. Tara Chand was undoubtedly an important witness and it seems to me that in the interests of justice further opportunity should have been given. I therefore frame

the following additional issue and remit the case to the learned Additional District Judge for a finding thereon: (1) Did the defendant pay any rent to Tara Chand for his share in the shop? If so, how much and for what periods?

The defendant should be given reasonable opportunity to produce Tara Chand and a finding recorded on the basis of the evidence of Tara Chand and the other evidence on the record. Report within two months. Objections shall be filed within ten days thereafter and the case put up for hearing thereafter as early as possible. Parties should appear before the Additional District Judge, Lahore, on 26th July 1937.

A.L./R.K.

Case remanded.

A. I. R. 1938 Lahore 451

BHIDE J.

Firm Abdur Rahim-Mohammad Gulzar
— Decree-holder — Appellant.

v.

Firm Fate Mohammad-Din Mohammad
— Judgment-debtor — Respondent.

Exn. Second Appeal No. 52 of 1937,
Decided on 3rd November 1937, from order
of Dist. Judge, Amritsar, D/- 3rd November
1936.

Execution — Step-in-aid — Application to wrong Court is not step-in-aid.

Application for execution of a decree made to a wrong Court cannot be considered as a step-in-aid of execution. [P 452 C 1, 2]

Ghulam Mohy.ud-Din — *for Appellant.*

Mohammad Munir — *for Respondent.*

Judgment. — This is a second appeal arising out of an application for execution of a decree, dated 14th December 1929, which has been dismissed by the Courts below as time-barred. The decree was obtained from the Court of Lala Parshotam Lal, Subordinate Judge. The first application for execution was made on 6th December 1932. By that time Lala Parshotam Lal had been transferred and the application for execution was presented to the Senior Subordinate Judge who transferred it to the Court of Mr. Sher Nawab Khan, Subordinate Judge. On 8th December 1932, the decree-holder was absent and the application was dismissed in default. The second application was presented on 17th December 1932 to the Court of Mr. Sher Nawab Khan. It was then discovered that the application should have been presented to the Court of Bakhshi Sher

Singh who was the successor of Lala Parshotam Lal. The application is then said to have been returned to the decree-holder for presentation to the proper Court. It was so presented on 20th December 1932. It was again dismissed on 24th April 1933. There were several other applications afterwards which were dismissed for one reason or another. Eventually, the present application was made on 25th March 1936 and it has been dismissed as time-barred on an objection being raised by the judgment-debtor.

The decision of the question of limitation turns mainly on the question whether the first application for execution, dated 6th December 1932, was made to the proper Court. The learned counsel for the appellant contended that the application was made to the proper Court as Lala Parshotam Lal, Subordinate Judge, who passed the decree, had been transferred; but it has been found by the Courts below that Bakhshi Sher Singh was the successor of Lala Parshotam Lal and in the circumstances it seems clear that the application should have been made to Bakhshi Sher Singh according to law. The learned counsel for the appellant then contended that the appellant had at any rate acted in good faith in prosecuting his application in the Court of the Senior Subordinate Judge and he was therefore entitled to deduct the time so spent under S. 14, Lim Act. The Courts below have found that the appellant did not act in 'good faith' in presenting the application to the Senior Subordinate Judge. This is a finding of fact; but even if it were considered to be a mixed question of fact and law, it seems to me that the appellant cannot get any benefit from S. 14 in the circumstances of the case. For his first application was made on 6th December 1932 and it was dismissed in default on 8th December 1932, as stated above. He was therefore entitled only to deduct two days on account of the prosecution of his first application. The second application had however not been made till 17th December 1932. Even making allowance for the two days spent in prosecuting the first application, this second application which was presented on 17th December 1932, i. e. more than three years and two days after the decree was time-barred.

The learned counsel for the appellant contended that the first application should be considered to be a step-in-aid; but it

seems clear that the Court of the Senior Subordinate Judge was not the proper Court for presentation of the application for execution and hence any application to that Court was not a step-in-aid. The appellant could at best claim the benefit of S. 14; but for the reasons stated above it seems to me that that section cannot help him in the circumstances of the case. I therefore uphold the decision of the learned District Judge and dismiss the appeal but in view of all the circumstances leave the parties to bear their costs.

B.D./R.K.

*Appeal dismissed.***A. I. R. 1938 Lahore 452**

BHIDE J.

Zaman Mehdi Khan — Defendant—Appellant.

v.

Hayat Khan, Plaintiff and another, Defendant — Respondents.

First Appeal No. 118 of 1937, Decided on 21st October 1937, from order of Dist. Judge, Gujranwala, D/- 24th February 1937.

Punjab Pre-emption Act (1 of 1913), S. 22 (1), (5)—Security bond becoming void—Fresh bond should be asked for and not cash.

Having exercised the option between cash and security bond by asking for security bond, the Court cannot ask for cash in case the security bond submitted becomes void. Court should ask for another security bond instead. [P 452 C 2]

Jagan Nath Aggarwal — for Appellant.
Shamair Chand — for Respondents.

Judgment.—The plaintiff was ordered to furnish security under S. 22 (1) of the Punjab Pre-emption Act, but the surety withdrew and then he was asked to deposit cash within a certain time. He failed to do so and as a result the suit was dismissed. The learned District Judge has held that the security bond having become void, the Court should have asked for fresh security and not cash under S. 22 (5) (b) of the Act. The learned Judge has accordingly remanded the case with the direction that fresh security be ordered to be furnished. In my opinion the interpretation placed on S. 22 (5) (b) by the learned District Judge is correct. S. 22 (1) was no longer applicable as issues had been framed and the option as regards choice between cash and security had already been exercised. I dismiss the appeal, but in view of all the circumstances leave the parties to bear their costs in this Court.

B.D./R.K.

Appeal dismissed.

A. I. R. 1938 Lahore 453

ADDISON AND ABDUL RASHID JJ.

Mt. Mubarak Jan — Plaintiff —
Appellant.

v.

Mt. Taj Begum and others —
Defendants — Respondents.

First Appeal No. 15 of 1937, Decided on 14th January 1938, from decree of Addl. Sub.Judge, First Class, Lahore, D/- 17th November 1936.

(a) Mussalman Wakf Validating Act (1913), S. 3—Words “which in all other respects is in accordance with provisions of Mussalman law”—Meaning.

The words “which in all other respects is in accordance with the provisions of Mussalman law” do not refer to the law of inheritance but the law of wakfs as governed by Mussalman law.

[P 453 C 2]

(b) Mussalman Wakf Validating Act (1913), S. 3 (a)—Wakf in favour of some members of family or some children or descendants to the exclusion of others is valid.

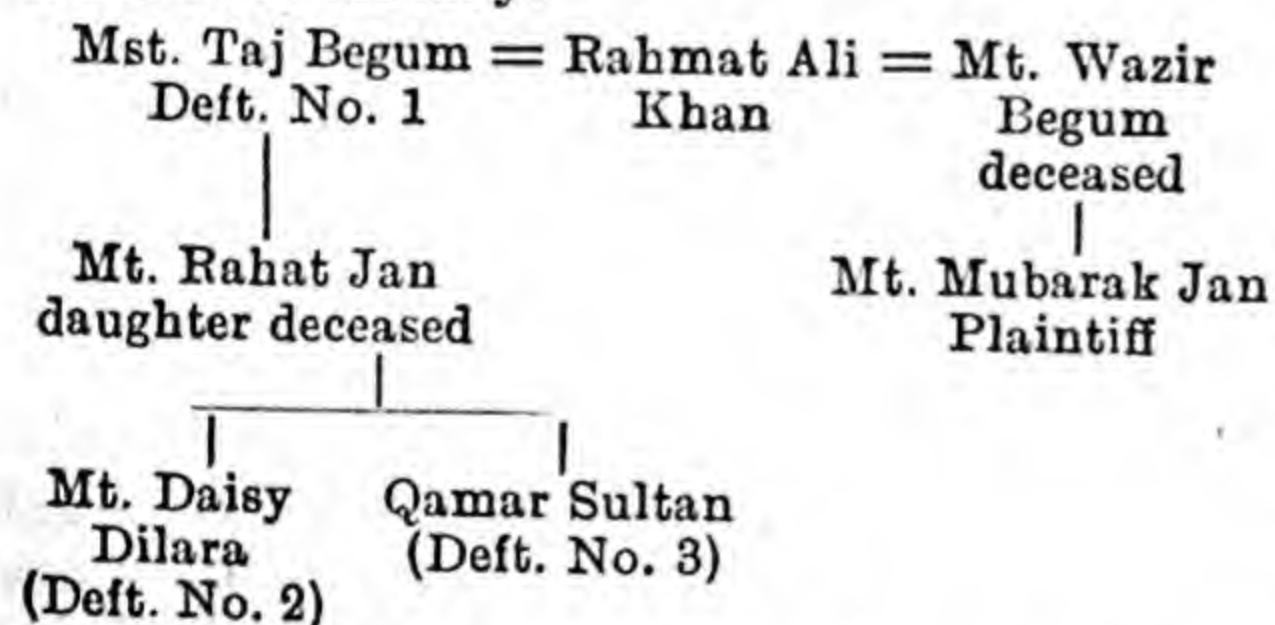
The expression “family, children and descendants” in Cl. (a) of S. 3 do not mean the family or children or descendants as a class but may mean only some persons of a particular class and under the Mahomedan law a valid wakf can be created in favour only of some members of the family or some of the children or descendants, whether males or females, and to the exclusion of others: *A I R 1930 Sind 318 and A I R 1928 All 516, Rel. on.*

[P 453 C 2]

Vishnu Datta and Mohd. Amin (Sheikh)
— for Appellant.

Malik Mohd. Amin — for Respondents.

Addison J. — The following pedigree table is necessary:



Rahmat Ali Khan executed a wakf-alal-aulad on 29th July 1931 under which he was himself the first beneficiary, then his wife Taj Begum, defendant 1, then his two grandchildren, Daisy Dilara and Qamar Sultan, after which the property was to go to Anjuman Hamayat Islam. Rahmat Ali Khan has since died. Mubarak Jan, his second daughter, has challenged the wakf and has claimed that she is entitled as heir to seven-eighths of the house. The suit has been dismissed and she has appealed. The

short point in the appeal is whether the wakf is valid. It was contended that as it was against the Mahomedan law of inheritance and the principal heir had been excluded it was illegal according to Mahomedan law. The section relied upon is S. 3, Mussalman Wakf Validating Act (6 of 1913), which runs as follows:

It shall be lawful for any person professing the Mussalman faith to create a wakf which in all other respects is in accordance with the provisions of Mussalman law, for the following among other purposes: (a) for the maintenance and support wholly or partially of his family, children or descendants; and (b) where the person creating a wakf is a Hanafi Mussalman, also for his own maintenance and support during his lifetime or for the payment of his debts out of the rents and profits of the property dedicated:

Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognized by the Mussalman law as a religious, pious or charitable purpose of a permanent character.

It is clear however, that the words, ‘which in all other respects is in accordance with the provisions of Mussalman law’ do not refer to the law of inheritance but the law of wakfs as governed by Mussalman law. Further, sub-cl. (a) allows a wakf for the maintenance and support wholly or partially of his family, children or descendants, and it has been held by a Division Bench of the Sind Judicial Commissioners Court in 125 I C 33¹ that the expression ‘family children and descendants’ in Cl. (a), S. 3, Mussalman Wakf Validating Act, do not mean the family or children or descendants as a class but may mean only some persons of a particular class and that under the Mahomedan law a valid wakf can be created in favour only of some members of the family or some of the children or descendants, whether males or females, and to the exclusion of others. This authority is on all fours with the present case while it may further be pointed out that in a Division Bench case, *A I R 1928 All 516*,² two widows received most inadequate benefits while both daughters were entirely neglected except that one daughter was to receive for her life, after her mother’s death, the scanty allowance payable to her mother in the first instance. That therefore is another instance of exclusion of some of the descendants. There is no question that the

1. *Abdul Nabi Karimdino v. Muzharali Nur Mahomed*, (1930) 17 A I R Sind 318=125 I C 33=25 S L R 39.

2. *Mt. Musharraf Begam v. Mt. Sikandru Jahan Begam*, (1928) 15 A I R All 516=111 I C 583=51 All 40=26 A L J 1180.

wakf is valid: in fact in the present case it goes completely to the Anjuman Hamayat Islam after the death of the two grandchildren. There is no force in this appeal which we dismiss but we make no order as to costs here. The appeal has been preferred in forma pauperis and accordingly the plaintiff is hereby ordered to pay the court-fees, which would have been paid by her if she had not been permitted to sue as a pauper. A copy of the decree should be forwarded to the Collector. Apparently the trial Judge did not make a similar order in the suit but Government under O. 33, R. 12, Civil P. C., can apply to the Court at any time to have the order made.

D.S./R.K.

Appeal dismissed.

A. I. R. 1938 Lahore 454

TEK CHAND OFFG. C. J.

H. G. Lush — Defendant — Petitioner.

v.

Lala Ram Chand Manchanda —

Plaintiff — Respondent.

Civil Revn. Petn. No. 701 of 1936, Decided on 15th July 1937, from decree of Judge, Small Cause Court, Lahore, D/- 27th July 1936.

Landlord and Tenant—Suit for rent—Person taking on lease certain premises so long as he would remain in town—Lessee leaving premises without sufficient reason before expiry of term — Landlord protesting to such vacating and entering into possession — Suit for rent for unexpired portion of lease held was maintainable.

A person contracted to take certain premises on lease for a period of three years and subsequently extended it to a period during which he would remain in the town. After remaining in possession of the premises for a long period he left the premises without any sufficient reason before the expiry of the term in spite of the warning given by the landlord that he would be liable for rent so long as he would remain in the town. The landlord thereupon took possession of the premises and brought a suit for recovery of rent for a part of the unexpired period of lease:

Held that a suit for rent could lie for the unexpired period of lease: (1876) 2 Q B D 575, *Rel. on*; 137 P R 1906, *Disting.* [P 455 C 2]

Ishwar Das — for Petitioner.

Devi Dyal Kapur — for Respondent.

Order.—The previous history of this case is given in my order of remand, dated 15th April 1936, in Civil Revn. No. 7 of 1936, and it is not necessary to recapitulate it here. Briefly, the facts are that

the plaintiff-respondent is the owner of a house in Lahore. The defendant-petitioner is an employee of the Burma Shell Company and has been posted at Lahore for some years. Early in 1931 the defendant took on lease the plaintiff's house on a rent of Rs. 70 per mensem, plus Rs. 3-8-0 water-rate, which also was payable to the landlord. Originally the tenancy was for a period of three years, commencing from 1st February 1931. The plaintiff alleges that subsequently, at the request of the defendant and by consent of parties, the term of the lease was extended from three years to "so long as the defendant remained in Lahore." The defendant however vacated the house on 15th March 1935, though he then was, and still is, posted at Lahore. He had paid to the plaintiff rent up to 15th March, and that for the later half of March has been realized from him under a decree passed by the Small Cause Court. In May 1935, the plaintiff brought this suit against the defendant for recovery of rent for April and May 1935, alleging that the defendant had vacated the house on 15th March 1935 without any justification that in accordance with the conditions of the contract between the parties the tenancy was to subsist so long as the defendant remained in Lahore, and that he was liable to pay rent for the period in dispute. The defendant pleaded that the tenancy was for a period of three years only which expired on 1st January 1934. He denied that the term of the lease had been modified as alleged by the plaintiff, and further averred that he had left the house "at the suggestion of the plaintiff himself." Lastly, he urged that the suit for rent was not maintainable as the plaintiff had taken possession of the house as soon as the defendant had vacated it.

The suit was originally dismissed by the Judge, Small Cause Court, on the legal ground that, even if the modification of the original term of the tenancy extending its duration from three years to the period during which "the defendant remained in Lahore" was proved, it was bad for uncertainty. On revision, it was held by this Court that this view of the law was incorrect, and that a tenancy for the period during which the tenant remained in the station where the rented premises are situate was valid. The case was accordingly remanded for re-decision on the merits. The Judge, Small Cause Court, has held it proved that the parties had, by mutual agreement, modified the

conditions of the tenancy so as to extend its duration from a period of three years to "so long as the defendant remained in Lahore." He has also held that the defendant did not vacate the house on 15th March 1935 "at the suggestion," or with the consent, of the plaintiff. He found, on the other hand, that the real facts were that the defendant wanted a reduction in the rent, to which the plaintiff did not agree; and the defendant vacated the house in spite of the warning of the plaintiff that he was liable to pay rent so long as he remained in Lahore. Though the plaintiff took possession of the house as soon as it was vacated by the defendant on 15th March 1935, this did not, in the opinion of the learned Judge, put an end to the tenancy as the plaintiff had never "assented to the surrender of possession by the defendant, which could only be made with the consent of the landlord." He accordingly passed a decree in favour of the plaintiff for Rs. 147, being the rent and water-rate for two months.

The defendant has come in revision and his counsel has challenged the findings of fact of the Court below, that the term of the tenancy had been extended by mutual consent of the parties, and that the defendant did not vacate the house at the suggestion, or with the consent, of the landlord. After hearing counsel I see no force in either of these contentions. The findings of the Court below are supported by oral and documentary evidence on the record and on this evidence no other conclusion can possibly be drawn. In the lower Court it was argued that there was a surrender of the tenancy when the defendant vacated the house and the plaintiff took possession of it. This contention was overruled by the learned Judge on the ground that surrender must be with the consent of the landlord or it might be by operation of law. In this case no consent was proved, and it is quite clear from the correspondence that the plaintiff was all along protesting against the vacation of the house by the defendant and was holding him responsible for payment of the rent. Before me, the learned counsel for the petitioner specifically stated that he was not agitating this point again. He admitted that if it were found that as a matter of fact the term of the tenancy had been extended "for the period during which the defendant remained in Lahore," it could not be said to have been determined on the

day the defendant vacated the house and the plaintiff took possession of it.

He argued however that on this finding the suit for rent did not lie, the only remedy open to the plaintiff being to sue for damages under S. 73, Contract Act. In support of this contention he referred to Woodfall's Law of Landlord and Tenant, p. 117, where it is stated, that there are two remedies available for breach of a contract of lease, either of which, but not both, may generally be adopted by the intended landlord or by the intended tenant, as the case may be, viz. (1) an action to recover damages for breach and (2) an action to compel specific performance of the contract. The learned counsel also referred to 137 P R 1906¹ in which the same proposition was laid down. This ruling however and the quotation from Woodfall are not applicable to the facts of the present case. In the ruling cited, the defendant, having agreed to take certain premises on lease, had not entered into possession at all. In the present case, as already stated, he had been in actual possession for a long time, but had vacated without any sufficient reason, before the expiry of the term. The rule laid down in Woodfall also applies to "intended landlord" or "intended tenant". Moreover, in those cases also, one of the alternative remedies available is stated to be a suit for specific performance of the contract.

No authority has been cited in support of the proposition, that in circumstances like those of the present case, a suit for rent does not lie. On the other hand in (1876) 2 Q B D 575,² the facts of which are very similar to those of the present case, a decree for recovery of rent for the unexpired period of the lease was passed. After giving the case careful consideration, I am of opinion that the decision of the lower Court is correct. The petition for revision fails and is dismissed. Having regard to all the circumstances however I leave the parties to bear their own costs throughout.

K.B./R.K.

Revision dismissed.

1. Lachmi Narain v. Vernon, (1906) 137 P R 1906=1 P W R 1907=5 P L R 1907.
2. Oastler v. Henderson, (1876) 2 Q B D 575=46 L J Q B 607=37 L T 22.

A. I. R. 1938 Lahore 456

JAI LAL J.

Telu — Judgment-debtor — Appellant.
v.*Raja Ram and others — Decree-holders — Respondents.*

Exn. Second Appeal No. 1097 of 1937, Decided on 10th January 1938, from order of Dist. Judge, Ambala, D/- 17th April 1937.

(a) Civil P. C. (1908), Ss. 2 (2), 144—Order on appeal setting aside sale of judgment-debtor's property is decree — S. 144 covers such order.

An order passed on appeal setting aside the sale of a judgment-debtor's property is a decree and S. 144 is wide enough to cover such order.

[P 456 C 2]

(b) Limitation Act (1908), Arts. 181, 182—Art. 181 applies to application for restitution under S. 144, Civil P. C. and not Art. 182.

Article 181 applies to an application for restitution under S. 144, Civil P. C. An application under S. 144 is not an application for execution and Art. 182 does not apply to such an application: *A I R 1931 Lah 504*; *A I R 1926 Lah 685*; *A I R 1924 Lah 166*; *A I R 1918 Lah 378* and *A I R 1934 All 626, Foll.*; *A I R 1934 Pat 246 (F B)*, *Not foll.* [P 456 C 2; P 457 C 1]

Prakash Chandra Jain — *for Appellant.*

Asa Ram Aggarwal — *for Respondents.*

Judgment.—This second appeal is by Telu, son of Mula, deceased judgment-debtor. In execution of a money decree against Mula, his proprietary land and his mortgagee rights in some other land were attached and sold to the decree-holders. On an appeal by the judgment-debtor Mula, to this Court the sale of the mortgagee rights to the decree-holders in full satisfaction of the decree was confirmed but the sale of the proprietary land was set aside on 21st December 1932. It appears that possession of both the mortgagee rights and proprietary rights had been given to the decree-holders, the purchasers of those rights. Mula having died an application was made by his son Telu on 19th May 1933 for possession of the land in which proprietary rights had been sold to the decree-holders but the sale had been set aside by this Court. This application however was dismissed in default. The application out of which these proceedings have arisen was then made by Telu on 14th January 1936. This application is also for possession of the proprietary land. It purports on the face of it to be made under S. 144, Civil P. C.

Two questions arise on this appeal: whether the application should be under

S. 144 or whether it is under S. 151, Civil P. C.; and secondly, which Article of the Limitation Act is applicable: whether Article 181, which provides a period of three years from the date of the order which entitled Telu to an order for restitution, or whether Art. 182, which applies to applications for execution, in which case the application of 19th May 1933 is claimed to be a step-in-aid of execution and therefore the application of 14th January 1936 is claimed to be within time.

Section 144 provides for restitution in cases where a decree is varied or reversed. The question is whether an order passed on appeal setting aside the sale of judgment-debtor's property is a decree. In my opinion it is. S. 144 is wide enough to cover such an order. The learned counsel for the appellants in fact did not seriously urge this point. This result follows from the definition of the decree in the Civil Procedure Code.

The next question is of the applicability of Art. 181 or Art. 182, Lim. Act. On that point the authorities of this Court are clear. It was held in *67 P R 1918*¹ that Art. 181 applied to an application for restitution under S. 144. The distinction between S. 583, Civil P. C. of 1882 and S. 144 of the present Civil P. C. was pointed out and it was held that the change in the phraseology of S. 144 enacted by the present Civil Procedure Code had the result of taking an application under S. 144 out of the purview of an application for execution of a decree. The same view was taken in *A I R 1924 Lah 166*² and *A I R 1926 Lah 685*³ and by a Division Bench of this Court on a Letters Patent appeal from the case in *A I R 1931 Lah 504*.⁴ It is true that there is no detailed discussion of the question in these three judgments but the conclusion of the learned Judges is that Art. 181 applies.

For the appellants reliance is placed on a Full Bench judgment of the Patna High Court, *13 Pat 411*;⁵ but against this as

1. *Ram Singh v. Sham Parshad*, (1918) 5 A I R Lah 378=44 I C 301=67 P R 1918=15 PLR 1918

2. *Chanda Singh v. Bishen Singh*, (1924) 11 A I R Lah 166=76 I C 501.

3. *Gujarmal v. Narain Singh*, (1926) 13 A I R Lah 685=96 I C 804.

4. *Gujarmal v. Narain Singh*, (1931) 18 A I R Lah 504=134 I C 206=32 P L R 395.

5. *Bhaunath Singh v. Kedar Nath*, (1934) 21 A I R Pat 246=148 I C 1180=13 Pat 411=15 P L T 173 (F B).

I have already mentioned there is the view of this Court and also the view of a Full Bench of the Allahabad High Court in A I R 1934 All 626.⁶ The preponderance of opinion in the other High Courts is to the same effect. I consider therefore that Art. 181 applies to an application for restitution under S. 144, Civil P. C. An application under that section is not an application for execution. In the present case there was no order by this Court when it accepted the appeal of the judgment-debtor in 1932 that the property in dispute should be restored to the judgment-debtor. Consequently I dismiss this appeal but under the peculiar circumstances of the case I leave the parties to bear their own costs in this Court.

R.M./R.K.

Appeal dismissed.

6. Parameshwar Singh v. Sitladin Dube, (1934)
21 A I R All 626=150 I C 1096=1934 A L J
503 (F B).

A. I. R. 1938 Lahore 457

BHIDE J.

*Nagina and others — Plaintiffs —
Appellants.*

v.

Mt. Bishni and others — Respondents.

Second Appeal No. 1623 of 1936, Decided on 16th April 1937, from decree of Dist. Judge, Ambala, D/- 2nd June 1936.

Limitation Act (1908), Art. 125 — Art. 125 is not restricted to reversioners — Suit by members of proprietary body of village to declare alienation by widow void is governed by Art. 125.

The word 'reversioner' should not be imported into Art. 125. Art. 125 is not restricted to suit by reversioners. A suit by certain members of the proprietary body of the village to declare that an alienation by a widow shall not affect their reversionary rights is governed by Art. 125. [P 457 C 2]

Tek Chand — for Appellants.

Dr. Nand Lal — for Respondents.

Judgment. — This is a second appeal arising out of a suit by certain members of the proprietary body of the village Dhanna in the Ambala district for a declaration that a gift of land made by a widow named Mt. Atri in favour of a minor named Maghi shall not affect their reversionary rights. The trial Court found that the plaintiffs were entitled to succeed to the property according to custom on the death of Mt. Atri, but held the suit to be time-barred under Art. 120, Lim. Act. This decision was confirmed on appeal by the learned District

Judge and the plaintiffs have come up in second appeal.

Two preliminary objections were raised by Dr. Nand Lal for the respondents, viz. that the appeal was not properly instituted as the power of attorney was not thumb-marked by all the appellants and secondly that the appeal was not properly stamped. Neither of them appears to have force. There was apparently doubt as to whether the power of attorney was duly thumb-marked by some of the appellants, but as the appeal could have been filed by any of the appellants in the interests of all, these appellants were eventually made respondents to remove the objection raised by the office. As regards the court-fee, the alienation was by a widow and as the suit was not based on any allegation that the property was ancestral, Art. 22, Court-fees Act (as amended in the Punjab) was not applicable and the court-fee of Rs. 10 was in my opinion sufficient.

On merits, the only question for decision is that of limitation. The learned counsel for appellants has contended that the suit was governed by Art. 125, Lim. Act and not by the residuary Art. 120. The Courts below have held that Art. 125 was inapplicable because the suit was instituted by members of the proprietary body and not by near reversioners. Art. 125, however is not by its wording restricted to suits by reversioners. According to the wording of that Article any suit by a Hindu or a Mahomedan of this type would be governed by it provided the plaintiffs were the persons who if the female who made the alienation died at the date of the institution of the suit, would be entitled to possession of the land in suit. According to the finding of the trial Court, the plaintiffs did fulfil this condition and I see no justification for importing the word reversioner in this Article which does not occur there. I therefore hold that the suit is governed by Art. 125, and would be clearly within time, the period of limitation under this Article being 12 years, if the plaintiffs are the persons entitled to possession on the death of Mt. Atri.

The learned District Judge has not however given any clear finding on the question whether the plaintiffs were the persons entitled to possession of the land, if Mt. Atri had died at the date of the institution of the suit. I accordingly accept the appeal and remand the case to the learned District Judge for determination of

this question and re-decision on merits. Costs to follow final decision.

Parties to appear before the learned District Judge of Ambala on 3rd May 1937.

T.M./D.S.

Case remanded.

A. I. R. 1938 Lahore 458

ADDISON AND DIN MOHAMMAD JJ.

Mohammad Sharif — Appellant.

v.

Mrs. Boughton and another —

Respondents.

Letters Patent Appeals Nos. 151 and 152 of 1937, Decided on 15th February 1938, from order of Bhide J., Lahore, D/- 23rd November 1937.

Punjab Colonization of Government Lands Act (5 of 1912), S. 18—Words used in S. 18 are similar to those used in S. 60, Civil P. C.—Lands though not liable to be attached and sold, receiver can be appointed in fit case to liquidate decree from profits of lands.

The words used in S. 60, Civil P. C. are the same as those used in S. 18 of Punjab Colonization of Government Lands Act. It follows therefore that if a receiver can be appointed under S. 51, Civil P. C. although the property is not liable to attachment or sale by reason of S. 60 of the same Code, similarly a receiver can be appointed in a fit and proper case to liquidate a decree from profits of lands, although the lands or rather the interest in the lands cannot be attached or sold by reason of S. 18, Punjab Colonization of Government Lands Act: *A I R 1937 Lah 433, Foll.; A I R 1925 P C 176 and A I R 1932 Cal 189, Rel. on; A I R 1933 Bom 350, Ref.*

[P 458 C 2]

Inder Dev — *for Appellant.*

Achhru Ram and Khilanda Ram —

for Respondents.

Addison J.—This judgment will dispose of Letters Patent Appeals Nos. 151 and 152 of 1937. One Mohammad Sharif got a decree from the trial Court, which was set aside by this Court on 20th November 1934. The opposite party claimed restitution and Mohammad Sharif successfully resisted this claim up to last year when, on 27th May 1937, a lease of certain land, of which he is an occupancy tenant and to which the provisions of S. 18, Punjab Colonization of Lands Act apply, was auctioned. The highest bidder was Captain Mehr Din, who offered Rs. 7736 for a lease of the land for 30 years; this sum being sufficient to pay off the amount claimed in restitution plus certain taqavi due, owing to the Government. This lease was confirmed by the Court on 18th June 1937. Against that order and the con-

nected order two appeals were instituted in this Court, which were dismissed by Bhide J. on 23rd November 1937. These appeals under the Letters Patent are against the orders passed by him. Under S. 18, Colonization of Government Lands (Punjab) Act 5 of 1912, the land in question cannot be attached or sold in execution of a decree or order of any Court or in any insolvency proceedings. It is on this ground that these appeals were admitted.

We are prepared to concede that a lease cannot be granted without attachment; but it was held by their Lordships of the Privy Council in 47 All 385¹ that a receiver could be appointed to realize the rents and profits and to apply the net balance towards liquidating a decree although the judgment-debtor's interest in the villages was a right to future maintenance within the meaning of S. 60, sub.s. (1) (n), Civil P. C., and therefore could not be attached and sold. The words used in S. 60, Civil P. C. are the same as those used in S. 18, Punjab Act 5 of 1912. It follows therefore that if a receiver can be appointed under S. 51, Civil P. C., although the property is not liable to attachment or sale by reason of S. 60 of the same Code, similarly a receiver can be appointed in a fit and proper case to liquidate a decree, although the lands or rather the interest in the lands cannot be attached or sold by reason of S. 18, Punjab Act 5 of 1912. We have already followed this Privy Council decision in I L R (1937) 18 Lah 486² and our decision was followed by a single Judge of this Court in Civil Exn. Second Appeal No. 127 of 1937.³ This judgment of the single Judge is on all fours with the present case, except that the receiver was only appointed for seven years. The same view was taken of the decision of the Privy Council by a Division Bench of the Calcutta High Court in 59 Cal 205,⁴ although a Division Bench of the Bombay High Court seems to have placed a different construction on their Lordship's decision: *see* 57

1. Rajindra Narain Singh v. Mt. Sundar Bibi, (1915) 12 A I R P C 176=87 I O 295=47 All 385=52 I A 262 (P C).

2. Tika Sant Singh v. Sain Das, (1937) 24 A I R Lah 433=I L R (1937) Lah 486=39 P L R 839.

3. Gopal Das v. Devi Das, *Reported in* (1937) 24 A I R Lah 738=39 P L R 649.

4. Hemendra Nath v. Prokash Chandra, (1932) 19 A I R Cal 189=137 I O 98=59 Cal 205=85 O W N 1066.

Bom 507.⁵ We follow our previous decision and hold that this is a fit and proper case in which a receiver should be appointed to realize the sum of Rs. 7736, from the profits of the land in order to liquidate the decretal amount plus the taqvi charges.

We accordingly accept the appeals to the extent that we make the purchaser of the lease a receiver of the land in suit until the above sum is liquidated. The Collector in granting the original lease made sufficient provision for the maintenance of Muhammad Sharif and we are not called upon therefore to do anything further in that respect. The receiver will have to render accounts to the Court each year on 15th January, commencing with 15th January 1939, showing the profits accruing for the past year. That sum will be deducted each year from the sum of Rs. 7736, and Muhammad Sharif can at any time get the land back from the receiver by paying either to him or preferably directly into Court the sum of Rs. 7736, minus the profits duly accounted for each year. Further, the receiver cannot hold possession for more than 30 years, for which he took the lease, and his possession will then cease whether the annual profits have or have not amounted to the sum which he had paid, namely the sum of Rs. 7736. The appeals are accepted as indicated above. Parties will bear their own costs before us and before the single Judge.

D.S./R.K.

Appeals accepted.

5. Secy. of State v. Bai Some, (1933) 20 A I R - Bom 350=146 I C 340=57 Bom 507=35 Bom L R 615.

A. I. R. 1938 Lahore 459

TEK CHAND J.

Kala Singh and others — Appellants.

v.

Boota Singh — Respondent.

Second Appeal No. 8 of 1937, Decided on 21st April 1937, from order of Dist. Judge, Lyallpur, D/. 2nd January 1937.

(a) Civil P. C. (1908 as amended by S. 35 of Punjab Act, 7 of 1934), S. 60 (1) (c)—Property validly and legally vested in Official Receiver in 1933—Amendment coming into force in 1935 does not divest him of such property—Succession opening out long after vesting of property—Legal representatives can claim no exemption.

The amendment to S. 60 (1) (c), Civil P. C. introduced by S. 35, Punjab Relief of Indebtedness Act, 7 of 1934, which came into force in 1935 does not divest the Official Receiver of property which is validly and legally vested in him in 1933. Nor can the legal representatives of the insolvent claim exemption under S. 60 (1) (c) when succession to them opened out long after the vesting of the property in the Official Receiver : *A I R 1937 Lah 52, Disting.* [P 460 C 1]

(b) Civil P. C. (1908), S. 60 (1) (c)—Applicability of S. 60 (1) (c) before amendment by S. 35, Punjab Relief of Indebtedness Act stated.

Under S. 60, Civil P. C. as it stood before its amendment by S. 35, Punjab Relief of Indebtedness Act, the exemption applied only if the houses were being used for or occupied bona fide for purposes of agriculture at the time of attachment.

[P 460 C 1]

Hazara Singh Uppal — *for Appellants.*

Judgment. — The facts of the case, which has given rise to this second appeal are as follows : In 1932 Buta Singh, respondent, in execution of a money decree obtained by him against Hazara Singh, father of the present appellants, got two houses attached as the property of the judgment-debtor. The appellants objected that the houses belonged to them and not to the judgment-debtor. These objections were dismissed. They then filed a suit for declaration of their title under O. 21, R. 63, Civil P. C., but the suit also failed. In May 1932, the judgment-debtor Hazara Singh applied for insolvency and on 5th October 1933, he was adjudicated insolvent and his property vested in the Official Receiver. This property included the houses in question. The appellants again objected before the Insolvency Court, that the houses belonged to them. After lengthy litigation this claim was disallowed by the District Judge, who held that they belonged to the insolvent. This order was passed on 24th February 1936. About a month later Hazara Singh, insolvent, died. About this time steps were taken to sell the houses, but the appellants, as the sons and legal representatives of the deceased, objected on the ground that the houses could not be sold as they were exempt under S. 60 (1) (c), Civil P. C. as amended by the (Punjab) Act No. 7 of 1934, which had come into force on 8th April 1935. The Insolvency Judge upheld the objection and directed that the houses be released. On appeal by Buta Singh, the learned District Judge has come to a contrary conclusion and has held that the houses vested in the Official Receiver in 1933, that they were not exempt from attachment and sale

under S. 60 (1) (c), Civil P. C. as then in force, and that they could not be released in 1936 after the amendment introduced by Act 7 of 1934.

As already stated, Hazara Singh had been adjudicated insolvent in 1933 when his property vested in the Official Receiver. Hazara Singh lived for 2½ years after the order of adjudication, but he never claimed that the houses were exempt under S. 60 (1) (c), Civil P. C. Nor did he claim that he was an agriculturist and that the houses were "occupied by him." It had been ruled in numerous cases under S. 60, as it stood before the amendment, that the exemption applied only if the houses were being used or occupied bona fide for purposes of agriculture at the time of attachment. The insolvent in his lifetime never claimed that he was an "agriculturist" within the meaning of S. 60 or that at the time of attachment or his insolvency the houses were being "used or occupied for bona fide agricultural purposes". The learned District Judge was therefore right in holding that the houses had vested in the Official Receiver in 1933. It is no doubt true that 18 months later S. 60 was amended so as to enlarge the scope of the exemption. Under the amended law the houses of an agriculturist are exempt if they are not let out on rent or lent to others or left vacant for a period of a year or more. But I fail to see how this amendment which came into force in 1935 could divest the Official Receiver of property which had validly and legally vested in him in 1933. Nor do I see how the appellants, as the legal representatives of the insolvent can claim exemption, when succession to them opened out long after the vesting of the property in the Official Receiver. The learned counsel for the appellants has relied upon A I R 1937 Lah 52,¹ but the facts of that case are clearly distinguishable.

The appeal fails and is dismissed. As the respondent is not present, there will be no order as to costs.

V.B.B./A.L.

Appeal dismissed.

1. *Bishen Chand v. Bakhshish Singh*, A I R 1937 Lah 52=169 I O 656=18 Lah 291=39 P L R 109.

A. I. R. 1938 Lahore 460

TEK CHAND J.

Dasaundha Singh — Appellant.

v.

Malhi Singh and another—Respondents.

Civil Ref. No. 19 of 1937, Decided on 16th November 1937, made by Deputy Commissioner and Collector, Karnal, D/ 24th August 1937.

Stamp Act (1899), S. 2 (17)—To bring instrument within definition of mortgage deed transfer should be effected by instrument in question.

In order to bring an instrument within the definition of mortgage deed it is necessary that the transfer should be effected by the instrument in question. Where an entry is merely a memorandum of payment of certain sum to another on account of the mortgage of certain land and does not purport itself to create the mortgage, the document is not liable to be stamped as a mortgage deed. [P 460 C 2]

Order.—This is a reference under S. 61, Stamp Act, by the Collector, Karnal District, forwarding a declaration by the Senior Subordinate Judge, Karnal, in Civil Appeal No. 25 of 1937, *Dasaundha Singh v. Malhi Singh*, decided on 24th April 1937, that a certain bahi entry (Ex. P.3) produced in that case was a receipt for the payment of Rs. 260 and could be admitted in evidence on payment of a consolidated penalty of Re. 1 as it did not bear a stamp. The Collector has expressed the opinion that the view taken by the Senior Subordinate Judge is wrong and that the document in question is really a mortgage deed, which created a charge for Rs. 260 on immovable property, and therefore it should have been stamped as such and penalty levied accordingly. I have examined the document and am unable to accept the view of the Collector. "Mortgage deed" is defined in S. 2 (17), Stamp Act as including every instrument whereby, for the purpose of securing money advanced, or to be advanced, by way of loan, or an existing or future debt, or the performance of an engagement, one person transfers or creates to, or in favour of another, a right over or in respect of a specified property.

In order to bring an instrument within this definition, it is necessary that the transfer should be effected by the instrument in question. The entry in dispute does not contain any words from which it may be inferred that the mortgage was created by it. It is merely a memorandum of payment of Rs. 260 to Mohli on account of the mortgage of certain land. It does not purport itself to create the mortgage. I hold that the document was not liable to be stamped as a mortgage deed.

D.S./R.K.

Order accordingly.

A. I. R. 1938 Lahore 461**BHIDE J.***Patru Mal — Defendant — Appellant.*
v.*Badri Parshad, Plaintiff and others,*
Defendants — Respondents.

Second Appeals Nos. 1161 and 1162 of 1936, Decided on 29th November 1937, from decree of Addl. Dist. Judge, Hissar, D/. 27th April 1936.

Custom (Punjab)—Applicability—Mahajans of Hissar town, whose main source of livelihood is business and not agriculture are governed by Hindu law and not custom—Fact that Mahajans were consulted at time of preparation of riwaj-i-am will not make Customary law applicable to all Mahajans of Hissar District.

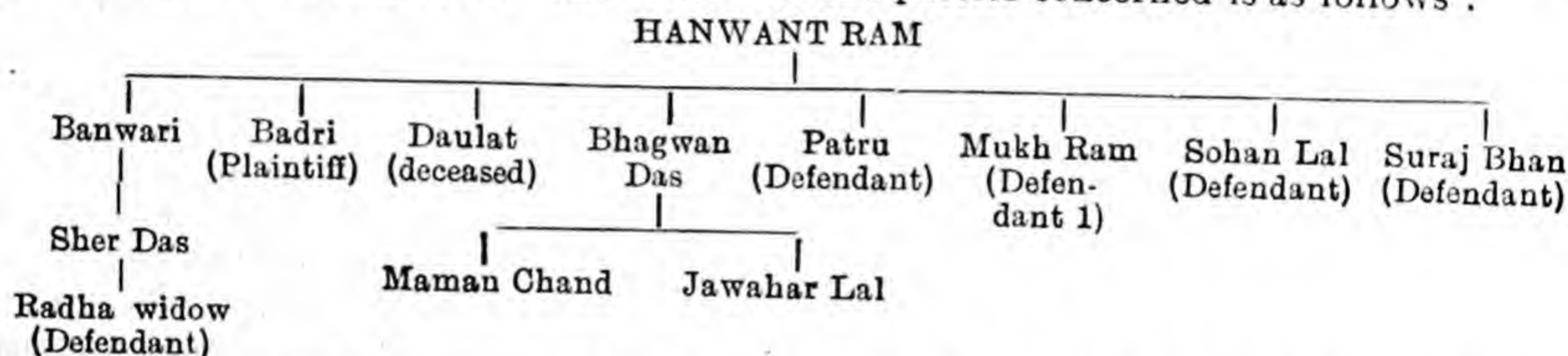
The Customary law of the District is based on enquiries made in rural areas at the time of the

settlement and no representatives from towns are consulted as a rule. The Mahajans of Hissar town, whose main source of livelihood is business and not agriculture, are not governed by the Customary law, but by the Hindu law. And the mere fact that Mahajans were consulted at the time of preparation of riwaj-i-am, would not show that the riwaj-i-am was evidence of customs obtaining amongst all Mahajans of the Hissar District particularly amongst residents of towns :
Case law referred. [P 462 C 2]

J. N. Aggarwal, Qabul Chand and Vishnu Datta for Nawal Kishore — *for Appellant.*

M. C. Mahajan and Yashpal Gandhi — *for Respondents.*

Judgment. — Civil Appeals 1161 and 1162 of 1936 are connected and will be disposed of together. The pedigree-table of the parties concerned is as follows :



Hanwant Ram had two wives. Daulat and Patru Mal were his sons by one of the wives and the remaining sons were by the other wife. On the death of Hanwant Ram, the entire estate consisting of land, houses and other property was partitioned, amongst the sons after a reference to arbitration. Daulat died shortly afterwards and thereafter two suits were instituted, one by Badri Parshad and the other by Patru. Patru claimed that he was the sole heir of Daulat according to Hindu law while Badri Parshad claimed that the parties were governed by custom and according to custom all the brothers of Daulat were entitled to succeed to his property. The main point for decision in both the suits, which were tried together, was whether the parties were governed by Hindu law or by custom. The trial Court held that the parties were governed by Hindu law and decreed Patru's suit and dismissed that of Badri Parshad. On appeal the learned Additional District Judge however came to a contrary conclusion and accepting the appeal of Badri Parshad decreed his suit and dismissed the suit of Patru. From this decision the present appeals have been preferred.

The main point for decision in these appeals is whether the parties are gov-

erned by Hindu law or by custom. The learned counsel for the appellant Patru Mal has contended that the parties being Mahajans and being residents of Hissar town and their main source of livelihood being business and not agriculture, they should be presumed to be governed by Hindu law. As regards the Customary law of the district, he urged that although the preface showed that the Mahajans in the district owned a considerable proportion of the land and were consulted at the time of the preparation of the riwaj-i-am of the District, this fact alone could not be sufficient to show that the riwaj-i-am applied to the parties to the present suit who, as stated above, are residents of a town and are not dependent on agriculture as their main source of livelihood. In support of his contention the learned counsel relied chiefly on 115 P R 1907,¹ 124 P R 1908,² 9 Lah 120³ and A I R 1927 Lah 47.⁴ The learned counsel for the respondents on the

1. Gohra v. Hari Ram (1907) 115 P R 1907.

2. Gamiatulnisa v. Hashmatulnisa, (1908) 124 P R 1908=4 I C 638=3 P L R 1909.

3. Muzaffar Muhammad v. Imam Din, (1927) 14 A I R Lah 642=103 I C 665=9 Lah 120=29 P L R 154.

4. Shiblal v. Hukum Chand, (1927) 14 A I R Lah 47=98 I C 881.

other hand contended that the rulings relied upon by the learned counsel for the appellant could no longer be held to be good law, that according to the decision of their Lordships of the Privy Council in 45 P R 1917,⁵ the *riwaj-i-am* is a strong piece of evidence in support of custom, and that the *riwaj-i-am* should be taken to be applicable to the whole of the District including towns and it was so applied to Peshawar town by their Lordships of the Privy Council in 10 Lah 86.⁶ It was also contended that Mahajans of the District should be looked upon as one community and that the fact that they were consulted at the time of the preparation of the *riwaj-i-am* is sufficient to show that the whole community is governed by custom as recorded in the *riwaj-i-am*. The learned counsel also pointed out that the *riwaj-i-am* was carefully prepared and in the answers to several questions, the custom as stated by Mahajans was specifically referred to.

The oral evidence produced by the parties was not of much value and the decision on the point of custom raised in the present case really turns on the question whether a presumption in favour of custom being applicable to the parties to the present case should be raised on the basis of the *riwaj-i-am* of the District. In his statement of the case Badri Parshad's counsel relied on 'special custom in the family and Mahajan community of Hissar' that all sons inherit equally and full brothers cannot exclude half-brothers. It is not now urged that any family custom is proved and the only question is whether any custom of the 'Mahajan community' of Hissar is proved. It is not clear whether by the word 'Hissar' Hissar town or 'Hissar district' was meant. But the Customary law of the district was not relied on at the outset, nor was any copy of the *riwaj-i-am* produced in evidence. The other party had therefore no opportunity of knowing that Badri Parshad relied on the 'Customary law of Hissar District' which was later relied on only in arguments.

However, even assuming that it was permissible for Badri Parshad to rely upon

the "Customary law of the District" at any stage, it seems to me that it cannot be held to be applicable to residents of towns. The Customary law of the district is based, as is well-known on inquiries made in rural areas at the time of the settlement, and so far as I am aware, no representatives from towns are consulted as a rule. The general instructions for the preparation of the *riwaj-i-am* will be found in paragraph 565 of Douie's Settlement Manual. It will appear therefore that it is the leading men from villages who are usually consulted. The preface to the Customary law of the Hissar district shows that inquiries were made from Mahajans because they owned much land in the tract. The customary rules recorded in the *riwaj-i-am* are of the rural population and as Mahajans are not usually found amongst the land owning rural population to any appreciable extent, the above remark about Mahajans was apparently intended to explain why they were consulted at all. But the fact that Mahajans were consulted, would not in my opinion show that the *riwaj-i-am* was evidence about customs obtaining amongst all the Mahajans of the district particularly amongst residents of towns, when there is no evidence to show that any representatives of Mahajan residents of towns were consulted.

It was urged on behalf of the opposite side that Mahajans of the district should be looked upon as one 'community'. But I think it will be dangerous to generalize custom on any such basis. If such generalization were permissible, it could perhaps be extended to all Mahajans in the Punjab or even in India which would be absurd. It is well known that custom varies with tribe as well as locality, and the safest course is to confine the rule of custom to the persons, whose representatives may be taken to have been consulted. In the present instance, the representatives of Mahajans owning lands and living in villages were presumably consulted. Such persons frequently adopt customs of the agricultural tribes amongst whom they live. But it would not, I think, be justifiable to assume from their answers that Mahajans all over the district are governed by the custom recorded in the *riwaj-i-am*. The parties to this case own some land, but they live in the town of Hissar and their main source of livelihood is admittedly business and not agriculture.

5. *Beg. v. Allah Ditta*, (1916) 3 A I R P O 129 = 88 I C 354 = 44 I A 89 = 45 P R 1917 = 44 Cal 749 (P C).

6. *Mt. Vaishno Ditti v. Mt. Rameshri*, (1928) 15 A I R P C 294 = 113 I C 1 = 55 I A 407 = 10 Lah 86 (P C).

There is a long array of decisions of the Punjab Chief Court and this Court to the effect that there is no presumption in the case of high caste Hindus living in towns that they are governed by custom. In fact, custom has always been proved by the person who relies on it, 45 Cal 450,⁷ and the onus lay on Badri Parshad. His counsel now relies only on the Customary law of the district. For reasons given above the "Customary law of the district" is, in my opinion, not sufficient to raise any presumption that the customs recorded therein apply to the parties to the present suits. The learned counsel for the opposite side relied on 10 Lah 86,⁸ in which the Customary law of the Peshawar district was apparently applied to residents of Peshawar town. But the question whether the Customary law of the district could be properly held to be applicable to residents of towns was apparently neither raised nor considered by their Lordships and hence I do not think the ruling can be taken to be authoritative on that point. In my opinion, it is not proved that the parties to this case are governed by custom. I accordingly accept these appeals, decree the suit of Patru Mal and dismiss that of Badri Parshad. But in view of all the circumstances, I leave the parties to bear their costs throughout.

V.B.B./R.K.

Appeals accepted.

7. Abdul Hussein Khan v. Bibi Sona Dero, (1917)
4 A I R P C 181=43 I C 306=45 I A 10=45
Cal 450=12 S L R 104 (P O).

A. I. R. 1938 Lahore 463

TEK CHAND J.

*Naranjan Singh and another —**Plaintiffs — Appellants.*

v.

*Ghulam Mohammed and another —**Defendants — Respondents.*

Second Appeal No. 1612 of 1937, Decided on 9th February 1938, from preliminary decree of District Judge, Ambala, D/- 6th October 1937.

(a) Mortgage—Consideration—Onus of proof — Execution proved — Acknowledgment of receipt of consideration by mortgagor recited — Purchaser of equity of redemption in auction sale — Onus lies on him to prove want of consideration.

Where a mortgage deed is proved to have been executed and the document contains an acknowledgment of the receipt of the consideration, this is strong prima facie evidence that the considera-

tion has been actually received and is evidence not only against the mortgagors but also against persons claiming under them subsequent to the date of the mortgage. [P 464 C 2 ; P 465 C 1]

In execution of a decree for interest on a mortgage, the equity of redemption was sold. The mortgage deed was proved to have been executed by the mortgagor and contained an acknowledgment of receipt of consideration. Subsequently in the suits on the mortgage, the purchaser denied consideration and contended that the onus of proving the consideration for the mortgage lay on the mortgagee :

Held that the onus lay on the purchaser to prove want of consideration : A I R 1914 All 319 ; A I R 1930 Mad 251 and A I R 1929 Pat 254, Rel. on. [P 464 C 2]

(b) Mortgage — Consideration — Suit for interest on mortgage—Consideration not denied by mortgagor—Purchaser of equity of redemption in execution of decree for interest is estopped from pleading want of consideration for mortgage.

In a suit for recovery of interest due on the mortgage, the mortgagor did not deny the consideration. The suit was decreed against him, and in execution of that decree the equity of redemption was purchased :

Held that as the purchaser had derived title from the mortgagor at a Court sale in execution of a decree for interest due on the mortgage deed it was not open to him to say that this very mortgage deed was without consideration. [P 465 C 1]

Achhru Ram — *for Appellants.*Mohammad Amin — *for Respondents.*

Judgment.—On 10th July 1921 Ghulam Mohammad, defendant 1, mortgaged house No. 2047 to Teja Singh, father of the plaintiffs, for Rs. 99. The mortgage was without possession and the mortgage money carried interest at Rs. two per cent. per mensem. On 26th November 1928, the mortgagor Ghulam Mohammad created an additional mortgage on the same house in favour of the same mortgagee for Rs. 99 carrying interest at Re. 1-2-0 per cent. per month. On the same day, i. e. 26th November 1928, another mortgage deed was executed by Ghulam Mohammad in favour of Teja Singh by which he raised Rs. 99 on the security of house No. 2047 and another house No. 2042: interest on the amount secured on this mortgage was also fixed at Re. 1-2-0 per cent. per month. It was further stipulated that the mortgage money would be paid within six years, but that the mortgagee would be entitled to recover interest every month. On 24th October 1934 the mortgagee brought a suit for recovery of interest due on foot of the mortgage (Ex. P-3) dated 26th November 1928. In this suit Ghulam Mohammad defendant did not plead that the mortgage-

(Ex. P-3) was without consideration and a decree was passed for the sum claimed. The mortgagee decree-holder took out proceedings in execution, and the equity of redemption of both houses Nos. 2047 and 2042 was sold, and was purchased by Ghulam Nabi defendant 2 who is a brother of the mortgagor, Ghulam Mohammad defendant 1.

On 8th March 1937, the plaintiffs (their father Teja Singh, the original mortgagee, having died in the meantime) brought the present suit against Ghulam Mohammad and Ghulam Nabi for recovery of Rs. 600 due on foot of the three mortgages aforesaid (Exs. P-1, P-2 and P-3). In this claim they calculated simple interest at Re. 1 per cent. per month instead of the stipulated rate, in view of the provisions of the Punjab Relief of Indebtedness Act, which had come into force in the meantime. Both the defendants admitted that the mortgage deeds in suit had been executed by defendant 1, but they denied consideration. They also raised certain other pleas, but we are not concerned with them in this appeal. The trial Judge first placed on the defendants the onus of proving that the mortgage deeds in question or any one of them were without consideration, but subsequently, on an application by the defendants, he placed the onus of proving the consideration on the plaintiffs. After examining the evidence produced by both parties, the learned Judge held that consideration had been proved with regard to the first mortgage, dated 10th July 1921, (Ex. P-1) but that the plaintiffs had failed to prove the consideration of the second and the third mortgage deeds (Exs. P-2 and P-3). He accordingly granted the plaintiffs a preliminary decree under O. 34, R. 4, Civil P. C., for Rs. 287 with proportionate costs and interest at Re. 1 per cent. per month on Rs. 99 from the date of the suit till payment, and further ordered that if the amount of the decree was not paid on or before 23rd July 1937 the plaintiffs would have the right to get house No. 2047 sold and get the decree made final. The rest of the plaintiffs' claim was dismissed.

The plaintiffs appealed to the District Judge who has affirmed the decision of the trial Court, holding that the auction purchaser Ghulam Nabi could not be regarded as a successor-in-interest of Ghulam Mohammad and therefore Ghulam Mohammad's admission as to the execution of the

mortgage deeds in question was not relevant against Ghulam Nabi. The plaintiffs have come in second appeal and it has been contended on their behalf that the Judges of the Courts below have misplaced the burden of proving consideration of the mortgage deeds (Exs. P-2 and P-3) on the plaintiffs and that on the material on the record the plaintiffs' suit should have been decreed with regard to these mortgages also. After hearing both counsel and examining the record I have no doubt that this contention is well founded and must succeed. The mortgagor Ghulam Mohammad is a literate person and he has signed both the mortgage deeds (Exs. P-2 and P-3) and below this signature on each of these deeds, he has acknowledged receipt of Rs. 99 in his own handwriting. So far as he is concerned therefore the onus of proving want of consideration clearly rests on him. S. 12, Debtors' Protection Act (2 of 1936) reads as follows :

Notwithstanding anything to the contrary contained in any other enactment for the time being in force, the burden of proving that any consideration alleged to have been paid by a money-lender actually passed shall be on him; unless the consideration is acknowledged by a debtor in his own handwriting or

In this case there is a clear acknowledgment by the debtor Ghulam Mohammad in his own handwriting of the receipt of consideration, Rs. 99 both on Exs. P-2 and P-3. Therefore the first part of S. 12 does not apply and the allocation of onus is to be governed by the ordinary law, under which, where execution is admitted, it lies on the executant to prove that the transaction was without consideration. So far as Ghulam Mohammad is concerned, this was frankly conceded by the learned counsel for the respondents. The question however remains as to whether Ghulam Nabi, who has purchased the equity of redemption of the mortgaged properties in Court sale effected in execution of a decree against Ghulam Mohammad, is in a different position. The Courts below have held that he is a stranger to the transactions, and as he is not in a position to admit or deny the execution of the deeds, the onus lay on the plaintiffs to prove consideration. In my opinion, this is an erroneous view of the law. The correct rule is laid down in 36 All 478,¹ where it was held that :

Where a mortgage deed is proved to have been executed and the document contains an acknow-

1. Babhu v. Sitaram, (1914) 1 A I R All 319=25 I C 426=36 All 478=12 A L J 806.

ledgment of the receipt of the consideration, this is strong prima facie evidence that the consideration has been actually received and is evidence not only against the mortgagors but also against persons claiming under them subsequent to the date of the mortgage.

In A I R 1930 Mad 251² at page 253 *et seq.*, the Allahabad case cited above was followed and it was laid down that the onus to prove want of consideration lies on the successor-in-interest of the original mortgagor, whether he is his heir or is a purchaser from him by private sale, or whether the mortgaged property has passed to him by an auction-purchase. The Patna High Court in 8 Pat 766³ has also taken the same view. In the two last cases the decision of the Calcutta High Court in 6 Cal 268⁴ has been explained. With the view of the law as laid down in these cases, I am in respectful agreement. In the case before us there are certain other circumstances which do not appear to have been noticed by the learned Judges of the Courts below. As already stated, the mortgagee had instituted in 1934 a suit for recovery of interest due on Ex. P-3. In that case, Ghulain Mohammad had not denied the consideration for Ex. P-3. The suit had been decreed against him, and it was in execution of that decree that the equity of redemption of the two houses was purchased by Ghulam Nabi. Ghulam Nabi thus derived title from Ghulam Mohammad at a Court sale held in execution of a decree for interest due on the mortgage deed (Ex. P-3.) It is difficult to see how it lies in his mouth now to say that this very mortgage deed (Ex. P-3) was without consideration. Further, he is the brother of the original mortgagor and there is a strong presumption that he must have known the real facts. No circumstances have been brought out by the defendants in their evidence which might throw any suspicion on either of the mortgage transactions embodied in Exs. P-2 and P-3. It must therefore be held that the onus of proving want of consideration was on the defendants, Ghulam Mohammad and Ghulam Nabi. Both parties have led all available evidence, and on this evidence there can be no doubt that the defendants have failed to prove want of consideration.

2. Raghavendra Rao v. Venkatasami Naicken, (1930) 17 A I R Mad 251=124 I C 277.

3. Jamuna Prasad v. Faujdarh Shahni, (1929) 16 A I R Pat 254=122 I C 251=8 Pat 766=10 P L T 183.

4. Brajeshwar Peshkar v. Budhanuddi, (1881) 6 Cal 268=7 C L R 6.
1938 L/59 & 60

I accept the appeal and in modification of the decrees of the Courts below, grant the plaintiffs a preliminary decree under O. 34, R. 4, Civil P. C. against both the defendants for Rs. 600 with costs in all Courts and interest at Re. 1 per cent per month on Rs. 297 from the date of the institution of the suit till payment on or before 10th May 1938. In case the amount decreed is not paid on or before 10th May 1938, the plaintiffs shall have the right to get houses Nos. 2042 and 2047 sold and have the decrees made final. In that event further interest will accrue at Rs. 4 per cent. per annum, from 10th May 1938 till payment.

K.S./R.K.

Decree modified.

A. I. R. 1938 Lahore 465

TEK CHAND J.

Karam Chand and another —

Plaintiffs — Appellants.

v.

Dr. Karam Dad Khan and others —

Defendants — Respondents.

Second Appeal No. 41 of 1937, Decided on 26th April 1937, from decree of Dist. Judge, Mianwali, D/- 6th October 1936.

Cosharer — Exclusive possession — One co-sharer in exclusive possession of portion of joint land not exceeding his share in it—Other co-sharer cannot dispossess him from such portion.

In a case of a joint khata, where one cosharer has been in exclusive possession for a long time of a portion of the joint land, which does not exceed his share in the entire holding, another cosharer cannot dispossess him against his will from the portion of which he had been in possession: 104 P R 1919; 108 P R 1889; 13 P R 1910; A I R 1924 Lah 293 and A I R 1925 Lah 518, *Rel. on.* [P 466 C 2]

V. N. Sethi — *for Appellants.*

Roop Chand — *for Respondents.*

Judgment.—On 3rd February 1916, Suleman Khan and his brothers, sons of Mehr Masih, sold certain specified fields, comprising an area of 101 kanals and 12 marlas to plaintiff 1 and father of plaintiff 2 and defendant 3. In the sale deed it was stated that the land sold was entered in the revenue papers as a part of a holding which was owned jointly by the vendors and the predecessors-in-interest of the present defendants-respondents (other than defendant 3), but that in a private partition these fields had fallen to the share of the vendors and that they had been in exclusive possession for a long time.

On 17th August 1935, the plaintiffs brought the present suit for possession alleging that they had been in possession of the land since the date of purchase, but that recently the defendants had attempted to disturb their possession and had actually brought under cultivation a portion of it. They accordingly prayed for a decree for exclusive possession. The suit was resisted by defendants 1 and 2, who stated that the vendors of the plaintiffs and the defendants were co-owners of the land which was a part of the joint holding, and denied that there had been any private partition, or that the plaintiffs or their vendors had been in exclusive possession. On the other hand they pleaded that the land had been in their own possession all along.

The trial Judge found that the alleged private partition had not been proved. He held however that the plaintiff's vendors had been in exclusive possession of the fields at the time of the sale. He also found that the plaintiffs had remained in cultivating possession of the land from 1916 to 1922, but that the land became banjar in 1923 and continued to be so till April 1935, when the defendants took possession of about three kanals of it, and brought it under cultivation. On these findings he held that the plaintiffs' claim was barred under Art. 142, Lim. Act. He accordingly dismissed the suit. On appeal, the learned District Judge upheld the finding of the Court below that the alleged private partition had not been proved but he found that the plaintiffs' vendors had been in exclusive possession since long before 1916 and that the plaintiffs had remained in exclusive possession from the date of the sale till 1922 when the land became banjar owing to some disputes relating to irrigation rights between the plaintiffs and other proprietors of the village. He found that the land remained in this condition till a short time before this suit when defendants broke a portion of it. On these facts, he found that from 1922 to 1934 the possession must be considered to follow title which was in all the co-owners including the plaintiffs and the contesting defendants. He accordingly accepted the plaintiffs' appeal in part and granted them a decree for joint possession.

The plaintiffs have come in second appeal and it has been contended on their behalf that the learned Judge is in error in holding that merely because the land was not under cultivation from 1923 to

1934, possession must be presumed to be that of all the co-owners. It is pointed out that the learned Judge has ignored the entries in the jamabandi for 1923-1924, 1927-1928 and 1931-1932, in all of which the land in dispute is shown as maqbuza mushtarian (in possession of the vendees, i. e. the plaintiff and appellant 3). He states that there is a presumption of correctness attaching to these entries, and that this has not been rebutted by any evidence on their part. After hearing both counsel and examining the record, I am of opinion that this contention is well founded and must succeed. As already pointed out, the Courts below have concurrently found that the plaintiffs' vendors were in exclusive possession before 1916 and that from 1916 to 1922 the plaintiffs themselves were in actual cultivating possession. Cultivation ceased in 1923 for want of irrigation but, as the jamabandi entries show, the land continued to be in possession of the plaintiffs until 1935, when a small portion of it was brought under cultivation by the contesting defendants. The allegation of the defendants that they had been in possession of the entire land from 1916 to 1934 has been held to be unproved. In these circumstances there is no doubt that the plaintiffs are entitled to a decree on the strength of their long exclusive possession even though the land is jointly owned by them and the defendants. It is well settled that in a case of a joint khata, where one cosharer has been in exclusive possession of a portion of the joint land, which does not exceed his share in the entire holding, another cosharer cannot dispossess him against his will from the portion of which he had been in possession : 104 P R 1919,¹ 108 P R 1889,² 13 P R 1910,³ A I R 1924 Lah 293⁴ and A I R 1925 Lah 518.⁵

The learned District Judge has observed that the plaintiffs must be taken to have abandoned their possession in 1923, but abandonment was not pleaded by the defendants nor was it put in issue, nor is there any evidence on the record to prove

1. *Ganesha Mal v. Ibrahim*, A I R 1919 Lah 237 = 53 I C 569 = 104 P R 1919 = 111 P L R 1919.

2. *Wazir Singh v. Mahtab Singh*, (1889) 108 P R 1889.

3. *Jhanji v. Ramzan*, (1910) 13 P R 1910 = 5 I C 808 = 60 P L R 1910.

4. *Mahomed Amin v. Karm Dad*, A I R 1924 Lah 293 = 69 I C 671.

5. *Saad Ullah v. Ibrahim*, A I R 1925 Lah 518 = 85 I C 553.

it. On the other hand, the plaintiffs have been shown in the revenue records as being in possession all along. I hold therefore that the plaintiffs are entitled to a decree for exclusive possession and entitled to remain in possession till partition. I accept the appeal, set aside the judgment and decree of the learned District Judge and in lieu thereof grant the plaintiffs a decree for exclusive possession of the land in dispute. Having regard to all the circumstances, I leave the parties to bear their own costs throughout.

K.B./A.L.

*Appeal allowed.***A. I. R. 1938 Lahore 467**

TEK CHAND J.

Sohan Singh—Plaintiff—Appellant.

v.

Danu and others — Defendants —

Respondents.

Second Appeal No. 1286 of 1936, Decided on 30th March 1937, from decree of Addl. Dist. Judge, Lahore, D/- 22nd May 1936.

Custom (Punjab) — Alienation — Consent — Plaintiff's grandfather selling ancestral land in 1888—At time of sale only two reversioners living, of whom one was plaintiff's father—Sale deed attested by plaintiff's father—Suit in 1901 by other reversioner for setting aside alienation in which plaintiff's father made defendant — Plaintiff's father supporting sale and suit dismissed—Consent given by plaintiff's father not proved to be mala fide—Plaintiff suing to set aside sale in 1934 — Plaintiff held had no locus standi to sue—Suit held barred by consent of plaintiff's father.

The alienation by sale of the ancestral land was effected in 1888 by the grandfather of the plaintiff who was born 26 years after the alienation and 25 years after the death of the alienor. At the time of such sale, only two reversioners were alive, who could have contested the sale. Of these, one was the father of the plaintiff who had attested the sale deed. The other brought a suit in 1901, for setting aside the alienation but the suit was dismissed. To this the plaintiff's father was made a defendant and he had supported the sale. In 1934 the plaintiff brought a suit for setting aside the alienation, on the grounds that the sale had been effected without consideration and legal necessity. It was not proved that the plaintiff's father gave consent to the sale mala fide with a view to injure the interests of the reversioners:

Held that the sale having become indefeasible at the instance of any reversioner long before the plaintiff was begotten, the plaintiff had no locus standi to sue : [P 468 C 2]

Held further that the plaintiff's suit was barred by the consent given by his father to the sale: 56 P R 1903 (F B), Rel. on. [P 468 C 2]

*Mathra Das — for Appellant.**Amar Nath Chopra — for Respondents.*

Judgment. — This second appeal arises out of a suit brought by Sohan Singh, plaintiff-appellant, for possession of ancestral land, which had been sold by registered deed by his grandfather Mehtab Singh to Hasta, father of the contesting defendants, for Rs. 1000 as far back as 24th April 1888. The plaintiff was born in 1914 and instituted the suit on 26th April 1934, alleging that the sale had been effected without consideration and legal necessity.

The defendants pleaded that the suit was barred by limitation, that the plaintiff, being an afterborn grandson of the vendor, had no locus standi to sue, and that the sale had been effected for consideration and necessity. The trial Judge found for the plaintiff on the first two points, holding that the plaintiff had locus standi to sue and that the suit was within limitation. He held however that necessity had been established for the full amount paid and on this finding he dismissed the suit. On appeal, the District Judge disagreed with the trial Judge on all the three points mentioned above. He found that necessity had been established to the extent of Rs. 600 only, but that the plaintiff had no locus standi to sue as his father Bahadur Singh had ratified the alienation before his birth and that the suit was barred by limitation. In the result he affirmed the decision of the trial Judge dismissing the suit.

Before considering the questions of law which have been argued before me, it is necessary to state a few facts which were either admitted at the trial or are concluded by the findings of the learned District Judge. As already stated, the sale in dispute was effected on 24th April 1888. The land was admittedly owned by the father of the vendor Mehtab Singh, and the only living reversioners of the vendor at the time of the sale were (1) his only son Bahadur Singh, father of the plaintiff and (2) his brother's grandson Amar Singh. Bahadur Singh attested the sale deed. The vendor Mehtab Singh died in 1889. After his death one Khazan Singh, a distant collateral, instituted a suit to pre-empt the sale. To that suit, Bahadur Singh and the vendees were impleaded as defendants. Bahadur Singh supported the sale, and the suit was dismissed. In 1901, the other reversioner Amar Singh, instituted a suit for possession of the land on the ground that the land was ancestral qua him and the sale by Mehtab Singh in

favour of Hasta had been effected without consideration and necessity. To this suit also, Bahadur Singh was impleaded as a defendant. On this occasion again, he supported the sale, which was upheld and the suit dismissed. After 1901 Bahadur Singh got a son named Bahal Singh, who is alive but has not brought any suit to contest the sale. The plaintiff Sohan Singh was born in 1914. He attained majority in 1932, and brought the present suit on 26th April 1934.

On these facts, there can be no doubt that the plaintiff's suit is barred by time. The learned trial Judge found the suit to be within limitation, following two Full Bench decisions of the Chief Court reported in 56 P R 1903¹ and 26 P R 1911.² Before me the learned counsel for the appellant has placed reliance on the same rulings. It appears however to have been overlooked that these rulings have been rendered obsolete by the enactment of (Punjab) Act 1 of 1920, which was in force at the time of the institution of the suit and governs the case. By S. 6 of that Act, a period of one year next after the commencement of the Act was provided for suits for which the period prescribed under the Act was shorter than that prescribed under the Limitation Act or the earlier Punjab Limitation (Ancestral Land Alienation) Act 1 of 1900. This one year expired in 1921, but at that time the plaintiff was a minor, and under S. 6, Lim. Act, he could bring the suit within one year of his attaining majority. The plaintiff was born sometime in 1914; he attained majority in 1932. Assuming that he had locus standi to sue, he could have brought the suit in 1933 up to the date of the completion of his 19th year. The present suit however was instituted on 26th April 1934. It is therefore clearly barred by time.

It is equally clear, that the plaintiff having been born 26 years after the alienation, and 25 years after the death of the alienor, had no locus standi to maintain the suit. As already stated, at the time of the sale, there were only two persons alive, who could have contested the alienation. Of these, Bahadur Singh, father of the plaintiff, had attested the sale deed and had subsequently supported the transaction in suits brought by Khazan Singh and

Amar Singh in 1891 and 1901 respectively. Amar Singh actually brought a suit in 1901 to contest the sale but his suit was dismissed. The sale had thus become indefeasible at the instance of any reversioner, long before the plaintiff was begotten. He had therefore no locus standi to sue: 56 P R 1903.³ The plaintiff's suit is further barred by the consent of his father Bahadur Singh, which has not been proved to have been given mala fide with a view to injure the interests of the reversioners.

In view of these findings it is not necessary to consider the contention of the respondents' learned counsel that the transaction must be held to have been effected for necessity in view of the fact that the entire consideration has been found to have been proved, that 3/5ths of this was paid to prior creditors, and that no immorality or wanton waste is imputed to the vendor. The appeal fails and is dismissed with costs.

K.B./A.L.

Appeal dismissed.

3. Gurdit Singh v. Hukam Singh, (1903) 56 P R 1903=167 P L R 1903 (F B).

A. I. R. 1938 Lahore 468

JAI LAL J.

Kali Ram — Defendant — Appellant.
v.

Bhiku and others — Plaintiffs —
Respondents.

Second Appeal No. 206 of 1936, Decided on 5th April 1937, from decree of Dist. Judge, Delhi, D/- 18th November 1935.

Custom (Punjab) — Succession — Ancestral land—Riwaj-i-am—Delhi Province — Daughter inheriting father's property — Daughter dying without leaving male descendants—Proprietors of thulla are entitled to succeed to her father's property in preference to husband — Husband inherits only wife's absolute property — Proprietors of thulla need not be descendants of common ancestor.

According to the custom recorded in the Riwaj-i-am of Delhi Province, the proprietors of the thulla are entitled to succeed to the estate of the deceased after the death of his daughter who inherited her father's property and who has left no male descendants. The rule in riwaj-i-am that the husband inherits the property of the wife, merely refers to land which is the absolute property of the wife, as, for instance, property gifted to her or property which is her stridhan. It does not relate to property inherited by her as a daughter. In the absence of a clear indication to the contrary, she must be deemed to succeed to an ordinary estate of a female, if not under the Customary law, under the Hindu law. To such property the heirs of her father are entitled to succeed in preference to her husband because on her death the property must be deemed to revert to such

1. Dheru v. Sidhu, (1903) 56 P R 1903=93 P L R 1903 (F B).

2. Sundar v. Salig Ram, (1911) 26 P R 1911=9 I C 800=34 P L R 1911 (F B).

heirs. The proprietors of the thulla need not be the descendants of the common ancestor as no such restriction is found in the riwaj-i-am.
[P 469 C 1,2]

Fakir Chand Mital — *for Appellant.*

Bhagwat Dayal — *for Respondents.*

Judgment. — Balle was the original owner of the land in dispute. He was a resident of village Kanjhaola in the province of Delhi. He died in 1914 and then there was a dispute between his daughter Mt. Manbhari and the proprietors of the thulla as to the right of succession to his land. The dispute was finally decided by the District Judge of Delhi in favour of the daughter who was held to be a preferential heir. Mt. Manbhari accordingly succeeded to the land and died in 1933. A month before her death she executed a will bequeathing the land in dispute to her husband. She did not leave any male descendant. The suit out of which this appeal has arisen was instituted by the proprietors of the thulla, who have been found to belong to the same got as Balle, for possession of land. The learned District Judge has held that according to the custom recorded in the riwaj-i-am of Delhi Province, the proprietors of the thulla are entitled to succeed to the estate of the deceased Balle after the death of the daughter who has left no male descendants.

The entry in the riwaj-i-am certainly supports the conclusion of the learned District Judge but the learned counsel for the appellant, the husband of Mt. Manbhari, who has come up on second appeal after obtaining a certificate under S. 41, Punjab Courts Act from the learned District Judge, has urged that the husband is described in another part of the riwaj-i-am as the heir to his wife in respect of property held by her in her own right. In my opinion the learned District Judge has rightly held that this merely refers to land which is the absolute property of the wife, as, for instance, property gifted to her or property which is her stridhan. It does not relate to property inherited by her as a daughter. In the absence of a clear indication to the contrary, she must be deemed to succeed to an ordinary estate of a female, if not under the Customary law, under the Hindu law. To such property the heirs of her father are entitled to succeed because on her death the property must be deemed to revert to such heirs and, as I have already stated, according to the custom mentioned in the riwaj-i-am the proprietors of the thulla

are entitled to succeed to the estate of the deceased proprietor.

In my opinion there is no force in the contention of the learned counsel that this condition in the riwaj-i-am implies that the proprietors in the thulla must be descendants of the common ancestor. There is no justification for restricting the application of the rule in the manner suggested because such restriction does not find any place in the riwaj-i-am. I therefore dismiss this appeal with costs.

W.D./A.L.

Appeal dismissed.

A. I. R. 1938 Lahore 469

BLACKER J.

Brahm Dev — Petitioner.

v.

Emperor.

Criminal Revision No. 1309 of 1937, Decided on 17th January 1938, from order of Sess. Judge, Lyallpur at Shekhupura, D/- 7th August 1937.

Criminal P. C. (1898), S. 173 — Order on police report that case be struck off is not judicial order.

An order of a Magistrate on a police report under S. 173 that a case be struck off is an administrative order and not a judicial order and accused is not entitled to a copy of such an order as of right : *A I R 1933 Pat 242, Foll.; A I R 1932 Pat 72, Expl.* [P 469 C 2]

Abdul Aziz — *for Petitioner.*

S. N. Bali for Advocate-General —

for the Crown.

Order.—The Division Bench judgment of the Patna High Court in *A I R 1933 Pat 242*¹ is a clear authority for holding that the order of a Magistrate on a police report under S. 173, Criminal P. C. that a case be struck off is an administrative order and not a judicial order and I have no hesitation in following it. The S. B. judgment quoted, *A I R 1932 Pat 72*,² is not really an authority to the contrary. It only lays down that the opposite order, i. e. an order taking cognizance on a police report is a judicial order. It is an order under S. 204, Criminal P. C. which, it may be noticed, is in Ch. 17, which is headed "Commencement of proceedings before Magistrates." This would imply that until these orders

1. *Umar Singh v. Emperor*, (1933) 20 A I R Pat 242=1933 Cr O 714=146 I C 70=34 Cr L J 1198=12 Pat 234=14 P L T 162.

2. *Raghunath v. Emperor*, (1932) 19 A I R Pat 72=1932 Cr C 136=136 I C 842=33 Cr L J 349=12 P L T 937.

have been passed, the judicial proceeding has not commenced. I, therefore, following the Patna D. B. judgment and holding that the order in question was not a judicial order, dismiss the petition.

K.S./R.K.

*Petition dismissed.***A. I. R. 1938 Lahore 470**

ABDUL RASHID J.

Thakarji Maharaj — Plaintiff —
Appellant.

v.

Khushi Ram and another —
Defendants—Respondents.

Second Appeal No. 600 of 1937, Decided on 16th November 1937, from decree of Addl. Dist. Judge, Hoshiarpur, D/- 27th January 1937.

Limitation Act (1908), Art. 134-A—Grant of permanent lease by mahant of idol in 1909 — Decree for possession obtained by lessee — In 1935 suit by successor of mahant in the name of idol for permanent injunction restraining lessee from dispossessing him — Suit held was to set aside transfer in 1909 and was governed by Art. 134-A—Initial onus of proving that suit was within time was on plaintiff—Plaintiff would be entitled to injunction prayed for on setting aside transfer in 1909.

A mahant of an idol granted a permanent lease to the defendant in 1909 of the temple property. The defendant obtained a decree for possession of the land in suit. In 1935, a successor of the mahant granting lease brought a suit in the name of idol represented by him for a permanent injunction restraining the defendant from dispossessing the plaintiff from the land in dispute :

Held that the substantial relief claimed by the plaintiff was to set aside the transfer of immovable property by his predecessor in 1909. The suit was therefore governed by Art. 134-A. It was for the plaintiff to indicate as to when he came to know of the transfer and to establish that he came to know of it within 12 years of the suit. The plaintiff would be entitled to the permanent injunction prayed for after he set aside the transfer in 1909 : *A I R 1933 Oudh 38, Rel. on.*

[P 471 C 1]

Nanak Chand Pandit — *for Appellant.*D. N. Aggarwal — *for Respondents.*

Judgment.—The facts bearing on the questions of law involved in this appeal may be shortly stated. Mt. Mehtabi was the original owner of the land in dispute measuring 9 kanals 17 marlas. In the year 1885, she gifted this land in favour of Keshwa Nand. Keshwa Nand was the mahant of an idol known as Thakarji Maharaj. Keshwa Nand was succeeded by his disciple Kundan Anand in 1904. On 18th January 1909, Kundan Anand granted

a permanent lease of the land in dispute to Lachhman Das, father of the defendants. In 1911 Kundan Anand was deposed from the office of mahant and was succeeded by Atma Nand. The land in dispute was in possession of the mortgagees in the year 1909. In 1912 the father of the present defendants sued Gosain and other mortgagees for possession by means of redemption. He impleaded Kundan Anand and the reversioners of Mt. Mehtabi as defendants in that case. A decree for redemption was passed in favour of the father of the present defendants on payment of Rs. 82. On 7th June 1928 the present defendants sued the tenants who were in possession of the land in dispute and a decree was passed in their favour on 25th September. Atma Nand was a party to this case but Thakarji Maharaj was not impleaded as a defendant. In 1934 the present defendants again instituted a suit against Atma Nand for recovery of possession of the land in suit. Atma Nand pleaded that Thakarji Maharaj was the real owner. This defence was not given effect to and a decree was passed in favour of the defendants for possession of the land in dispute.

On 25th April 1935 the present suit was instituted by Thakarji Maharaj through mahant Atma Nand for a permanent injunction restraining the defendants from dispossessing the plaintiff from the land in dispute. The defendants pleaded inter alia that the plaintiff was not the owner of the land in dispute as the land had been gifted in favour of Kashwa Nand personally and was not the property of the idol Thakarji Maharaj, that the suit was barred by limitation, that the lease in favour of the defendants' father was for consideration and necessity and that the suit did not lie in its present form. The trial Court decreed the plaintiff's claim holding that the land in dispute had been gifted in favour of the idol, that Atma Nand was only the manager of this property, that the plaintiff had been all along in possession of the land, that the alienation effected by Kundan Anand in 1909 in favour of the father of the present defendants was without consideration and necessity and that the suit was within time. Against this decision, the defendants preferred an appeal in the Court of the learned District Judge. The learned District Judge held that the alienation in favour of the father of the defendants was for consideration and necessity. He also held that the suit of the

plaintiff was barred by limitation. On these findings the appeal was accepted and plaintiff's suit dismissed with costs throughout. Against this decision the plaintiff has preferred a second appeal to this Court.

The learned counsel for the appellant contended that the learned District Judge had erred in holding that the suit was barred by limitation. He urged that the plaintiff had been in possession of the land throughout and that therefore every attack on his title and every attempt to oust him gave him a fresh cause of action. It was maintained by the learned counsel that in these circumstances his suit was within limitation under Art. 120, Lim. Act. The learned counsel relied on A I R 1933 Lah 920,¹ 8 Lah 22² and 140 P R 1907.³ In my opinion the contention of the learned counsel is without force. In the present case the substantial relief claimed by the plaintiff was to set aside the transfer of immovable property made by Kundan Anand, the manager of Thakarji Maharaj, in the year 1909. This was therefore a suit to set aside a transfer of immovable property comprised in a Hindu religious or charitable endowment made by a manager thereof for a valuable consideration. The present suit consequently falls under Art. 134-A, Lim. Act. The limitation for such a suit is 12 years from the time when the transfer becomes known to the plaintiff. It was for the plaintiff to indicate in his plaint as to when he came to know of the transfer and to establish that he had come to know of the transfer within 12 years of the institution of the suit. The plaintiff would be entitled to the permanent injunction prayed for by him only after he succeeds in setting aside the transfer made by Kundan Anand in 1909 in favour of the father of the present defendants.

In the three rulings relied on by the learned counsel for the appellant, there was no question of setting aside transfers of immovable property. In those cases the plaintiffs had throughout been in possession of the property in dispute and they had brought suits for declarations to correct revenue entries or for similar other

reliefs. Under those circumstances it was held that every invasion of the right of the plaintiffs gave them a new cause of action, and rendered suits for declarations filed by the plaintiffs within six years to be within time. Art. 120 is a residuary Article and as the present suit falls within the purview of Art. 134-A, Art. 120 cannot be held to be applicable. As under Art. 134-A, limitation begins to run from the time when the transfer becomes known to the plaintiff, the initial onus of proving that his suit is within time is on the plaintiff. If neither in the plaint nor at any subsequent stage of the case the plaintiff has ever fixed any date on which he alleges that he came to know of the transfer to the defendants, the suit must fail on that account. Reference may be made in this connexion to A I R 1933 Oudh 38.⁴ The learned counsel for the respondents also relied on 38 Mad 1064.⁵ He urged that the land in dispute had throughout been in possession of the mortgagees and that the plaintiff or his manager Atma Nand had never entered into actual physical possession. The learned counsel contended that in these circumstances even if Art. 120 be held to be applicable, the suit would be barred by limitation as limitation would run from the date of the alienation in 1909 and not from the date when the plaintiff had knowledge of the alienation. It is not necessary to give a considered opinion on this point as I have already held that the present suit is barred by limitation under Art. 134-A, Lim. Act.

In view of the findings given above, it is unnecessary to consider the question of consideration and legal necessity in any detail. I am of the opinion that consideration for the alienation in favour of the father of the defendants has been proved but that legal necessity has been proved only to the extent of Rs. 82 instead of Rs. 250. For the reasons given above I dismiss this appeal with costs.

V.B.B./R.K.

Appeal dismissed.

4. Raghunandan Misra v. Mahadeo, (1933) 20 A I R Oudh 38=140 I C 182=9 O W N 835.

5. Venkatachala Reddiar v. Collector of Trichinopoly, (1914) 1 A I R Mad 708=24 I C 369=26 M L J 537=38 Mad 1064.

1. Ram Lal v. Thakurji Mandir, (1933) 20 A I R Lah 920=146 I C 136.

2. Smail v. Bahab, (1927) 14 A I R Lah 119=100 I C 732=8 Lah 22=28 P L R 490.

3. Hakim Singh v. Waryaman, (1907) 140 P R 1907.

A. I. R. 1938 Lahore 472

BHIDE J.

*Mohammad Ramzan and another —
Auction-purchasers—Appellants.*

v.

*Mt. Khadija Sultan Begum, Decree-
holder and others, Judgment-debtors
—Respondents.*

Exn. First Appeal No. 113 of 1937,
Decided on 14th July 1937.

(a) Contract Act (1872), S. 135—Auction-purchaser allowed to withdraw deposit on furnishing security to re-deposit when asked — Surety bond executed—Purchaser when asked to deposit amount asking for time which was granted—Consent of counsel for decree-holder—Court directing surety to pay amount—Surety held not absolved—Bond being in favour of Court, it had discretion to grant time to purchaser.

Where in an execution case, the auction-purchaser who had deposited the sale price in Court was allowed to withdraw it on furnishing security to re-deposit when asked to do so, and on so being asked he asked for a month's time to deposit the amount which was granted by the Court and was not objected to by the counsel for the decree-holder, but on subsequent date the Court being aware of the surety bond ordered the surety to deposit the amount and modified the previous orders :

Held that the surety was not absolved under S. 135, Contract Act. The bond was in favour of the Court and the Court had discretion to order the auction-purchaser to deposit the amount at any date it liked and the consent of the counsel for the decree-holder was immaterial : *A I R 1927 Lah 336, Ref.* [P 473 C 1]

(b) Civil P. C. (1908), S. 151 — Review — Surety bond furnished to deposit purchase price when asked to do so—Court ordering purchaser to deposit money and further that property be resold on failure and short-fall recovered from him—Court becoming aware of surety bond and subsequently modifying order by directing surety to pay amount—Court held had inherent power to review and modify its order.

Where in an execution case the Court had allowed the auction-purchaser to withdraw the deposit made by him on furnishing a security for re-depositing it when asked to do so and a surety bond was accordingly executed, and the Court having asked the purchaser to deposit the amount made an order that if the amount was not deposited within certain period the property be resold and short-fall be recovered from him but on the next date on becoming aware of the surety bond the Court reviewed and modified its order and directed the surety to pay the amount :

Held that the Court had an inherent power to review its previous order as the error was patent on the face of the record and the previous order was made by the Court suo motu through oversight. [P 473 C 1]

C. L. Aggarwal — *for Appellants.*

Bashir Ahmad and Tasadduq Hussain—
for Respondents.

Judgment.—The material facts of the case giving rise to this appeal may be briefly stated as follows : Mt. Khudija Sultan, respondent 1, obtained a decree for a sum of Rs. 10,000 on 19th December 1934. In execution of that decree, a house belonging to the judgment-debtor was sold and was purchased by Mohammad Ramzan who deposited Rs. 5540 as purchase price in Court. In the meantime, the judgment-debtor's sons had instituted a suit to challenge the decree and in the course of that suit an injunction was obtained for staying the sale proceedings relating to the house. No objections to the sale had been filed in Court within the statutory period, but owing to the injunction obtained by the sons of the judgment-debtor the sale was not confirmed. The auction-purchaser thereupon made an application for withdrawal of the amount deposited by him on the ground that he was likely to lose interest thereon. The Court allowed him to withdraw the amount on his furnishing security to re-deposit the sum when required. The suit filed by the sons of the judgment-debtor was subsequently dismissed. Thereupon the auction purchaser was called upon to re-deposit the sum of Rs. 5540 referred to above. He asked for a month's time to deposit the amount whereupon the Court passed the following order on 5th January 1937 :

The petitioner with his counsel is present. Lala Karam Chand, counsel for the decree-holder, is present. Lala Karam Chand has no objection. Hence the purchase money be deposited by 30th January 1937. If it is not deposited by that date a fresh auction shall be held and the petitioner shall be responsible for the short-fall.

On the next date (20th March 1937) the surety bond filed by the auction-purchaser was brought to the notice of the Court whereupon the Court modified its previous order and directed that the surety Mohammad Din be ordered to pay the sum of Rs. 5540 in Court by 31st March 1937. From this order the auction-purchaser as well as the surety have preferred the present appeal. On behalf of the surety the main contention advanced was that the decree-holder's counsel having agreed to give time to the auction-purchaser for depositing the amount, he was absolved from liability under S. 135, Contract Act. The learned counsel for the respondent however pointed out that the bond in this case was in favour of the Court and not of the decree-holder and the time was given by the Court. Reliance was placed in support of

the argument on 100 I C 762.¹ The contention of the learned counsel for the respondent appears to me to be well founded. The bond in this case was in favour of the Court and the Court had the discretion to order the auction-purchaser to deposit the amount by any date it liked. The consent of the counsel for the decree-holder was in the circumstances immaterial and I therefore hold that the surety was not absolved.

The next contention urged was that the Court having ordered on 5th January 1937 that in default of deposit by the auction-purchaser the property would be resold and that the auction-purchaser would be liable only for the short-fall, the Court had no power to review its order. The order of the Court, dated 20th March 1937, however makes it clear that the previous order was passed due to inadvertence as the bond filed by the auction-purchaser had been overlooked by the Court. This was an error patent on the face of the record and it seems to me that the Court had inherent power to review the previous order and direct the surety to deposit the amount on the basis of the bond furnished by him. As a matter of fact it appears that the auction-purchaser himself had never requested the Court to resell the property and make him liable only for the short-fall. The Court had passed the previous order suo motu through oversight and the counsel for the auction-purchaser also raised no objection to the later order. The appeal has no force and must be dismissed on the merits. In the circumstances, it is not necessary for me to discuss the preliminary objection which was raised on behalf of the respondent that the appeal was incompetent at least so far as the auction-purchaser was concerned. I dismiss the appeal with costs.

S.C./R.K.

Appeal dismissed.

1. Dhari Mal v. Kanshi Ram, A I R 1927 Lah 336=100 I C 762.

* A. I. R. 1938 Lahore 473

YOUNG C. J. AND MONROE J.

Mt. Talian w/o Vasawa

Convict — Appellant.

v.

Emperor.

Criminal Appeal No. 719 of 1937, Decided on 9th November 1937, from order of Addl. Sess. Judge, Lyallpur, D/- 20th May 1937.

* Penal Code (1860), S. 302—Sentence—**Young girl killing her newly born baby—Sentence of transportation for life is inappropriate.**

Where a young girl of 15 kills her newly born baby, a sentence of transportation for life is wholly inappropriate. In England it is always assumed that a girl who commits such a murder at such a time is hardly responsible for her actions, it being well known that child-birth produces occasionally peculiar reactions in the mother. The sentence of transportation for life should be reduced to a sentence for a short period. [P 473 C 2]

Young C. J.—Mt. Talian, a young girl 15 years of age, has been condemned to transportation for life by the learned Sessions Judge of Lyallpur for the murder of her newly born baby. Mt. Talian had an illicit connexion with one man and shortly afterwards she married another. A child was born about four months after her marriage. The child was not therefore the child of her husband. It is said that in the presence of her mother Mt. Imam Bibi, and also in the presence of another woman Mt. Begum, this young girl murdered her child by strangulation. The mother of the girl was also charged with the offence, but we think fortunately for her the learned Judge acquitted her. On the evidence it would appear that both had something to do with the murder, and indeed Mt. Begum, who was also present at the time, cannot escape suspicion of complicity in the crime. The learned Judge however has found only Mt. Talian guilty and we have no reason to doubt his conclusion as to her on the evidence. The only point in the case is the question of sentence. We clearly cannot interfere in this matter. But where a young girl of 15 kills her newly born baby, a sentence of transportation for life appears to us to be wholly inappropriate. In England it is always assumed that a girl who commits such a murder at such a time is hardly responsible for her actions, it being well known that child-birth produces occasionally peculiar reactions in the mother. We suggest therefore that Government should reduce the sentence of transportation for life to a sentence for a short period.

D.S./R.K.

Reduction of sentence recommended.

A. I. R. 1938 Lahore 474

BLACKER J.

Mohammad Sadiq
Convict — Appellant.

v.

Emperor.

Criminal Appeal No. 758 of 1937, Decided on 20th December 1937, from order of Magistrate, Amritsar, Dated 14th June 1937.

(a) Penal Code, Ss. 366 — Evidence of girl abducted must be taken with great caution.

In cases of offences under S. 366, the evidence of the girl alleged to have been abducted must be taken with a great amount of caution. [P 475 C 2]

(b) Penal Code (1860), S. 366—Young man abducting girl of marriageable age — Natural presumption is that he abducted her with intention of having sexual intercourse with her either forcibly or with her consent after seduction or after marrying her—If any other intention is alleged to exist, burden is on accused to prove it.

Even a forcible abduction does not amount to an offence under S. 366, unless there are other ingredients, namely the intention either that the girl should be seduced or forced to illicit intercourse or that she should be compelled to marry against her will. In cases of forcible abduction, there can seldom be direct evidence as to the actual intention of the abductor and that intention must be inferred from the circumstances of each case under S. 114, Evidence Act. Human nature being what it is, whenever one finds a young man abducting a girl of marriageable age, the first natural presumption must be that he has abducted her with the intention of having sexual intercourse with her either forcibly, or with her consent after seduction, or after marrying her. If he has any intention other than that which is suggested by the natural circumstances of the case, the burden lies upon him under S. 106, Evidence Act to prove that intention. [P 476 C 1, 2]

Abdul Aziz (Mian).— *for Appellant.*

Mohammad Monir, Assistant Advocate-
General — *for the Crown.*

Judgment.—Ghulam Mustafa, Muhammad Shah, Suleman, Mahmud Ali, Muhammad Sadiq and Sehr Gul appeal through counsel and Muhammad Rafi from the jail against their convictions by a S. 30 Magistrate of Amritsar under S. 366 read with S. 149, I. P. C., and sentences of five years' rigorous imprisonment inflicted upon all the appellants except Mahmud Ali and Muhammad Rafi and sentences of two years' rigorous imprisonment inflicted upon them. The prosecution case was that Ghulam Mustafa, who is a student in Amritsar, was the first cousin of a girl of the name of Mt. Masuda Bano, who is also a schoolgirl attending a school at Amritsar.

She was aged about 16 or 17 and was the daughter of a respectable Mahomedan gentleman of Amritsar of the name of Mian Mehraj Din. Being first cousins, they were naturally on friendly terms with each other as is shown by the evidence in the case not only of the girl but of other relations. On 15th March 1937, Mt. Masuda Bano was going to her school which is the Stratford College for women in the civil station at Amritsar in a tonga driven by one Fazal Din, a servant of the family, and accompanied by Mt. Hayat Bibi, another servant, and a little girl called Shamim Akhtar. When she reached the gates of the College and stepped off the tonga she was seized by Suleman and Sehr Gul appellants and taken forcibly to a car which was standing by Muhammad Shah and Muhammad Sadiq were standing by with drawn swords and Ghulam Mustafa and Mahmud Ali were sitting in the car also with drawn swords. Muhammad Rafi was the hired driver of the car. As soon as they got the girl into the car, they drove it off at a very great speed. The tongawala did his best to pursue in his tonga whipping his horse into a gallop. He naturally very soon lost sight of the car but was able to observe the very important fact that the car turned on to the Grand Trunk road in the direction of Lahore and not in the direction of Jullundur or Gurdaspur.

The outrage was witnessed by another schoolgirl Mt. Savitri and a Hindu gentleman who describes himself as a businessman of the name of Lala Durga Das. Miss Sant Singh, the Head Mistress of the school, promptly informed the police and the father of the girl accompanied by some police officers set out in another car in pursuit. On reaching Lahore, they went to the Naulakha police station from where telephonic messages were sent out to the main stations along the Grand Trunk road, namely Gujrat, Jhelum, Rawalpindi, Campbellpur and Peshawar. Mr. Mehraj Din then hired a bigger and newer car at Lahore and set out along the road to Peshawar. Meanwhile the car containing the miscreants driven at immense speed had reached Jhelum. The speed at which they were driving the car is shown by the fact that although they only left Amritsar at 8.30 and had had to pass through Lahore, Gujranwala and other places and stopped at least once on the road to fill up with petrol they had got to Jhelum, a distance of 138 miles from Amritsar, in just about

three hours. The Jhelum police who had received the telephonic message and were waiting on the bridge over the river Jhelum made a gallant attempt to stop the car. Whether they would have been successful or not is not apparent, but Ghulam Mustafa who was driving tried to turn the car across the level crossing of which the police had shut the gate. Seeing the gate shut he tried to turn the car round and in doing so the car fell into a ditch and overturned. The police were then able to take the seven appellants and the girl out of the car and also recovered from it a number of articles, including four swords.

The defence story is that only Ghulam Mustafa took the girl away and that she went away with him willingly, the only other person in the car being Muhammad Rafi, the hired driver. Subsequently, one Hissam Din, a servant of the girl's father, who has not been produced as a witness collected Suleman, Sehr Gul and Muhammad Shah from various places in Amritsar and set out in pursuit. The idea apparently was that as friends of Ghulam Mustafa they might be useful. They stopped in Lahore where they spent some time in finding Mahmud Ali and took him with them. When they reached Jhelum, Ghulam Mustafa had already been arrested as he had accidentally overturned his car trying to turn a sharp corner. They all went to the police station and there were arrested with the exception of Hissam Din. Muhammad Sadiq, according to his story, had come to Jhelum that day from Bhalwal and he was also arrested in the same mysterious manner by the police on his appearance at the station. Comparing the two stories, that for the defence is obviously most fantastic. The prosecution story is an unusual one as the act ascribed to these young men of fairly good position and antecedents is one of great daring and also of great folly. But that it happened as the prosecution says there seems to be no doubt, and one can only ascribe it to the influence of modern ideas of American gangsterism.

To take the prosecution first, one fact appears to me to be settled beyond any reasonable doubt and that is that the seven appellants were arrested at Jhelum at about 11.30 as stated by Saleh Muhammad, the Jhelum head constable, and Daya Ram, the witness from Jhelum. There is no reason apparent on the face

of the record to disbelieve the evidence of these witnesses and there are plenty of reasons for disbelieving the counter defence story. The first of these is that the story narrated is impossible. According to the evidence of the most reliable witnesses, this Hissam Din did not start collecting these youths till about 9 o'clock at Amritsar. Having first collected one from Dr. Mehraj Din's dispensary, he then had to go to other places and collect two more. He then had to drive to Lahore where he had to go into the City to the Royal Hotel and spend some time in finding Mahmud Ali. He then had to drive off to Jhelum. Evidence has been led, and it is defence evidence too, that a telephonic message was received from Jhelum by the Nau-lakha police at Lahore, at 12.15 P. M. stating that all seven of the appellants had already been arrested at Jhelum. Now, if this message was received at Lahore at 12.15, the latest time for the arrest that can reasonably be supposed would be between 11.45 and 12. For these persons, not to have left Amritsar till considerably after 9 o'clock and then to have spent a considerable time in Lahore City looking for Mahmud Ali and then to have reached Jhelum by 11.45 or 12 O'clock is, in my opinion, a sheer impossibility. The evidence on which this case rests is mostly interested evidence or the evidence of persons who could be procured to give it at a very small expenditure. The ridiculous nature of some of it is shown by a passage in the deposition of one witness from Jhelum who, ignoring the fact that he had first said that the car was lying upside down in a disabled condition in a ditch, speaks of Mt. Masud Bano as insisting upon their immediately going on with the journey and chiding the constables for not permitting them to proceed.

Coming now to the Amritsar incident—the actual abduction—the main evidence is that of the girl herself. It is now a well settled rule in these cases that the evidence of the girl is to be taken with a great amount of caution and it could be argued that the tongawala and the female servant are also interested witnesses. Mt. Savitri, the other school girl, is ostensibly a disinterested witness; but there are signs on comparing her statement in Court with that which she made before the police that she has improved her story to her own greater credit and glory and is therefore not completely reliable. But not the slightest

reason has been given for disbelieving the evidence of Lala Durga Das, who appears to be a respectable gentleman, gives a satisfactory reason for being where he was and is not shown to be unduly interested in either party. His evidence clearly proves the offence of forcible abduction of this girl. Moreover there is ample corroboration of it by other circumstances. Not only are the circumstances of the arrest of these seven young men at Jhelum extremely strong corroboration of the story told by the actual eye-witnesses of the abduction, but also there is further corroboration in the report made by Miss Sant Singh, the Principal of the school. This report was made immediately and gives an account of the affairs which is substantially the same as that given later in Court. Her report was made at 9.15 and she actually gave Mr. Morris, the Deputy Superintendent of Police, the number of the car in which the girl had been taken away. It seems to me therefore that the prosecution story as narrated by the two sets of witnesses at Amritsar and Jhelum is correct in every substantial particular.

It is clear therefore that Mt. Masuda Bano was forcibly taken away in a motor car from Amritsar against her will. This is shown by the evidence of Lala Durga Das and the other witnesses as well as her own statement for they show that she was dragged into the car struggling and crying for help. It is difficult in these circumstances to hold with counsel for the appellants that she accompanied Ghulam Mustafa willingly. A good deal has been made of the fact that at one place, according to her own statement, the car stopped to get petrol and that she had an opportunity of calling for help. But counsel appears to have a very exaggerated opinion of the courage and determination of a young girl in these circumstances, surrounded as she was by seven young men armed with swords. As her statement shows, they threatened her with the swords if she made any attempt to escape or attract attention. It is obvious that in these circumstances the wretched girl could do nothing. But even a forcible abduction does not amount to an offence under S. 366, I. P. C., unless there are the other ingredients, namely the intention either that the girl should be seduced or forced to illicit intercourse or that she should be compelled to marry against her will. In a case of this sort, there can seldom be direct evidence as

to the actual intention of the abductor and that intention must be inferred from the circumstances. S. 114, Evidence Act provides that the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Human nature being what it is, whenever one finds a young man abducting a girl of marriageable age, the first and natural presumption must be that he has abducted her with the intention of having sexual intercourse with her, either forcibly or with her consent after seduction or after marrying her. If he has any intention other than that which is suggested by the natural circumstances of the case, the burden lies upon him under S. 106, Evidence Act to prove that intention. *Illus. (a)* to S. 106 is clearly in point. Therefore in this case the initial natural presumption is that Ghulam Mustafa abducted Mt. Masuda Bano with the intention of having sexual intercourse with her either after having married her or not. There is however in this case the further evidence of the girl herself who stated in answer to a question by the Public Prosecutor that the appellants told her in the car that she was being taken to the frontier for the purpose of being married to Ghulam Mustafa. I am not impressed by the argument of Mr. Saleem that this statement of the girl is in any way unnatural because it appears at the very tail end of her statement. He contends that as her whole statement showed herself as not consenting to the act of the appellants, it was unnecessary for her to say so in express terms. It was obviously the duty of the Public Prosecutor in a case under S. 366 to establish the intention by direct evidence if he could, and therefore it was very proper of him at the end of the girl's statement to ask the questions to which she has given these replies, and I cannot see eye to eye with counsel in finding anything suspicious in the fact that they appear at the end of her examination-in-chief. It should be noticed that this portion of the girl's evidence is actually favourable to the appellants rather than otherwise because it enables the Court to hold that the appellants had not the more serious intention of seducing or raping her but the less serious intention of compelling her to marry one of them.

The appellant Ghulam Mustafa has indeed given a version of what his intentions were. According to him, he was taking the girl with her own consent to a visit to the archaeological remains at Taxila. (His Lordship then discussed the evidence and proceeded.) Then again counsel have laid stress upon the fact that the girl's statement was recorded under S. 164, Criminal P. C. and that the Magistrate for some reason which is not apparent added a footnote to her statement that he had warned the girl of the consequences of departing from it. But there is nothing whatever to show that this statement of the girl was taken at the instance of her father and it seems to me that it was merely a routine matter by the police. The police know by experience that in abduction cases the girl is likely to make her statement according to the wishes of whichever party happens to have control of her and probably in this case they were afraid that attempts would be made by the relations of the boy who were also the relations of the girl to get her to depart from her story. That such influences were at work is shown by the evidence which the girl's own aunts have been induced to give, and which I regretfully have to state that I believe to be false.

It seems to me therefore that the case of forcible abduction with the intention of forcing this girl to marry Ghulam Mustafa against her will is completely proved against the appellants who also as members of an unlawful assembly are all and each of them liable for any acts committed in the furtherance of the object of that assembly. But I am of opinion that the sentences passed by the learned Magistrate in this case are most excessive. No doubt the case is a serious one and is to some extent made more serious by the fact that the girl is a respectable girl and that considerable damage had been done to her reputation by the act of the appellants even though she was an innocent and unwilling party. Many of her more evil-minded acquaintances will still be refusing to believe in her innocence. But, on the other hand, the sentences inflicted are out of all proportion to the sentences which are usually inflicted in cases of this sort. Possibly, the Magistrate has been influenced by the display of force and the theatrical nature of the appellants' act; but this appears to me to have been more in the nature of reckless folly than of ordinary criminality. Added

to this there are the facts that the intention which has been established was the less serious of the intentions contemplated by the section under which they are punishable and also that there is no evidence that the girl was molested in any way to any greater extent than was called for by the necessity of taking her away and making her keep quiet. In these circumstances, whilst I uphold the conviction, I reduce the sentences of Ghulam Mustafa, Muhammad Shah, Suleman, Muhammad Sadiq and Sehr Gul to 18 months' rigorous imprisonment each and that of Muhammad Rafi to nine months' rigorous imprisonment. I am unable to appreciate the learned Magistrate's reasons for holding Mahmud Ali's guilt less than that of his companions, and his sentence is accordingly reduced to the same as theirs, i. e. 18 months' rigorous imprisonment.

R.M./R.K.

Sentences reduced.

A. I. R. 1938 Lahore 477

COLDSTREAM J.

Sadulla — Accused — Petitioner.

v.

Emperor.

Criminal Misc. Petn. No. 247 of 1937, Decided on 25th October 1937, for transfer of case from the Court of Addl. Dist. Magistrate, Gurgaon.

Criminal P. C. (1898), S. 164 — That maker of statement is person in Court can be proved by police officer.

The fact that the person who made the statement under S. 164 is the person in Court can be proved by the police officer who had the statement recorded and the trying Magistrate need not be examined. [P 477 C 2]

Tasadduq Hussain — for Petitioner.

Order.—This application is not opposed. Counsel states that it is necessary to call the trying Magistrate to prove that the witnesses to be cross-examined were the persons who made statements which were recorded under S. 164, Criminal P. C. The records of such statements are presumed to be genuine (*see* S. 80, Evidence Act) and this fact that the person who made a statement under S. 164, Criminal P. C. is the person in Court can be proved by the police officer who had the statement recorded. This application appears to be frivolous and is dismissed.

S.O./R.K.

Application dismissed.

A. I. R. 1938 Lahore 478

ADDISON AND DIN MOHAMMAD JJ.

Mt. Tulsi Bai—Plaintiff — Appellant.
v.*M. Haji Bakhsh and another, Official Receiver, Jhang, Defendants —**Respondents.*

First Appeal No. 347 of 1936, Decided on 7th October 1937, from decree of Senior Sub-Judge, Jhang, D/- 8th June 1936.

Hindu Law — Co-parcenary — Relinquishment — Renouncement should be in favour of all co-parceners and of entire interest.

A co-parcener cannot renounce his interest except in favour of all other co-parceners. Moreover a co-parcener cannot renounce his interest in part of the joint family property. [P 479 C 1]

*Achhru Ram and Indar Dev Dua —**for Appellant.**Mehr Chand Mahajan, C. L. Aggarwal and Krishna Swarup —**for Respondents.*

Addison J.—One Ram Lal died on 31st May 1935 and his widow Mt. Tulsi Bai instituted the present suit on 29th August 1935 for a declaration that she was the owner of the house in suit and that it was not liable to attachment and sale in execution of a decree obtained by defendant 1 Haji Bakhsh against Thakar Das, son of the deceased Ram Lal. Thakar Das is the son of Ram Lal by his first wife. Mt. Tulsi Bai, plaintiff, was his second wife and she has only daughters surviving by Ram Lal. Her case in the plaint was that Thakar Das fully separated from his father Ram Lal in 1912 and had no concern with Ram Lal's estate after that date. It was added that Thakar Das executed a deed of relinquishment as regards the suit house on 21st October 1929 while the will of Ram Lal dated 25th May 1924 also supported the fact that the plaintiff was the owner of the suit house. The decree-holder, defendant 1, pleaded that there was no deed of relinquishment, that Thakar Das remained a member of the joint family with his father, that if any deed was executed about the suit house it was fictitious and collusive and entered into with a view to defeat the creditors of Thakar Das. Further, the deed of relinquishment could not be in favour of one member of the joint family nor could it be in respect of part of the property. Thakar Das, defendant 2, also pleaded that he did not separate from his father in 1912. He claimed to be a member of the joint Hindu family

with his father and his own sons. He added that the deed of relinquishment was fictitious and without consideration and was never acted upon. On these pleadings the following comprehensive issue was framed :

Does the house in dispute exclusively belong to the plaintiff and is not therefore liable to attachment and sale in the decree of defendant 1 against defendant 2 ?

The trial Judge held that there was no separation and that the family was a joint Hindu family. He has also held that the suit property was joint Hindu family property, that the deed of relinquishment was entered into to defeat the creditors of Thakar Das who was at the time heavily indebted and that no consideration had been established for this deed of relinquishment. Finally it was held that Thakar Das could not give up his rights in this particular item of the joint family property which was ancestral and in any case his relinquishment could not affect the rights of his sons. The suit was accordingly dismissed and the plaintiff has appealed. There is not an iota of evidence that there was any separation in 1912 and this part of the case was not pressed. The house in suit was built on ancestral land by Ram Lal from 1919 to 1921. He was then employed under Government in Quetta but it has been established that there was a considerable nucleus of ancestral property which used to be managed by Thakar Das, Ram Lal's son, and Mutawalli Ram, Ram Lal's brother. Ram Lal was receiving this income. It may be that he spent some of his own earnings as a Government servant on the construction of the house but that has not been proved, and as already stated it has been established that there was income property. The house was built on ancestral land and in these circumstances it must be held that the house formed part of the joint family property.

Though Ram Lal never separated his son, it is in evidence that he became somewhat displeased with him in 1929. Ex. P. W. 7/3 dated 6th February 1929, is a letter written by Ram Lal to Dial Das whose son married one of Ram Lal's daughters. (After discussing evidence on record their Lordships proceeded.) Another point arises in this case. Thakar Das had then sons and it is clear that he could not renounce the rights of his sons in the property in question. It is also stated in Para. 264 of Mulla's Principles of Hindu

Law, Edn. 8, that the Madras High Court has held that a co-parcener may renounce his interest in the co-parcenary property either in favour of the other co-parceners as a body or in favour of one or more of them, but the Allahabad High Court has held that a co-parcener cannot renounce his interest except in favour of all other co-parceners. The Allahabad view seems to be the better but, in any case, there is no authority that a co-parcener can renounce his interest in part of the joint family property, as was done in the present case, in favour of one or all other coparceners. This therefore cannot be taken to be a case of renunciation by a co-parcener of his share in the joint family property. The will is obviously invalid as regards the ancestral joint Hindu family property, which this house must be held to be.

Finally it was contended by the learned counsel for Thakar Das that, whether it was held that there was renunciation or not, the plaintiff had still no title as the suit property must be held to be ancestral and the father had therefore no power to will it to his wife in 1924. Thakar Das on his father's death thus stepped in as heir to his father. It is not necessary to decide this point as the appeal must fail on the grounds that there was no consideration for the deed of relinquishment, that this deed was entered into to defeat Thakar Das' creditors, and that there can be no renunciation of a portion of a co-parcenary property, while such renunciation must be in favour of all the co-parceners, which would have left Ram Lal and Thakur Das' sons as owners of the property in their capacity as members of a joint family. For the reasons given, we dismiss the appeal with costs.

B.D./R.K.

*Appeal dismissed.***A. I. R. 1938 Lahore 479**

BHIDE J.

*Lala Daulat Ram and others —
Defendants — Appellants.*

v.

*Lala Haveli Shah and others —
Plaintiffs — Respondents.*

Second Appeals Nos. 1085 and 1086 of 1937, Decided on 17th January 1938, from decree of Dist. Judge, Lyallpur, D/- 24th June 1937.

(a) Mutation — Entries in Jamabandi — Presumption.

A presumption of correctness attaches to the entries in jamabandi made in due course of law.

[P 480 C 1, 2]

(b) Transfer of Property Act (1882), S. 11—
Sale of site of shop — Enjoyment cannot be restricted.

When ownership of a site of a shop is transferred to the vendee, its enjoyment cannot be restricted by conditions, e. g. that the vendee should not convert the shop into two or more. [P 480 C 2]

Shamair Chand — *for Appellants.*

V. N. Sethi — *for Respondents.*

Judgment. — Civil Appeals 1085 and 1086 of 1937 are connected and will be disposed of together. They arise out of two suits of a similar character, in which the plaintiffs sued for a declaration that they were the owners of the land underneath the tharas in front of the shops of the defendants and that the defendants were not entitled to make certain alterations in their shops contrary to the conditions of the sale of the sites underneath the shops made by Mr. Warburton, the predecessor-in-interest of the plaintiffs, in favour of the defendants. The defendants claimed that they were the owners of the site underneath the tharas, that the alterations and additions made by them were not contrary to the conditions of sale and lastly that the said conditions were not binding in law. The trial Court dismissed the suits. On appeal, the learned District Judge has decreed the claim to the extent of declaring that the plaintiffs were the owners of the site underneath the tharas in front of the shops of the defendants. From this decision, the defendants have preferred appeals while the plaintiffs have preferred cross-objections.

The main point for decision in the appeals is whether the site underneath the tharas has been rightly held to be the property of the plaintiffs. The finding in favour of the plaintiffs is one of fact, but it is contended on behalf of the defendants-appellants that the finding is vitiated by the fact that the learned District Judge has omitted to take into consideration some material evidence and has misconstrued some of the documents relied on by the defendants. As regards the oral evidence, attention was invited to the evidence of Sant Singh, Jagat Singh, Hira Nand and Mohammad Ismail who have deposed that the land underneath the tharas was sold to the defendants. It is true that in the printed conditions of the sale which were published in advance, it was stipulated that the site underneath the tharas would remain with the vendor, i. e. Mr. Warburton, but the evidence of the

above witnesses was to the effect that at the time of the sale these conditions were modified and it was stated that the site underneath the tharas would go to the vendees. Sant Singh has deposed that he held a power of attorney and the alteration made in the conditions, as stated by him, is supported by an endorsement made by him on the receipt given to the defendants. The learned District Judge has referred to this receipt, but has found that the alteration in the conditions was made after the sale. This, however, was not the evidence given by Sant Singh and the other witnesses referred to above. The evidence was that the alteration was made at the time of the sale by auction and the endorsement merely was a piece of evidence in support of this alteration. Jagat Singh, Hira Nand and Mohammad Ismail have apparently purchased similar sites from Mr. Warburton and it might be said that their evidence is interested. But there seems to be no good reason for doubting the veracity of Sant Singh who apparently held a general power of attorney from Mr. Warburton. Nothing has been brought out in his cross-examination to throw doubt on his veracity or evidence produced to rebut his statement that he held a power of attorney. The evidence of these witnesses received further support from the testimony of Miss Warburton, daughter of the vendor, who has also supported the contention of the defendants-appellants. She has not been shown to be in any way interested in supporting the defendants.

The testimony of the defendants' witnesses also receives strong corroboration from the mutation Ex. D.2 with respect to the sale of the site of the shops. The learned District Judge has remarked that the mutation referred to the shops as a whole and not to the platforms particularly. It is difficult to understand what the learned District Judge means exactly by this remark. The learned Judge of the trial Court has pointed out that the areas given in the mutation show that the sites sold to the defendants included the land underneath the tharas. This finding of the trial Court was not upset by the learned District Judge and its correctness was not disputed before me even by the learned counsel for the plaintiffs. The mutations were followed in due course by entries in the jamabandi and there is a presumption of correctness attaching to

these entries. The burden lay heavily on the plaintiffs to show that these entries were wrong and that as a matter of fact the land underneath the tharas had not been sold to the defendants. They have, however, failed to adduce any such evidence. In the circumstances, it must be held that the land underneath the tharas has been sold to the defendants and that the trial Court's decision on the point was correct. I may state here that I am confining myself in this case to the sale of the sites in favour of the defendants. The learned District Judge has referred to certain copies of judgments which indicated that the purchasers of certain other shops were not allowed the ownership of sites underneath the tharas in front of their shops. I am not however concerned with the correctness of the decision in those cases. The present case has to be decided on the evidence produced by the parties and taking into consideration the mutation Ex. D.2 along with the oral evidence discussed above, I am of opinion the trial Court's decision was correct.

So far as the cross-objections are concerned, the only point raised was that the learned District Judge was not right in holding that in view of S. 11, T.P. Act, the conditions restricting the making of alterations in the shops were void. The only objection raised by the learned counsel for the plaintiffs was that the defendants were not entitled to convert their shops into two or more shops as they had done. The restriction obviously appears to me to be in contravention of the provisions of S. 11, T. P. Act; inasmuch as when the ownership of the site of the shops was transferred to the defendants its enjoyment could not be restricted by the vendor. The learned counsel for the plaintiffs next contended that the restriction was necessary for the beneficial enjoyment of the adjacent properties. He was however unable to explain how the partition of one shop into two or more shops could be reasonably considered to affect the enjoyment of the neighbouring properties. It is also to be noted that the plaintiffs are not themselves the neighbours and no objection has been raised in this respect by the owners of the neighbouring shops. On the above findings, I accept the appeals and reject the cross-objections and dismiss the plaintiffs' suit with costs throughout.

V.B.B./R.K.

Appeals accepted.

A. I. R. 1938 Lahore 481

DALIP SINGH J.

Mt. Parbati — Appellant.

v.

Gopal Das — Respondent.

First Appeal No. 213 of 1937, Decided on 25th January 1938, from order of Sub-Judge, First Class, Ludhiana, D/- 6th April 1937.

(a) Mortgage—Document effecting change in rate of interest does not require registration.

A document effecting a change in the rate of interest payable on a mortgage is not a change in the mortgagee's interest in land and therefore does not need registration. [P 481 C 2]

(b) Registration Act (1908), S. 17 — Mortgage of whole property—Subsequent recognition of absence of any interest created by original deed in particular portion of property does not require registration.

A dispute regarding the amount and interest due on a mortgage of a certain property was referred to arbitration. The arbitrator finding that in a suit it had been decided that the mortgagor had no interest in 5/16ths of property, gave the award that the mortgagee was to realize his amount by sale of 11/16ths of the property originally mortgaged :

Held that the award only recognized the fact that the mortgagee never had any interest in that 5/16ths of the property for the simple reason that the mortgagor had also no interest in that property. There was no creation or extinction or limitation of any right by the award. It was merely the recognition of absence of any interest created by the original deed in 5/16ths of the property and hence it did not require registration.

[P 481 C 2]

Vishnu Datt — *for Appellant.*

Indar Dev for Achhru Ram

— *for Respondent.*

Judgment. — In this case a widow, *Mt. Parbati*, mortgaged immovable property without possession for Rs. 6500 with the respondent; the rate of interest was annas 14 per cent. per mensem with six-monthly rests. The mortgage was dated 8th February 1924. On 1st June 1935 disputes as to the amount of the mortgage and the interest were referred to Lala Brij Lal Sayal, pleader, for arbitration. The arbitrator gave his award on 12th November 1935. The amount was fixed at Rs. 17,800. The amount was to be paid within six months; in case of default, the respondent was to realize the amount by the sale of 11/16ths of the mortgaged property because it was pointed out that *Mt. Parbati's* rights in the encumbered property amounted only to 11/16ths as had previously been determined in a suit. The award was put into Court. An objection was raised that the award needed registration. The grounds

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alleged in the Court below were that the award had limited the mortgage to 11/16ths of the property instead of the whole property originally mortgaged and that further the rate of interest had been awarded not at the rate fixed in the deed but at as. 12 per cent. per mensem with annual rests and for both these reasons the award needed registration. The trial Court held that the award did not need registration for these reasons. On the other issues the Court found in favour of the respondent and passed a decree *ex parte* against *Mt. Parbati* as on the date fixed for evidence *Mt. Parbati* did not appear and her counsel withdrew for lack of instructions. *Mt. Parbati* has come in appeal and the learned counsel appearing for her has urged the same points as were urged, as mentioned already, in the Court below and has further pointed out that the award hypothecates the remainder of the property of the widow. I have no hesitation in agreeing with the trial Court as regards the points urged before it. In A I R 1919 Lah 212,¹ there is a ruling directly on the point, namely that a change in the rate of interest is not a change in the mortgagee's interest in land and therefore does not need registration.

As regards 11/16ths of the property a suit had been brought by another claimant against *Mt. Parbati* and it had been held that he was entitled to 5/16ths of the property. The award only recognizes the fact that the mortgagee never had any interest in that 5/16ths of the property for the simple reason that the mortgagor had also no interest in that property. There was no creation or extinction or limitation of any right by the award. It was merely the recognition of absence of any interest created by the original deed in 5/16ths of the property. As regards the last point however, the only reply by the learned counsel for the respondent was that there was nothing to show that the remaining property amounted to Rs. 100 in value. Hence there was nothing to show that the addition of interest in land by the new hypothecation fell within S. 17 (1) (e), Registration Act. The learned counsel for the appellant has not been able to show me any evidence that this hypothecation creates any interest in the immovable property of the value of over Rs. 100. I therefore dismiss the appeal with costs.

K.S./R.K.

Appeal dismissed.

1. *Isar Mal v. Tuka*, (1919) 6 A I R Lah 212=50 I C 647.

* * A. I. R. 1938 Lahore 482

ADDISON AND DIN MOHAMMAD JJ.

Mt. Resham Bibi — Plaintiff —

Appellant.

v.

Khuda Bakhsh — Defendant —

Respondent.

Second Appeal No. 136 of 1937, Decided on 24th November 1937, from the order of Abdul Rashid J., D/- 22nd October 1937.

(a) Mahomedan Law — Marriage — Apostasy.

Apostasy ipso facto effects cancellation of a Muslim marriage. [P 482 C 2]

* * (b) Mahomedan Law — Apostasy — Declaration attended with volition to which declarer adheres and in which he persists is sufficient — Motive of declarer is immaterial and Court is barred from making further enquiries.

Renunciation of a religious faith requires no other proof than a person's declaration, the only condition being that the declaration is not casual, of which the declarer may repent afterwards, but it should be attended with volition and should be such to which the declarer adheres and in which he persists. The motive of the declarer is immaterial. A genuine conversion is one which has actually taken place and if once it is proved as an accomplished fact, further enquiry is barred: *Case law reviewed.* [P 484 C 1]

Where the plaintiff declared not only in the plaint but even in her statement in Court as her own witness that she did not believe in God, the Qoran and the Prophet of Islam :

Held that she at once went out of the pale of Islam and the marriage with her husband was dissolved. [P 484 C 1]

Held further that the lower Court was not justified in testing the bona fides and sincerity of the plaintiff especially by the objectionable and unwarranted procedure of allowing pork to be brought to Court and calling upon the plaintiff to take it in open Court. [P 484 C 2]

Madan Mal — *for Appellant.*

Mahbub Ilahi — *for Respondent.*

Din Mohammad J.—The suit out of which this appeal has arisen was instituted by one Mt. Resham Bibi against her husband Khuda Bakhsh for a declaration that she was no longer his wife as she had become an apostate from Islam three or four years prior to the institution of the suit. She alleged that she did not believe in God, the Qoran and the Prophet of Islam and that in fact she professed no religion. Her marriage had consequently been dissolved and the defendant could no longer treat her as his wife. The cause of action for the suit had arisen as her husband in spite of being apprised of the fact of her apostasy was bent upon asserting his conjugal rights against her and had even lodged a case under S. 498, I. P. C. in which he had claimed her as his wife.

The defendant controverted the allegation of apostasy and averred that the plaintiff had not in fact renounced Islam, that his marriage with her had not been dissolved on any account and that the plea of renunciation had been set up falsely, merely to save the accused in the case under S. 498, I. P. C.

On the pleadings of the parties the only material issue that arose was whether the plaintiff had renounced Islam. The Subordinate Judge relying on the declaration made by the plaintiff in her plaint, supported as it was by her statement in Court, came to the conclusion that she had renounced Islam and granted her the decree prayed for. The defendant appealed against that decision to the District Judge who at the hearing of the appeal put to the test the plaintiff's alleged renunciation by offering her pork and impressed by her refusal to do so as well as by the manner of her dress and speech concluded that the plaintiff's assertion was false, and holding that her mere word of mouth was not sufficient to prove renunciation and that her marriage with the defendant was still subsisting, he allowed the appeal and reversed the decree of the Subordinate Judge. From that decision the plaintiff preferred an appeal to this Court and her appeal came on for hearing before Abdul Rashid J. The appellant's counsel contended before him that the District Judge could not go behind the declaration made by the plaintiff and that in a case of apostasy the statement made by the person concerned was sufficient. On behalf of respondent, on the other hand, it was urged that in all such cases it was necessary to hold an enquiry into the alleged renunciation in order to determine whether it was genuine or otherwise, that the District Judge was consequently justified in proceeding in the manner in which he had done and that the finding of fact arrived at by the District Judge that no renunciation had taken place could not therefore be disturbed on second appeal. Certain authorities were cited on both sides but finding that none of them threw any light on the question at issue, the learned Judge recommended that the case should be referred to a Division Bench for decision.

Before us, too, the same arguments have been advanced by the parties and the same authorities relied upon. The question whether apostasy ipso facto effects cancellation of a muslim marriage, is not disputed,

nor is it denied that if the plaintiff's declaration were true, it would amount to apostasy. The only question with which we are concerned therefore is whether the District Judge could ignore the plaintiff's declaration and institute an inquiry into its genuineness in order to determine the extent of her disbelief.

The earliest decision to which reference may be made in this connexion is the one reported in 132 P R 1884.¹ There one of the learned Judges composing the Division Bench in the course of his judgment remarked that the conversion must be taken to be bona fide and not colourable and the other learned Judge observed that a bona fide conversion to Christianity is an act of apostasy from Islam.

In 106 P R 1891,² the husband had in a fit of anger uttered disrespectful and abusive language regarding the law and the Prophet of Islam and the learned Judges who constituted the Division Bench observed that there was nothing to show that the husband intended thereby to abjure his religion or to deny the Prophet.

In 61 P R 1899,³ Reid and Walker JJ. after laying down the rule of the Muslim law governing such cases remarked that the repudiation in that case was not colourable but bona fide.

In 85 P R 1906,⁴ Chatterji J. who delivered the judgment of the Division Bench observed that there was no serious contention that the defendant's conversion was a colourable and not a bona fide one.

In 29 I C 857,⁵ a Division Bench of the Punjab Chief Court said that if the conversion was an accomplished fact and that if it was not proved to be a colourable transaction, the Court could not decline to give effect to it because the underlying motive was not a proper one. The learned Judges further observed that evidence showed that the woman had adopted the Christian religion not as a device or as a temporary measure but with the intention of remaining a Christian for ever, and in

the absence of any evidence to the contrary, they were unable to hold that the conversion should be regarded as a colourable transaction and that it should not be acted upon.

In 71 I C 830, which is the same as A I R 1924 Lah 397,⁶ Scott-Smith J. in a case in which the plaintiff had alleged that she had renounced Islam and had repeated her allegation in her statement in Court held that the only question which had to be determined was whether renunciation had taken place.

In A I R 1928 Lah 956,⁷ Dalip Singh J. observed that it was not within the province of the Court to enquire into the genuineness or otherwise of the conversion and that if formal renunciation was accompanied by rite of baptism, it was immaterial whether her motive was a genuine conversion or a mere device to get rid of her husband.

In A I R 1934 Lah 976,⁸ Beckett J. followed A I R 1928 Lah 956⁷ and made similar observations.

In A I R 1936 Lah 666,⁹ Agha Haider J. held that so long as conversion was genuine, ulterior and even sordid motives would not affect the question.

In A I R 1937 Lah 759,¹⁰ Tek Chand J. while approving of the observations made in some of the judgments referred to above held that all the same the factum of renunciation must be proved, and in the case before him did not disturb the finding of fact arrived at by the District Judge that the apostasy of the wife was not genuine.

These are the only authorities to which our attention was directed in connection with the subject under discussion and we have now to determine what these authorities actually lay down in respect of the necessity of proving the bona fides or the mala fides of the conversion and to what extent the enquiry into these matters can proceed. Speaking for myself, I am disposed to think that wherever the Judges applied their mind to this aspect of the case and

1. *Mt. Khan Bibi v. Pir Shah*, (1884) 132 P R 1884.

2. *Mt. Nani Jan v. Hussain*, (1891) 106 P R 1891.

3. *Allah Bakhsh v. Mt. Amir Begum*, (1899) 61 P R 1899=15 P L R 1900.

4. *Imam Din v. Hassan Bibi*, (1906) 85 P R 1906=148 P L R 1906.

5. *Ghaus v. Fajji*, (1915) 2 A I R Lah 14=29 I C 857=114 P L R 1916.

6. *Bakho v. Lal*, (1924) 11 A I R Lah 397=71 I C 830.

7. *Amar Nath v. Mt. Ved Kaur*, (1928) 15 A I R Lah 956=117 I C 664.

8. *Mt. Sardaran v. Allah Baksh*, (1934) 21 A I R Lah 976.

9. *Sardar Mohammad v. Mt. Maryam Bibi*, (1936) 29 A I R Lah 666=165 I C 383.

10. *Mt. Saidan v. Sharaf*, (1937) 24 A I R Lah 759=169 I C 927.

remarked that the conversion or renunciation was not a colourable transaction, they meant nothing more than that the conversion or renunciation had taken place in fact. They neither referred to the sincerity or insincerity of the conversion or to the nobility or otherwise of the motive. To my mind a person's religious belief is not a tangible thing which can be seen or touched. It is the mental condition of one's believing in certain articles of faith that constitutes one's religion and if one ceases to believe in them, which again is a mere mental condition, one automatically ceases to profess that religion which is made up of those articles of faith. Consequently, to probe further into the matter and to try to ascertain the true nature of one's disbelief is sheer intermeddling, not justifiable on any ground. In the words of Lord Macnaghten "No Court can test or gauge the sincerity of religious belief" or as put by another eminent English Judge even more forcibly "Even the devil himself knoweth not the heart of man." Renunciation of a religious faith therefore requires no other proof than a person's declaration, the only condition being that the declaration is not casual, of which the declarer may repent afterwards, but it should be attended with volition and should be such to which the declarer adheres and in which he persists. The motive of a declarer is similarly immaterial. A person may renounce his faith for love or for avarice. He may do so to get rid of his present commitments or truly to seek salvation elsewhere. But that would not affect the factum of renunciation, and in cases like the present, it is the factum alone that matters and not the latent spring of action which results therein. If, therefore, apostasy takes the form of conversion to another faith, proof of conversion in accordance with the tenets of that faith will be sufficient to indicate apostasy and if it is not accompanied by any such extrinsic manifestation, declaration as stated above will do. A genuine conversion is one which has actually taken place and if once it is proved as an accomplished fact, further enquiry is barred. In the case before us, as soon as the plaintiff declared not only in the plaint but even in her statement in Court as her own witness that she did not believe in God, the Qoran and the Prophet of Islam, she at once went out of the pale of Islam. As remarked by Plowden J. in 132 P R 1884,¹

it is impossible to be of the Mahomedan religion without the belief that the Prophet of Islam was and is the Prophet of God,

or as remarked by Stogdon and Beachcroft JJ. in 106 P R 1891,²

the essentiality of apostasy is said to consist in the uttering of words against the Mahomedan religion, after embracing the Mahomedan faith, which is the belief in the Prophet of Islam with respect to all that came down to him from the Almighty God.

A Muslim derives his law from the Qoran and next to the Qoran relies on the record of the Prophet's sayings (otherwise known as traditions) in so far as it is authentic and is not in conflict with the Qoran. These sources alone are treated as sacred and all others are secular and thus open to human interpretation and human criticism. Neither the Qoran nor the traditions deal with the subject under discussion and the principles enunciated by the British Indian Courts in this respect are the only equitable and expedient rules which can be enforced. It is, in my opinion, most unconscionable to compel a wife to continue to owe her marital allegiance to a person whose religion she has relinquished and whose society she abhors. A recalcitrant wife cannot be even sent to jail under the present law and minds so far estranged cannot find peace under the same roof.

I would therefore hold that the plaintiff's marriage was dissolved as soon as she became apostate and that she was entitled to the declaration prayed for.

Before I conclude, I am compelled to say, that I strongly deprecate the manner in which the District Judge proceeded to test the plaintiff's bona fides. In the first place, this amounted to an admission of additional evidence which the District Judge was not empowered to admit in this way, and secondly the method adopted by him was most objectionable. He actually allowed pork to be brought into Court and called upon the plaintiff to take it to prove the sincerity of her declaration. The least that I can say is that the District Judge should have known that her refusal to take it was not sufficient to disprove her statement. One may relinquish a faith, which is an easy thing to do, but one may not acquire at the same time a liking for those things which one has been taught to detest throughout one's life. Such method of enquiry was neither contemplated by law nor warranted by the exigencies of the case.

For the reasons mentioned above, I would allow the appeal, set aside the decree of the District Judge and restore that of the trial Court. I would however leave the parties to bear their own costs throughout.

Addison J.—I agree.

K.S./R.K.

Appeal allowed.

A. I. R. 1938 Lahore 485

JAI LAL J.

Udham Singh — Defendant — Appellant.

v.

Pandit Bashambar Das, Plaintiff and others, Defendants—Respondents.

Second Appeal No. 1380 of 1936, Decided on 5th April 1937, from decree of Additional District Judge, Lahore, Dated 22nd July 1936.

Registration Act (1908), S. 17 (2) (xi)—Purchaser out of money left with him by vendor redeeming mortgage—Receipt reciting extinction of mortgage is admissible in evidence and can be raised by purchaser as attack in his suit to enforce contract and as defence in mortgagee's suit.

Where a property is mortgaged by the owner who subsequently sells it and the purchaser redeems the mortgage out of the money left with him, the receipt reciting the fact of extinction of the mortgage is admissible in evidence on the ground that the transaction is not between original parties to the mortgage. The purchaser can enforce the contract by means of a suit and also can raise the question by way of defence in a suit brought by the mortgagee : 7 All 820 and 27 All 305, *Foll.* [P 486 C 1]

Harnam Singh — for Appellant.

Amar Nath Monga — for Respondent (Plaintiff).

Judgment.—Girja Singh was the owner of the land in dispute. He had mortgaged it with possession to Udham Singh for Rs. 900. The plaintiff Bashambar Das purchased this land from Girja Singh and undertook to redeem the mortgage on payment of Rs. 900, which he retained out of the consideration for the sale in his favour. Alleging that he had paid Rs. 900 to the mortgagee Udham Singh he instituted the suit, out of which this second appeal has arisen for possession of the land. The trial Court dismissed the suit holding that the document on which Bashambar Das relied in support of his allegation that he had paid Rs. 900 to Udham Singh required

registration and being unregistered was inadmissible in evidence. On appeal the learned District Judge has reversed the decree of the trial Judge and has decreed the suit on two grounds : (1) that the document did not require registration because it did not on the face of it purport to extinguish the mortgage, and (2) that the document was not between the original parties to the mortgage and did not therefore require registration under the provisions of S. 17, Registration Act.

On the first point the learned Judge relied upon a judgment of this Court in 10 Lah 709,¹ but that judgment, in my opinion, does not support his conclusion because the document in that case made no reference to the extinction of the mortgage whereas in the present case the document is to the effect that the mortgagee had received the Rs. 900 which had been kept in trust with Bashambar Das and had given possession to him and had no connexion with the land in dispute which would be mutated in favour of Bashambar Das. He also added that the mortgage deed had been filed in a Civil Court in Lahore. The document on the face of it therefore does make mention of the extinction of the mortgagee's rights. This distinction does not seem to have been observed by the learned District Judge and his judgment therefore cannot be sustained on the first ground.

The second ground taken by the learned District Judge is however supported by two authorities of the Allahabad High Court in 7 All 820² and 27 All 305.³ The later judgment merely refers to the previous judgment and accepts as correct the law laid down there. In 7 All 820² several villages were mortgaged by the original owner who subsequently sold one of them and left Rs. 700 with the purchaser to redeem the village purchased by him. Rs. 700 was paid by the purchaser and an endorsement was made on the mortgage deed reciting the extinction of the mortgage. It was held that this endorsement was admissible in evidence on the ground

1. *Muhammad Hussain v. Karam Ilahi*, A I R 1929 Lah 312=118 I C 533 = 10 Lah 709=30 P L R 717.

2. *Gurdial Mal v. Jauhri Mal*, (1885) 7 All 820=(1885) A W N 279.

3. *Ganga Bakhsh v. Jagannath*, (1904) 27 All 305=1904 A W N 266=1 A L J 693.

that the transaction was not between original parties to the mortgage and that the subsequent purchaser, who paid part of the mortgage debt to redeem the village purchased by him, could enforce the contract by means of a suit and also could raise the question by way of defence in a suit brought by the mortgagee. Consequently it was held that the payment of the mortgage debt had been established and could be proved in the suit and the suit of the mortgagee was dismissed pro tanto. The principle of this judgment applies to the present case. The transaction is between persons who were not parties to the original mortgage deed and though the receipt relied upon by the respondent does recite the fact of extinction of the mortgage, if the view of the Allahabad High Court is correct, the matter could be raised both as a ground of attack in a suit brought by the purchaser and also as a ground of defence in a suit brought against him. No decision dissenting from the view taken in the Allahabad case has been cited at the bar. I consequently dismiss this appeal but leave the parties to bear their own costs throughout under the peculiar circumstances of the case.

P.R./D.S.

*Appeal dismissed.***A. I. R. 1938 Lahore 486**

JAI LAL J.

Lala Jiwan Ram — Petitioner.

v.

Messrs. Motor and General Finance Ltd. Delhi and another — Respondents.

Civil Revn. No. 863 of 1937, Decided on 27th January 1938, from order of Dist. Judge, Delhi, D/- 30th April 1937.

Arbitration—Award—Objection to award—Proceedings postponed twice, as Judge busy with other work—Petitioner not present on subsequent hearing when order to proceed ex parte passed—At next hearing, application filed to set aside ex parte order—No replication filed till then nor any final order passed—Petitioner held entitled to relief asked.

An application to file an award had been made against the petitioner. The petitioner filed his objections to the award. Twice the petition had to be postponed as the District Judge was busy with other work. Subsequently, the petitioner did not appear and order to take ex parte proceedings was passed. At the next hearing and before any final order had been passed against him, the petitioner appeared and asked for setting aside the ex

parte proceedings. No replication by the respondent had been filed till then:

Held that the petitioner was entitled to the ex parte proceedings being set aside. [P 486 C 2]

Dwarka Nath Aggarwal—*for Petitioner.*

Amolak Ram Kapur — *for Respondents.*

Order.—This is an application for revision of an order passed by the District Judge of Delhi refusing to set aside ex parte proceedings against the applicant. Originally an application to file the award had been made against the petitioner. The award had been made by an arbitrator said to have been appointed without the intervention of the Court. On 21st August 1936 the petitioner filed his objections to the award but the District Judge could not proceed with the matter because he was engaged in hearing some criminal appeal and the case was postponed to 21st November 1936 on which date it is admitted by the respondents they had to file the replication. But on that date no replication was filed indeed—none has been filed up to to-day—and it appears that the petitioner did not appear. The case however was postponed to 7th January as the Judge was otherwise busy. It also appears that notice of the change of the date to 7th January was given to the Mukhtar-i-khas of the petitioner. On 7th January however the petitioner did not appear and ex parte proceedings were taken against him and the case was postponed to 11th January. On that date the petitioner did appear and asked for the setting aside of the ex parte proceedings. The learned District Judge on an application being subsequently made refused to set aside the order.

As in the present case twice it had been postponed on 21st August and on 21st November owing to the learned District Judge being busy with other work and no replication has up to this time been filed and the petitioner appeared before any final order was passed against him, except an order to proceed ex parte against him, he was, in my opinion, entitled to the proceedings being set aside on an application to that effect being made. He did make that application and the learned District Judge was not justified under the circumstances to allow the ex parte proceedings to remain against the petitioner. I accept this petition and set aside the order of the learned District Judge and send back the case to him with direction to proceed with the proceedings relating to the filing of the

award in accordance with law. The costs of this petition shall abide the result. The parties have been directed to appear before the District Judge on 1st March 1938.

V.B.B./R.K.

Petition accepted.

A. I. R. 1938 Lahore 487

TEK CHAND J.

Khota Ram and another — Defendants
— Appellants.

v.

Timku Ram and another, Plaintiffs
and others — Defendants — Respondents.

Second Appeal No. 1559 of 1936, Decided on 8th April 1937, from decree of District Judge, Dera Ghazi Khan, D/- 21st August 1936.

Co-sharer—Joint possession—Person opening doorway in wall of his house abutting on common courtyard—Each house abutting on courtyard and having door in it — Opening of door does not amount to ouster of other co-owners—Suit for injunction does not lie unless inconsistent or excessive user is proved.

Where a person opens a door way in the wall of his own house abutting on a courtyard which is the joint property of the parties and each one has a door to his house opening in the courtyard, the opening does not amount to an ouster of the other co-owners from the court-yard and the other co-owners cannot bring a suit for injunction to restrain him from opening the door unless an excessive user or a user inconsistent with that to which it has been put before, has been proved : 46 P R 1868 and A I R 1930 Sind 34, Rel. on ; A I R 1925 Lah 287, Disting. [P 487 C 2]

S. L. Puri and Nand Lal Salooja —
for Appellants.

M. L. Puri —
for Respondents (Plaintiffs).

Judgment.—The plaintiffs and defendants 1 to 5 are the owners of seven houses marked A to G, which abut on a common courtyard or deorhi marked H on the plan. The plaintiffs own houses A and B. Houses C and G belong to defendants 1 and 2, while houses D, E and F belong to defendants 3 to 5. Formerly, houses A to F only had doors opening in the courtyard H. House G belonged to third parties. One of the back walls of this house adjoins the courtyard, but there was no door opening in it. Sometime before the suit defendants 1 and 2 purchased house G from the original owners, and they have opened the door J in the back wall of the house opening in the courtyard. The plaintiffs have brought a suit for a perpetual injunction, directing

defendants 1 and 2 to close the door marked J, and restraining them from opening any other door or window towards the courtyard. The suit was resisted by defendants 1 and 2. Defendants 3 to 5, who own houses D, E and F, which, as already stated, also open into the courtyard, did not raise any objection to the opening of the door J in the courtyard by defendants 1 and 2. The suit was dismissed by the trial Court. On appeal by the plaintiffs however the learned District Judge has granted them a decree for the injunction asked for.

It is common ground between the parties that the courtyard is the joint property of the plaintiffs and defendants 1 to 5. It is also admitted, that the doors of houses A to F have opened in this courtyard for a very long time. The question for consideration is whether defendants 1 and 2, who are co-owners of this courtyard and have now become the owners of house G, have a right to open the door in the wall of this house abutting on the courtyard. It is not denied for the plaintiffs-respondents, that defendants 1 and 2 have got a right to open a door in the wall of their house G. It is however contended that they have no right to pass through this door to the courtyard. I can see no legal foundation for this contention. As already stated, the courtyard is the joint property of the parties including defendants 1 and 2. The opening of the door J does not amount to an ouster of the plaintiffs or the other co-owners, nor does it put the courtyard to a use inconsistent with the user to which it had been put heretofore. I cannot therefore see how the plaintiffs have got any cause of action to maintain the present suit. Further, it has not been shown that the courtyard is being put to such an excessive user by defendants 1 and 2 by opening the door in question, as would warrant the issue of the injunction prayed for by the plaintiffs. In 46 P R 1868¹ it was held that where a person opens a doorway in the wall of his own house, abutting on a courtyard which is the joint property of the parties, the other co-owners have no cause of action against him unless it is proved that the opening of the door has rendered the common property less useful to the other co-sharers or has deprived them of any right which they otherwise would have had. In the present case, none

1. Heera Singh v. Teloo, (1868) 46 P R 1868.

of these things is established. See also to the same effect A I R 1930 Sind 34,² the facts of which were very similar to those of the present case.

The learned counsel for the respondents relied upon a single Judge's judgment of this Court reported in 84 I C 917.³ That case however was decided on its peculiar facts and did not lay down a rule of general application. Further, it was found there that the position of the door had altered the character of the plot then in dispute, which had been reserved for the common purposes of the village. In my opinion, the learned District Judge is clearly in error in decreeing the plaintiffs' suit. I accept the appeal, set aside the judgment and decree of the learned District Judge and restore that of the Court of first instance dismissing the plaintiffs' suit with costs throughout.

K.B./A.L

Appeal allowed.

2. Girdhari Das Radhakishan Das v. Tiruth Das Gokuldas, A I R 1930 Sind 34=120 I C 497=24 S L R 208.

3. Bishna v. Sapuran Singh, A I R 1925 Lah 287=84 I C 917.

A. I. R. 1938 Lahore 488

BHIDE J.

Devi Doara — Defendant — Appellant.
v.

Court of Wards, Guru Amarjit Singh, Jullundur — Plaintiff — Respondent.

Second Appeal No. 884 of 1937, Decided on 26th January 1938, from decree of Dist. Judge Jullundur, D/- 10th April 1937.

Landlord and Tenant — Occupancy rights—Occupancy tenant mortgaging his occupancy rights with consent of landlord — Occupancy vesting in transferee after expiry of period of limitation for redemption — Such transfer of occupancy rights to transferee is binding on landlord.

Where an occupancy tenant mortgaged his occupancy right with another person with the consent of landlord, the occupancy rights vest in the transferee for the expiry of period of redemption of the mortgage. The occupancy rights having been mortgaged with the consent of the landlord, he must be deemed to have accepted the mortgage with any consequences that might result from it according to law. One of these consequences is the vesting of the mortgagor's rights in the mortgagees after the expiry of the period of limitation for redemption of the mortgage. It is open to the landlord to redeem the mortgage himself before the expiry of limitation but if he does not do so, the transfer of the occupancy right to the mortgagees on the expiry of limitation is binding on him.

Occupancy rights can be transferred under Ss. 53 and 57, Punjab Tenancy Act with the consent of the landlord. The mere fact that the landlord is not a party to a suit by the mortgagee claiming declaration of his rights makes no difference : 27 Cal 1004 (P C) ; 37 P R 1883 and A I R 1925 Bom 339, Rel. on ; A I R 1931 Lah 211 ; 8 P R 1905 (Rev.) ; 79 P R 1898 and 6 P R 1901, Dist-ing. [P 489 C 2; P 490 C 1]

J. L. Kapur — *for Appellant.*

Achhru Ram and F. C. Mittal

— *for Respondent.*

Judgment. — The material facts of the case giving rise to this second appeal are as follows : One Ram Das, who was an occupancy tenant, mortgaged his land in favour of Lal Das on 3rd January 1871. In the year 1901 Lal Das transferred his mortgagee rights in part of the land in favour of a "Devi Doara" known as Sarandas Wala and mutation was duly effected in favour of the Devi Doara on 16th May 1901. After the death of Ram Das, the Devi Doara brought a suit against his widow, Mt. Bir Kaur, in the year 1933 for a declaration to the effect that her right to redeem the mortgage had become extinguished by lapse of time and obtained an ex parte decree on 5th December 1933. A mutation on the basis of this decree was effected in favour of the Devi Doara and the Devi Doara is recorded as the occupancy tenant of the land in question in the revenue records. Thereafter, the present suit was instituted on behalf of the plaintiff, who is the landlord, for possession of the land on the ground that the occupancy tenancy had become extinct on the death of Mt. Bir Kaur, which took place on 23rd October 1934. The plaintiff's contention was that certain acknowledgments had been made by the mortgagees which extended the period of limitation and hence the mortgagor's right had not been extinguished. The defence was that the mortgagee rights had already vested in the Devi Doara after the expiry of the period of limitation before the death of Mt. Bir Kaur, and consequently the occupancy tenancy could not be extinguished on the death of Mt. Bir Kaur. The trial Court decreed the suit and the decree was affirmed on appeal by the learned District Judge. From this decision the defendant Devi Doara has preferred this appeal.

The learned District Judge has held that the period of limitation was extended by certain acknowledgments but the learned counsel for the plaintiff respondent did not attempt to support the judgment of the

learned District Judge on this point. The learned District Judge has relied on a certain jawab-i-dawa which was signed by one Hari Chand. Hari Chand was apparently the manager of the appellant Devi Doara but Devi Doara as well as Hari Chand were defendants in the suit in which the jawab-i-dawa was produced and the jawab-i-dawa appears to have been signed by Hari Chand in his personal capacity as a defendant. The learned District Judge has merely remarked that Hari Chand being also the manager of the Devi Doara, the jawab-i-dawa should be taken to have been filed on behalf of the Devi Doara as well; but the jawab-i-dawa does not purport to have been signed by Hari Chand in his capacity as the manager of the Devi Doara, and in the circumstances the learned District Judge's decision on the point is not sustainable.

The other document on which the learned District Judge's finding as to the extension of the period of limitation was based was a copy of mutation, (Ex. P. 5). The evidence, however, does not show that the report regarding this mutation was actually signed by Lal Das the mortgagee as alleged. The original report was not produced and there could be no presumption under S. 90, Evidence Act with regard to the copy of the Patwari's report which was placed on the record. The decision of the case must therefore rest on the question whether the mortgagee rights vested in the Devi Doara on the expiry of the period of limitation. It is not disputed that if the period of limitation was not extended by any acknowledgment, the period of limitation for redemption of the land expired in the year 1931. It is claimed on behalf of the appellant that on the expiry of the period of limitation, the rights of the mortgagor were extinguished and the same vested in the appellant Devi Doara. This contention receives support from 27 Cal 1004,¹ 37 P R 1883² and 27 Bom L R 467.³ On the other hand it is contended on behalf of the plaintiff that occupancy tenant's rights could not be acquired by mere lapse of time. Reliance was placed in support of this argument on S. 9, Punjab Tenancy

Act and on the following rulings, namely 11 Lah 716,⁴ 8 P R 1905 (Rev.),⁵ 79 P R 1898⁶ and 6 P R 1901.⁷ S. 9, Punjab Tenancy Act does not appear to be in point. It deals apparently only with the question of a first acquisition of tenancy rights on the strength of long possession. In the present instance, the tenancy rights are claimed by the appellant on the basis of the provisions of Art. 148 and S. 28, Limitation Act. The rulings cited by the learned counsel did not involve any question of the rights of the mortgagor of the occupancy tenancy devolving on the mortgagee owing to expiry of the period of limitation. They merely go to show that on the death of an occupancy tenant without heirs the mortgage comes to an end and the landlord in such a case is entitled to take possession of the land free from any encumbrance. 8 P R 1905 (Rev.)⁵ on which some stress was laid is also clearly distinguishable. In that case the tenancy was claimed on the basis of adverse possession but the adverse possession began since the death of the last occupancy tenant when the tenancy itself became extinct. As the tenancy itself had become extinct, there was nothing left of which any adverse possession could be claimed. In the present instance, the tenancy is claimed to have devolved upon the Devi Doara before date of the death of Mt. Bir Kaur, when it is alleged to have become extinct.

No direct authority covering the point raised has been cited on either side. I am however unable to find anything in the Punjab Tenancy Act to prevent the application of the provisions of S. 28, Limitation Act to the circumstances of this case. It has been found in this case that the occupancy rights were mortgaged with the consent of the landlord and this finding has not been challenged before me. It would, therefore, follow that the landlord accepted the mortgage with any consequences that might result from it according to law. One of these consequences is the vesting of the mortgagor's rights in the mortgagee on the expiry of the period of limitation and the plaintiff must be deemed to have consented to this contin-

1. *Fatimatulnissa Begum v. Sundar Das*, (1900) 27 Cal 1004=27 I A 103=4 C W N 565=7 Sar 718 (P C).

2. *Khilanda Ram v. Jinda*, (1883) 37 P R 1883.

3. *Indurai Bhaurai v. Shivalal Nabhubhai*, (1925) 12 A I R Bom 339=87 I C 699=27 Bom L R 467.

4. *Nizam Din v. Mt. Wazir Begam*, (1931) 18 A I R Lah 211=131 I O 342=11 Lah 716=32 P L R 183.

5. *Shib Sahai v. Balbir Singh*, (1905) 8 P R 1905 Rev=67 P L R 1906.

6. *Chiragha v. Mahtaba*, (1898) 79 P R 1898.

7. *Narindar Singh v. Lehna Singh*, (1901) 6 P R 1901.

gency in accepting the mortgage. The plaintiff being interested in the tenancy might have redeemed the mortgage himself before the expiry of limitation but he did not care to do so. It is true that the plaintiff was not a party to the ex parte decree declaring that the occupancy rights had vested in the Devi Doara; but this fact only entitled him to prove in this case that the occupancy rights did not devolve on the Devi Doara. No cogent reason has been, in my opinion, given in support of the plaintiff's contention that the occupancy rights did not vest in the Devi Doara. Occupancy rights can be transferred under the Punjab Tenancy Act with the consent of the landlord (Vide Ss. 53 and 57) and in the present instance, it must, I think, be held that the transfer of the occupancy rights to the Devi Doara on the expiry of limitation was binding on the landlord. I accordingly accept this appeal and dismiss the suit, but in view of all the circumstances leave the parties to bear their own costs throughout.

R.M./R.K.

Appeal allowed.

* A. I. R. 1938 Lahore 490

ADDISON AND ABDUL RASHID JJ.

*Sadhu Ram — Decree-holder —**Appellant.*

v.

*Kishori Lal — Judgment-debtor —**Respondent.*

Letters Patent Appeal No. 160 of 1937, Decided on 22nd February 1938, from Judgment of Bhide J., reported in *A I R 1938 Lah 148*.

(a) Provincial Insolvency Act (1920), S. 24—It is not proper to go into question whether debts mentioned are real—Mere fact that some of the debts mentioned are fictitious would not justify order of dismissal of debtor's petition.

In the summary enquiry under S. 24, it is not proper to go into the question whether the debts mentioned are real debts but the Court has to see whether prima facie the person applying to be adjudicated insolvent is unable to pay his debts. The mere fact that some of the debts entered in the petition are fictitious would not by itself justify an order of dismissal of the petition, though it can be taken into consideration at the time of discharge. [P 491 C 1]

* (b) Provincial Insolvency Act (1920), S. 4—S. 4 comes into play only after adjudication as insolvent—Decision in summary inquiry under S. 24 as to whether debtor is entitled to present petition for adjudication is not covered by S. 4 and does not operate as res judicata.

The expression "of any nature whatsoever" in sub-s. (1), S. 4 of the Act has to be read ejusdem generis with the first expression, that is, "questions of title or priority," and such questions of title or priority can arise only after the adjudication is made. That is to say ordinarily where a debtor presents a petition the Insolvency Court will ask for proof as to his right to do so and is entitled to go into that question but it does not follow that it is a final decision on any question then arising and will act as res judicata under S. 4 of the Act. The summary enquiry under S. 24 as to whether a debtor is entitled to present a petition has nothing to do with S. 4 of the Act, which section only comes into play after adjudication in disputes between the debtor's estate represented by a receiver and the claims of one or all of his creditors: *A I R 1938 All 28, Rel. on.*

[P 491 C 2; P 492 C 1]

Tek Chand and Qabul Chand —

*for Appellant.*R. L. Anand II and Amar Nath Grover
— *for Respondent.*

Addison J.—Kishori Lal applied to be adjudicated an insolvent stating his assets to be Rs. 2961 and his debts to be Rupees 11,300. He gave the names of four creditors. The petition was ultimately dismissed on the ground that Kishori Lal was able to pay his debts as three of them were bogus and the remaining debt was less than the assets shown. The debtor did not appeal against this decree but Sadhu Ram appealed to the District Judge from the finding that his debt was bogus. His appeal was very properly dismissed as the only person who could have appealed was the debtor and he did not appeal. It may be mentioned that Sadhu Ram was a witness and produced the two promissory notes in his favour executed by Kishori Lal and also produced a copy of the decree for Rs. 4400 which he had obtained against Kishori Lal. Afterwards Sadhu Ram took out execution of his decree against Kishori Lal who pleaded that the execution could not proceed as it had been found by the Insolvency Court that the debt was fictitious. The executing Court repelled this contention, but it was accepted on appeal by the learned District Judge who considered that the decision of the Insolvency Court on this question was final under the provisions of S. 4, Insolvency Act. The same view was taken by the learned Judge of this Court who dismissed the second appeal. Against his decision this appeal under the Letters Patent has been preferred.

It may be at once mentioned that the debtor Kishori Lal did not state in his insolvency petition that Sadhu Ram's debt

was bogus and there was no dispute between him and Sadhu Ram on this question, the dispute having been raised by the one creditor whose debt was held to be genuine. It is difficult therefore to see that there has been any adjudication of the question which would bind Sadhu Ram and Kishori Lal. Further, it seems obvious that S. 4, Insolvency Act, covers questions arising after a particular person has been made an insolvent. This follows from the scheme of the Act. A debtor's petition is presented under S. 10, Insolvency Act which enacts that he shall not be entitled to present it unless he is unable to pay his debts and one of three other conditions is fulfilled. The particulars required in such a petition are given in S. 13 while S. 24 provides for the procedure at the hearing, the principal provision being that there must be proof that the debtor is entitled to present his petition. In the proviso to S. 24 (1) it is further laid down that where the debtor is the petitioner, he shall only be required to furnish such proof of his inability to pay his debts as to satisfy the Court that there are *prima facie* grounds for believing the same and the Court, if and when so satisfied, shall not be bound to hear any further evidence. It has frequently been held that in this summary enquiry it is not proper to go into the question whether the debts mentioned are real debts but the Court has to see whether *prima facie* the person applying to be adjudicated insolvent is unable to pay his debts; it has also been held that the mere fact that some of the debts entered in the petition are fictitious would not by itself justify an order of dismissal of the petition, though it could be taken into consideration at the time of discharge while other action could be taken against the petitioner, if considered desirable. S. 4 of the Act runs as follows:

(1) Subject to the provisions of this Act, the Court shall have full power to decide all questions whether of title or priority, or of any nature whatsoever, and whether involving matters of law or of fact, which may arise in any case of insolvency coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case.

(2) Subject to the provisions of this Act and notwithstanding anything contained in any other law for the time being in force, every such decision shall be final and binding for all purposes as between, on the one hand, the debtor and the debtor's estate and on the other hand, all claim-

ants against him or it and all persons claiming through or under them or any of them.

(3) Where the Court does not deem it expedient or necessary to decide any question of the nature referred to in sub-s. (1), but has reason to believe that the debtor has a saleable interest in any property, the Court may without further inquiry sell such interest in such manner and subject to such conditions as it may think fit.

The converse of this question came before a single Judge of the Bombay High Court in the case reported in A I R 1935 Bom 80.¹ In that case a creditor who had filed a petition under S. 9, Insolvency Act, in order to prove his debt to be subsisting, impeached a discharge receipt executed by him in favour of the debtor on the ground of fraud and it was held that the question did not fall under S. 4, Insolvency Act. That section covered only questions such as disputes between the debtor's estate represented by a receiver on the one hand and the claims of one or all of his creditors on the other together with other questions of priority or title. In order that S. 4 might apply, it was necessary that there must have been a contest between the debtor's estate and the general body of creditors. The expression "of any nature whatsoever" in sub-s. (1), S. 4 of the Act had to be read *eiusdem generis* with the first expression, that is, "questions of title or priority," and such questions of title or priority could arise only after the adjudication was made. That is to say, ordinarily where a debtor presents a petition the Insolvency Court will ask for proof as to his right to do so and is entitled to go into that question but it does not follow that it is a final decision on any question then arising and will act as *res judicata* under S. 4 of the Act.

In other words, it is clear that S. 4 comes into play after the debtor has been adjudicated an insolvent; under S. 4 the Court can then decide any question of title or priority arising between the debtor and one or more of his creditors if it considers this to be just and necessary as well as expedient. But it need not go into all of these questions as is shown by sub-s. 3 of S. 4. Under that sub-section the Court can sell the interest of the debtor, leaving the parties to fight out the extent of his interest in a regular suit before the ordinary Courts. Sub-s. (3) therefore goes to show that S. 4 applies after adjudication. Of course, if the

1. *Gopika Bai v. Chapsi*, (1935) 22 A I R Bom 80 = 154 I C 566 = 59 Bom 161 = 36 Bom L R 1236.

Insolvency Court after adjudication does decide any question of title or priority, its finding would be final and the question could not be reargued elsewhere; but that does not apply to the preliminary and summary enquiry as to whether the debtor ought to be adjudged an insolvent. It was held by a Division Bench of the Allahabad High Court in A I R 1938 All 28² that the term "or of any nature whatsoever" in S. 4 is a very wide one but must however be read in conjunction with the earlier part of the section which refers to questions of title or priority and with the opening words of S. 4, "subject to the provisions of this Act." In other words, this term must be subject to the limitation of ejusdem generis.

It must therefore be held that the summary enquiry under S. 24 as to whether a debtor is entitled to present a petition has nothing to do with S. 4 of the Act, which section only comes into play after adjudication in disputes between the debtor's estate represented by a receiver and the claims of one or all of his creditors. We accordingly accept the appeal, set aside the order of the District Judge as well as of the single Judge of this Court and restore the order of the executing Court, allowing the execution to proceed. There will be no order as to costs.

D.S./R.K.

Appeal accepted.

2. Budhsen v. Asharfi Lal, (1938) 25 A I R All 28 = 172 I C 997 = I L R 1938 All 50 = 1937 A L J 1071.

A. I. R. 1938 Lahore 492

DIN MOHAMMAD J.

Mt. Alam Khatun — Deft. — Appellant.

v.

Hayat Khan — Plaintiff — Respondent.

First Appeal No. 16 of 1937, Decided on 26th April 1937.

Civil P. C. (1908), S. 11, O. 2, R. 2—Cause of action distinct—Gift of certain property to wife in lieu of dower—Widow remarrying after death of her husband—Suit for pre-emption by brother of her husband dismissed—Subsequent suit for declaration of title to property on ground of remarriage of widow and for avoidance of gift—Suit is not barred under S. 11 or O. 2, R. 2—Plaintiff held could not challenge validity of gift in such subsequent suit.

A Mahomedan gifted certain property to his wife in lieu of dower. After the death of the husband the widow remarried and the brother of her husband brought a suit for pre-emption alleging that the transaction was a sale and not a gift. The suit was dismissed. Subsequently he brought a suit for declaration that he had acquired a title to the

property on the ground of remarriage of the widow and that the gift was null and void against him :

Held that as the plaintiff was challenging in his previous suit what the husband had done in relation to the property and as in the subsequent suit he was basing his right of ownership on what had been done by the widow herself, the reliefs in the two suits were based on two separate causes of action and the subsequent suit was not barred either under S. 11 or under O. 2, R. 2. [P 493 C 1]

Held further that the plaintiff was debarred from challenging the gift in the subsequent suit as by bringing the suit for pre-emption he should be taken to have consented to the transaction in the eye of the law : A I R 1914 Lah 460, *Foll.*

[P 493 C 1]

Barkat Ali — *for Appellant.*Tasadduque Husain — *for Respondent.*

Judgment.—On 11th June 1932, one Nur Khan made a gift of the property now in suit to his wife Mt. Alam Khatun in lieu of her dower. On 25th June 1932, Nur Khan died leaving him surviving his widow, Mt. Alam Khatun, and a brother Hayat Khan. On 13th November 1932, Mt. Alam Khatun remarried. On 28th June 1933, Hayat Khan instituted a suit for pre-emption of the land gifted to Mt. Alam Khatun alleging that it was a sale and not a gift. This suit was decreed by the trial Court but was dismissed by the District Judge on appeal on 19th October 1934. On 23rd March 1936, Hayat Khan instituted the suit, out of which this appeal has arisen, for a declaration that he had acquired a right of ownership in the property in suit on the ground that Mt. Alam Khatun had remarried as well as for the reason that the deed of gift, dated 11th June 1932, was null and void as against him. Mt. Alam Khatun resisted the suit on various grounds and on the pleadings of the parties the following preliminary issues were framed :

(1) Whether the suit is barred under O. 2, R. 2, Civil P. C.? (2) Whether the plaintiff is in possession of the suit land and therefore competent to bring the suit in its present form? (3) Whether the previous judgment between the parties operates as *res judicata* in the present suit ?

The trial Court decided Issue 2 in favour of the plaintiff as he was clearly in possession of the land in suit but holding that the suit was barred both under O. 2, R. 2, and S. 11, Civil P. C., it dismissed the suit. On appeal, the District Judge reversed the decision of the Court below on Issues 1 and 3 and consequently remanded the case to the trial Court for disposal in accordance with law. It is against this decision that Mt. Alam Khatun has presented this appeal. Counsel for the appellant has

contended (1) that the plaintiff was not entitled to challenge the validity of the gift inasmuch as by bringing a suit for pre-emption, he should be taken to have consented to the transaction in the eye of the law, and (2) that in any circumstances his suit was barred both by O. 2, R. 2 and S. 11, Civil P. C. So far as the first point is concerned, I have no hesitation in saying that the position urged by counsel for the appellant is legally sound. If any authority is needed for the proposition, reference may be made to a Division Bench judgment of the Punjab Chief Court reported in 78 P R 1914.¹ That case is on all fours with the present case and has never since been dissented from. Counsel for the respondent has very frankly conceded that he cannot cite any authority in which the contrary has been held. I hold therefore, that the plaintiff is debarred from challenging the validity of the gift made in favour of Mt. Alam Khatun.

On the second point however, I am not convinced that the suit is barred by any provision of law. Both the Courts below have discussed various authorities on the subject; but I do not consider that it is necessary to refer to any authority in this connexion, inasmuch as the question appears to me to be very simple, hardly standing in need of any authority to support it. The plaintiff in his previous suit challenged what Nur Khan had done in relation to the land in suit. In his present claim however he is basing his right of ownership on what has been done by the widow herself and there can be no question but that the two reliefs are based on separate causes of action altogether. It cannot therefore be urged that at the time the pre-emption suit was instituted by the plaintiff, he was bound under any provision of law to seek relief on the other ground also which had nothing to do with the ground on which he was seeking the first relief. Counsel for the appellant relied on 11 M I A 50,² 7 Lah 40³ and 36 All 476⁴ but he had to confess that none of these authorities was in point. In 11 M I A 50,² all that was laid down was that

1. *Gujar v. Auliya*, A I R 1914 Lah 460=23 I O 835=78 P R 1914=184 P L R 1914.

2. *Raghunadha Periyasoodya Taver v. Kattama Nachier*, (1868) 11 M I A 50=10 W R 1=2 Sar 212 (P O).

3. *Roshan v. Nighia*, A I R 1926 Lah 162=94 I O 27=7 Lah 40=27 P L R 209.

4. *Bhagwati Saran v. Parmeswar Das*, A I R 1914 All 271=25 I O 283=36 All 476=12 A L J 798.

a defendant whose right to possession was attacked was bound in law to raise all defences available to him and the same principle was reiterated in 7 Lah 40³ on the authority of the same judgment. In 36 All 476⁴ a Division Bench of the Allahabad High Court had held:

There is nothing in law to prevent a plaintiff in a suit for pre-emption also setting up a claim for possession of the property as owner and his suit ought not to be dismissed on the ground that he has put his case in the alternative.

I am in respectful agreement with the propositions of law laid down in the judgments cited above; but in my view they are of no avail to the plaintiff in the present case. I accept the appeal to this extent, that I hold that the validity of the gift cannot now be challenged by the plaintiff, but considering that the relief based on the ground of Mt. Alam Khatun's remarriage is not barred by any provision of law, I dismiss the appeal to that extent. The trial Court will now concern itself with this issue alone and have nothing to do with the question whether the gift in question is null and void. As parties have partially succeeded before me, there will be no order as to costs in this appeal.

K.B./A.L. *Appeal partly allowed.*

A. I. R. 1938 Lahore 493

ADDISON AND DIN MOHAMMAD JJ.

Baldev Raj Paul and another —

Plaintiffs — Appellants.

v.

Messrs. Mool Chand-Amolak Ram —

Defendants — Respondents.

Second Appeal No. 1353 of 1937, Decided on 16th February 1938.

Limitation Act (1908), Art. 29 — Attachment and receipt of amount deposited in Court by receiver — Suit to recover it back is not governed by Art. 29.

Where certain amount deposited in Court by the receiver appointed under O. 40, Rule 1, Civil P. C., is attached and paid to a person a suit to recover back such amount is not governed by Art. 29, as the attachment is neither seizure within the meaning of Art. 29, nor wrongful: *Case law referred.* [P 495 C 2; P 496 C 1]

D. R. Sawhney and Mehr Chand Mahajan — *for Appellants.*

Achhru Ram and Hans Raj Sawhney — *for Respondents.*

Din Mohammad J. — The facts of the case giving rise to this appeal are as follows: On 16th May 1927, one Parma Nand claiming to be a partner in a firm working under the style of Manohar Lal Gujral instituted a suit for dissolution of partner.

ship and accounts. On 31st May a receiver was appointed under O. 40, R. 1 Civil P. C. and authorized to take charge of timber and other assets of the firm. Up to 1929 he collected various outstandings and deposited them in Court to the credit of the firm. Among other sums so deposited, there was a sum of Rs. 1695.12.0 which had been collected by Kahan Chand, receiver. On 25th January 1929, a firm working in the name of Mul Chand-Amolak Ram brought a suit against Manohar Lal in his personal capacity and obtained an ex parte decree on 22nd February 1929. On 16th March the decree-holder took out execution and applied for attachment of the sum mentioned above. On 23rd March the sum was attached and on 11th April it was paid to one Sita Ram on behalf of Messrs. Mul Chand-Amolak Ram without any objection being raised by Manohar Lal. On 23rd April, an application was made by Parma Nand in which he made some complaints against Kahan Chand and further protested against the realization of the sum of Rs. 1695.12.0 by Messrs. Mul Chand-Amolak Ram.

On 24th April the Senior Subordinate Judge made an order that the receiver should file a suit for recovery of the said amount. On 6th October 1930, a preliminary decree was made in Parma Nand's suit and a commissioner was appointed to take accounts. On 22nd January 1932, Parma Nand once more made an application against Kahan Chand and further prayed that the commissioner be authorized to file the said suit. On 8th April the commissioner was so authorized and, on 11th April the suit was filed. The Subordinate Judge decreed the suit which, however was dismissed on appeal by the District Judge on the ground that the commissioner had no right to institute the suit. On a further appeal being made to this Court, the order of the District Judge was set aside and the case remanded for disposal in accordance with law. The Senior Subordinate Judge decreed the suit but the District Judge dismissed it on the ground that the suit was time-barred. Hence this appeal. The sole question for determination in this case is as to what Article of the Limitation Act governs the suit. Counsel for the appellant strenuously contends that the case is either governed by Art. 62 or Art. 120 and that Art. 29 has no application whatsoever inasmuch as (i) there is no wrongful seizure under legal process and

(2) at any rate there is no seizure from the possession of the plaintiff. In support of his contention counsel has referred to several authorities which are discussed below. In 61 M L J 330¹ the headnote is as follows:

In a case of alleged wrongful seizure of goods under colour of legal process a distinction must be drawn between acts done without judicial sanction and acts done under judicial sanction improperly obtained. If goods are seized under a writ or warrant which authorized the seizure, the seizure is lawful and no action will lie in respect of the seizure unless the person complaining can establish a remedy by some such action as for malicious prosecution. If however the writ or warrant did not authorize the seizure of the goods seized, an action would lie for damages occasioned by the wrongful seizure without proof of malice.

It is no doubt a case under tort but the principles enunciated by their Lordships of the Privy Council in this judgment are applicable to the facts of the present case in so far as the interpretation of the words "wrongful seizure" is concerned. To put it in a nut-shell, their Lordships seem to have laid down that a seizure under judicial sanction is not wrongful. In 21 Cal 142,² which again is a case from the Privy Council, their Lordships remarked as follows:

Even if the rule stated by the learned Judges admitted of no exception, . . . it seems to be a somewhat strong thing to hold that the appellant when he paid the Government revenue was in wrongful possession of the estate. He was in rightful possession at the time. He was in possession under authority of the highest Court in India.

From these observations also, it appears that whatever is done under the authority of a competent tribunal, cannot be called wrongful. In 30 Cal 440³ a Division Bench of the Calcutta High Court held that a suit to recover the surplus proceeds of a sale held under Regulation 8 of 1819 wrongfully taken out by the defendant in execution of a decree against a third party, did not come under Art. 29, Limitation Act. In 11 Mad 345⁴ at pages 354 and 355 it is observed:

Defendant 4 contended that the money paid to him under the order of 7th June 1882, if it was wrongfully paid, was wrongfully seized within the meaning of Art. 29, Limitation Act, and therefore the plaintiff is barred from recovering the amount wrongly

1. Ramanathan Chetty v. Mira Saibo Marikar, (1931) 18 A I R P C 28 = 130 I C 310 = 61 M L J 330 (P C).

2. Dakhini Mohun Roy v. Sarodey Mohun Roy, (1894) 21 Cal 142 = 20 I A 160 = 6 Sar 366 (P C).

3. Lakshimi Priya v. Ramakanta, (1903) 30 Cal 440 = 7 O W N 520.

4. Rupabai v. Adi Mulam, (1888) 11 Mad 345.

paid. We do not think the order for payment was a legal process within the meaning of that section.

The process meant by that Article refers to process under which seizure takes place. Here there was no seizure. The fund was in Court and was subject to the order of the Court. Art. 29 does not apply.

In 49 P W R 1910⁵ it was held that a suit to recover the money voluntarily paid into an execution Court by a defendant under the mistaken belief that he was liable to pay it on account of costs and wrongly received by the plaintiff from the said Court was governed either by Art. 97 or Art. 120 and not by Arts. 29, 62 or 96. In the course of his judgment, Rattigan J. observed :

He subsequently took out this money from the Court, but I fail to see how this act on his part can be said to be 'a wrongful seizure of moveable property under legal process'.

In 38 All 676,⁶ it was contended that Art. 29 applied to the case of money obtained from the Court by process of law inasmuch as this amounted to seizure; but this contention was repelled. In 39 All 322⁷ at p. 329, a question arose whether a sum of money deposited in Court and paid by it to certain persons amounted to seizure by them. Piggot J. who delivered the judgment in concurrence with Walsh J. remarked :

There has been some argument before us as to the meaning of the word 'seizure', and we were asked not to treat that word as precisely equivalent to 'attachment' or 'taking in execution'. It is quite possible that the word used in the Article is intentionally a wide one; but one thing seems clear, namely that 'seizure' implies the taking of something out of the possession of its owner. In the present case the money representing the price of the grain was from first to last in the custody of the Court; the Court conceived that it had realized the price of the grain and was holding it for the benefit of those persons who might hereafter be found to be entitled to it. . . . Under these circumstances I am quite satisfied that there was never any 'seizure' of this money within the meaning of Art. 29.

In 84 I C 6,⁸ which is on all fours with the present case, it was held that the suit was not governed by Art. 29 but by Art. 62 or Art. 120. Mr. Baker, Judicial Commissioner, referred to the various authorities reviewed above and held that in cases like the present there could be no wrongful seizure. In 64 I C 513,⁹ a Division Bench

of the Calcutta High Court held that prima facie a seizure under a writ issued by a Court was not a wrongful seizure and a suit for compensation for such a seizure was not governed by Art. 29. In the course of their judgment, the learned Judges observed:

In the present case the writ was issued by the Court and prima facie it was not a wrongful seizure. The writ was not without jurisdiction as the Court had jurisdiction over the subject-matter; nor was the writ executed against a person who was no party to the decree, nor with respect to goods outside the scope of the writ. In these circumstances, we think that Art. 29 is inapplicable to the case.

In A I R 1931 Nag 47,¹⁰ the Additional Judicial Commissioner observed that the crux of Art. 29 was in the words "wrongful seizure" and it was because the process was illegal that the seizure became wrongful so as to give a cause of action for the suit. In 38 Mad 972,¹¹ the suit was for recovery of the money drawn by the defendant from the Court and the question arose whether Art. 29 governed it. White C. J. who delivered the judgment in agreement with Sankaran Nair and Oldfield JJ. observed:

The appellant has contended that the appropriate Article is Art. 29 and that the suit is time-barred. It is not necessary to consider whether the suit is for compensation within the meaning of the Article. Assuming it is, the question is, did the attachment of the debt constitute a wrongful seizure of moveable property under legal process within the meaning of the Article. There is no doubt there was a 'legal process', but was there any seizure thereunder? I am of opinion that there was not.

As against these authorities, reliance is mainly placed on 8 Bom 17¹² and 31 Mad 431.¹³ It may be remarked, however that the Bombay judgment was considered in most of the cases referred to above but was either not followed or was held to have been wrongly decided. So far as 31 Mad 431¹³ is concerned, it is sufficient to remark that this authority was referred to in 38 Mad 972¹¹ and distinguished, two of the Judges being the same in both the cases. We are disposed to hold, therefore, that neither was there a seizure in this case nor was it wrongful within the meaning of

5. Fazaluddin v. Zainab, (1910) 49 P W R 1910 = 6 I C 654.

6. Niader v. Mt. Ganga, (1916) 3 A I R All 335 = 35 I C 86 = 38 All 676 = 14 A L J 728.

7. Ram Narain v. Brij Bankey Lal, (1917) 4 A I R All 276 = 39 I C 532 = 39 All 322 = 15 A L J 295.

8. Rajaram v. Mulchand, (1924) 11 A I R Nag 248 = 84 I C 6 = 20 N L R 189.

9. Arjan Biswas v. Abdul Biswas, (1921) 3 A I R Cal 774 = 64 I C 513 = 35 C L J 480.

10. Krishna v. Sitaram, (1931) 18 A I R Nag 47 = 130 I C 157.

11. Yellammal v. Ayyappa Naick, (1914) 1 A I R Mad 126 = 22 I C 870 = 38 Mad 972 = 26 M L J 166 (FB).

12. Jagjivan Javerdas v. Gulam Jilani, (1884) 8 Bom 17.

13. Damaraju Narasimha Rao v. Thadinada Gangaraju, (1908) 31 Mad 431 = 4 M L T 271 = 18 M L J 590 (FB).

Art. 29, Lim. Act, and that this being so the suit was well within time when it was instituted. We are supported in our conclusion by a reference to Rr. 43 and 52 of O. 21, Civil P. C. In R. 43 it is said that where the property to be attached is moveable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure; while in Rule 52, which deals with attachment of property in custody of the Court, it is stated that the attachment shall be made by a notice to such Court, requesting that such property may be held subject to the further orders of the Court from which the notice is issued. There is thus a clear distinction between the procedure to be adopted when the property is to be seized from the judgment-debtor and when it is to be recovered from the custody of the Court.

On the grounds stated above, we allow this appeal, set aside the order of the District Judge and restore that of the Senior Subordinate Judge. We however order that from the date of the suit till the date of realization, future interest on the sum decreed will be charged at the rate of three per cent. only. The appellant will have his costs from the respondents in all Courts.

V.B.B./R.K.

*Appeal allowed.***A. I. R. 1938 Lahore 496**

BLACKER J.

Pearey Lal — Convict — Petitioner.

v.

Emperor.

Criminal Revn. No. 1453 of 1937, Decided on 16th December 1937.

Criminal P. C. (1898), S. 510 — Paper in somebody's handwriting that Chemical Examiner's report shows that certain packets contain cocaine is not legal evidence and cannot be a substitute for Chemical Examiner's certificate.

Where all that is on the record of a case is a little scrap of paper on which it is written in somebody's handwriting that the Chemical Examiner's report shows that certain packets contained cocaine, it is not legal evidence and cannot be a substitute for the original certificate or at least for a copy of it certified by the Magistrate as being a true copy. The provisions relating to the production of a report by the Chemical Examiner in place of the Chemical Examiner's own personal appearance in Court are special provisions of the Code and must be strictly adhered to. [P 496 C 2]

Puran Chand—*for Petitioner.*

Mohammad Monir, Assistant Advocate-General—*for the Crown.*

Order.—The procedure in this case with regard to the recovery of the cocaine and the production of the necessary certificate

from the Chemical Examiner has been so lax that it is impossible to uphold the conviction. In the first place, the head constable should have taken great care to see that there was no possibility of the packets recovered from Mumtaz being mixed up with the packets recovered from the present petitioner. Instead of doing so, he merely gave all the packets to a chaukidar who appears from the record of his cross-examination to be a person whose evidence in such a case would at the very least be suspicious and he does not appear to have sealed the packets up until he reached the thana. There is very little guarantee in these circumstances that the person to whom he entrusted the packets which were recovered in the two searches did not get them mixed up or even substitute fresh packets for one or more of them. This by itself might not have been a fatal objection in the present case as if all the packets recovered in the searches contained cocaine ipso facto the packets recovered from the present petitioner must have contained it.

But, on looking through the record of the case, I find in it no certificate from the Chemical Examiner to the effect that the packets in this case contained cocaine. Presumably in the other case or in some other cases there must have been some such certificate which the learned Magistrate may or may not have seen. He has not said so unambiguously in his judgment. He has merely said that the result of the Chemical Examiner's analysis shows that these packets contained cocaine. All that is on the record of this case is a little scrap of paper on which it is written in somebody's handwriting that the Chemical Examiner's report shows that these packets contained cocaine. This is not legal evidence and cannot be a substitute for the original certificate or at least for a copy of it certified by the Magistrate as being a true copy. The provisions relating to the production of a report by the Chemical Examiner in place of the Chemical Examiner's own personal appearance in Court are special provisions of the Code and must be strictly adhered to. As the case stands at present, there is no legal evidence on the record which will show that the packets recovered from the present petitioner actually contained cocaine. I therefore accept the petition and acquit the petitioner.

D.S./R.K.

Petition accepted.

A. I. R. 1938 Lahore 497

TEK CHAND J.

Wadhawa Singh — Plaintiff —

Appellant.

v.

Kunj Lal — Defendant — Respondent.

Second Appeal No. 1302 of 1936,
Decided on 27th April 1937, from decree
of Senior Sub-Judge, Sialkot, D/- 20th
April 1936.

(a) Registration Act (1908), S. 17 (1) (c)—
Receipt recording receipt of consideration on
mortgage—Registration under S. 17 (1) (c)
is necessary.

A receipt which records the receipt of the con-
sideration for a mortgage on the date of the
execution of the document, requires registration
under the provisions of S. 17 (1) (c), to be admis-
sible in evidence as a receipt: *A I R 1934 Lah*
970 Foll. [P 498 C 2]

(b) Registration Act (1908), S. 49—Colla-
teral purpose—Mortgage for amount exceeding
Rs. 100—Unregistered receipt evidencing pay-
ment of consideration is inadmissible in evi-
dence as receipt for refund of consideration
money as it is not collateral purpose—Receipt
embodying terms of mortgage is however
admissible in evidence to support claim for
refund of consideration if mortgage implies
personal liability.

Where the sole purpose for which an unregis-
tered receipt is executed is to furnish evidence in
writing of the payment of the "consideration on
account of the creation of an interest in immov-
able property" exceeding Rs. 100 in value, the
claim for the refund of the amount cannot be
treated as a "collateral" purpose within the mean-
ing of S. 49, and such receipt is therefore inad-
missible in evidence. If however the document
embodies the terms of a mortgage transaction it
would be admissible to support a claim for the
refund of the amount advanced, if the mortgage
transaction implies a personal liability of the
mortgagor to repay the amount. In the case of a
usufructuary mortgage however the mortgagor is
under no personal liability to repay the amount
and hence the receipt is inadmissible in evidence
for a collateral purpose in a suit for the refund of
the consideration: *A I R 1929 Nag 115* and
A I R 1932 Lah 655, Rel. on; 24 Cal 677, Ref.;
A I R 1932 Lah 164, Disting. [P 498 C 2;
P 499 C 1]

Amar Nath Chopra and R. L. Anand 1
— for Appellant.

Yashpal Gandhi for M. C. Mahajan and
M. C. Mahajan—for Respondent.

Judgment.—The facts of the case which
has given rise to this second appeal are as
follows: On 28th of August 1927, Kunj Lal,
defendant, purported to mortgage one-half
share of 31 kanals and 19 marlas of agricul-
tural land to Wadhawa Singh, plaintiff, for
Rs. 600. At the time of the transaction, a
"receipt" (Ex. P.1) was executed by Kunj
Lal in favour of Wadhawa Singh. This

receipt contained the terms of the mort-
gage, but was not registered. On 8th
November 1929, mutation of the mortgage
was effected in favour of Wadhawa Singh
who was found to be in possession. On
2nd June 1930, Kunj Lal executed a regu-
lar mortgage deed in respect of another
plot of land, 9 kanals and 9 marlas in area,
in favour of Wadhawa Singh for Rs. 300.
This deed was duly registered.

In 1932 Kasturi Lal, son of Kunj Lal,
brought a suit for possession of the lands
covered by both the transactions, alleging
that they were the property of a joint
Hindu family, consisting of his father and
himself, and that the former had no power
under Hindu law to mortgage it without
family necessity. The suit was decided
by Sheik Mohammad Hussain, Subordi-
nate Judge, on 29th May 1933. He held
that the mortgage for Rs. 600 could not
be proved, as its terms were embodied in
the receipt (Ex. P/1), which was the sole
repository of the transaction and which,
being unregistered, was inadmissible in
evidence. He therefore found that the
mortgage in question had not been estab-
lished, nor could Wadhawa Singh prove
the payment of Rs. 600 aliunde. With
regard to the second mortgage for Rs. 300,
he held the consideration proved, but
found that there was no necessity for the
transaction. He accordingly granted Kas-
turi Lal a decree for possession of the
lands comprised in both the transactions.
This judgment was upheld on appeal by
the District Judge, and in execution of the
decree Kasturi Lal obtained possession
from Wadhawa Singh.

On 4th May 1934 Wadhawa Singh
instituted the present suit against Kunj
Lal for recovery of Rs. 900 which, he
alleged, he had paid to the defendant as
consideration for the mortgage transactions
of 1927 and 1930, but which had been set
aside in the suit brought by Kasturi Lal,
and possession of the lands comprised
therein taken away from him. Kunj Lal
pleaded that the suit was barred by limita-
tion, that the finding in the previous suit
by Kasturi Lal (to which both the present
plaintiff and the defendant were parties)
that the payment of Rs. 600 could not be
proved, was *res judicata*, and that, in any
case, Ex. P-1 was inadmissible even for the
purpose of proving the alleged payment of
Rs. 600 and claiming a refund thereof. He
admitted receipt of Rs. 300 as considera-

tion for the second mortgage. The Subordinate Judge dismissed the plaintiff's claim for Rs. 600 but granted him a decree for Rs. 300 on the second transaction.

Wadhawa Singh appealed to the Senior Subordinate Judge against the dismissal of his suit for refund of Rs. 600. The learned Judge did not record any finding on the point of limitation. He held that the finding in the former suit, that the receipt Ex. P-1 was inadmissible for want of registration, operated as *res judicata* in this suit, and that the receipt was inadmissible even for the purpose of proving the payment of Rs. 600 by Wadhawa Singh to Kunj Lal on 28th August 1927. He accordingly dismissed the appeal. Wadhawa Singh has come in second appeal, and it has been contended on his behalf that the suit was within limitation under Art. 97, as the cause of action arose when the mortgages were held to be invalid in Kasturi Lal's suit, which was decided by the first Court on 29th May 1933, less than a year before the institution of the present suit. Mr. Mehr Chand for the respondent frankly conceded that this is so, and that the suit is not barred by limitation. He also admitted that the question as to the payment of Rs. 600 was not *res judicata* between the present plaintiff and the defendant for, though both of them were impleaded as defendants in the former suit, Kunj Lal did not appear and there was no contest between the two co-defendants *inter se* in that suit.

The next question is whether the unregistered document, Ex. P-1, is admissible as evidence of the mortgage transaction, or at any rate, of the payment of Rs. 600 by the plaintiff to the defendant. In the written grounds of second appeal, as presented in this Court, it was stated that Ex. P-1 was merely a memorandum of an already accomplished transaction, but this contention was abandoned at the hearing. It was conceded by the learned counsel, who argued the case on behalf of the appellant, that the document (which is set out in *extenso* in the judgment of the lower Appellate Court) contains all the terms of the mortgage and is the sole repository of the transaction. There are no words in it which might indicate that the mortgage had been effected orally at a prior date, and this fact was merely recited in Ex. P-1. It was therefore admitted by the learned counsel that this document could not be

admitted to prove the mortgage. He urged, in the alternative, that the document was really a "receipt" acknowledging payment of Rs. 600 as the consideration of the mortgage. But if this is a correct description of Ex. P-1, it is clearly inadmissible under Cl. (c) of S. 17 (1), Registration Act. The latest ruling of this Court is 16 Lah 485,¹ which overruled two earlier Single Bench decisions and laid down that a receipt which records the receipt of the consideration for a mortgage on the date of the execution of the document requires registration under the provisions of S. 17 (1) (c) to be admissible in evidence. Following this decision, I must hold that Ex. P-1 is not admissible as a "receipt".

The learned counsel for the appellant urged, however, that the document can be admitted under the proviso to S. 49 (which gave statutory recognition to the judicial decisions of this Court and other Courts by the Amending Act of 1929) as evidence of any "collateral transaction not required to be effected by registered instrument." In considering this argument, it must be borne in mind that a transaction can be called "collateral" only if it is independent of, or divisible from, the transaction to effect which the law requires registration. The appellant's learned counsel stated that Ex. P-1 was either a receipt acknowledging payment of the consideration for the mortgage, or it was the repository of the terms of the mortgage, executed at the time when the transaction was effected. The question of the applicability of the proviso to S. 49 should therefore be examined in the light of both these alternatives. If Ex. P-1 is really a "receipt", the sole purpose for which it was executed was to furnish evidence in writing of the payment of the "consideration on account of the creation of an interest in immovable property" exceeding Rs. 100 in value, and consequently the claim for the refund of the amount cannot possibly be treated as a "collateral" purpose. In this view the deed is clearly inadmissible: see A I R 1929 Nag 115² and A I R 1932 Lah 655.³

If however Ex. P-1 is the document embodying the terms of the mortgage

1. Ghulam Mohammad v. Sarkhru, A I R 1934 Lah 970=156 I C 376=36 P L R 211=16 Lah 485.

2. Sukhlal v. Bisesar, A I R 1929 Nag 115=118 I C 57.

3. Bahwal v. Amrik Singh, A I R 1932 Lah 655=142 I C 424=34 P L R 354.

transaction, entered into at the time of its execution, it would be admissible to support a claim for the refund of the amount advanced, if the mortgage transaction implied a personal liability of the mortgagor to repay the amount. This would depend on the nature and terms of the mortgage. If, for instance, the transaction was one of a "simple mortgage" or an "English mortgage", it would necessarily imply a personal covenant to repay, and the unregistered deed evidencing the mortgage would be admissible for the "collateral" purpose of enforcing the personal covenant. If, however, the mortgage is "usufructuary" or is one by way of conditional sale, and the mortgagee has taken possession of the property, the mortgagor does not, in the absence of an express or implied stipulation to the contrary, incur any personal liability. It is one of the characteristics of these kinds of mortgages that the mortgagee must look exclusively to the land for repayment of the debt. He cannot sue the mortgagor personally for payment of the debt (24 Cal 677,⁴ 1 P R 1870,⁵ Ghosh's Law of Mortgages, Vol. 1, p. 99). See also Sir D. F. Mulla's Indian Registration Act, Edn. 3, p. 84, where the law is stated as follows:

In a usufructuary mortgage the nature and terms of the security negative a personal liability, and if the deed were inadmissible for want of registration as evidence of a mortgage, it would not support a suit to recover the money advanced.

In the case before us, there can be no doubt as to the real nature of the transaction. Ex. P-1 recites that the mortgagee had been put in possession of the mortgaged land, and that he would remain in possession till redemption by the mortgagor by payment of the mortgage money in the month of Magh or Jeth. During this period the mortgagee was to receive the rents and profits accruing from the property and appropriate the same in lieu of interest. The mortgage was therefore clearly "usufructuary" as defined in S. 58 (d), T. P. Act, the relevant portions of which may be reproduced here :

Where the mortgagor delivers possession of the mortgaged property to the mortgagee and authorizes him to retain such possession until payment of the mortgage money and to receive the rents and profits accruing from the property, and to appropriate the same in lieu of interest, or in payment of the mortgage money

. . . . the transaction is called a usufructuary mortgage.

The learned counsel for the appellant cited 13 Lah 259,⁶ but that case is clearly distinguishable. There, the learned Judges found that the deed in question clearly contained a stipulation that the mortgagee could recover "the amount due from the person and other property of the mortgagor". In either view of the case therefore Ex. P-1 is inadmissible for the purpose of supporting the plaintiff's claim for recovery of Rs. 600. This being so, I am constrained to hold that the plaintiff's suit had been rightly dismissed by the Courts below. The appeal fails and is dismissed ; but having regard to all the circumstances, I leave the parties to bear their own costs throughout.

K.B./A.L.

Appeal dismissed.

6. Pars Ram Jaishi Ram v. Brij Mohan, A I R 1932 Lah 164=135 I C 33=13 Lah 259=33 P L R 536.

A. I. R. 1938 Lahore 499

TEK CHAND J.

Piare Lal and another — Defendants
— Appellants.

v.

Sher Gir and another, Plaintiffs and
another — Defendant — Respondents.

First Appeal No. 26 of 1937, Decided on 27th April 1937, from order of Dist. Judge, Lahore, D/- 4th January 1937.

Res judicata — Litigating under same title — Former suit by A against trustees of temple that certain property attached to temple belonged to him—Defendants claiming title to property in temple — Suit finally decreed in favour of A — Subsequent suit by worshippers of temple against A's heirs claiming same property as belonging to temple held barred by res judicata — Plaintiffs pleading decision in former suit was obtained collusively must prove it.

A suit was brought by A against the trustees of a certain temple that certain property attached to the temple belonged to him. The trustees defended the suit on the ground that the title in the property in suit was in the temple. The suit was finally decreed in favour of A. Later on, the plaintiffs alleging themselves to be the worshippers of the temple brought a suit against A's heirs for a declaration that the property which was the subject-matter of the former suit was the property belonging to the temple. On a contention being raised by A's heirs that the former decision operated as res judicata, the plaintiffs contended that it was obtained collusively and could not therefore be res judicata and also because they were not the successors of the trustees-defendants in the former suit :

4. Luchmeshar Singh v. Dookh Mochan Jha, (1897) 24 Cal 677.

5. Ruttonjee Cursetjee v. Hormusjee Cowasjee, (1870) 1 P R 1870.

Held that the plaintiffs being the worshippers of the temple were persons interested in it and had therefore the locus standi to sue to protect the property of the temple from being wrongfully claimed by third persons. [P 501 C 1]

Held also that though the plaintiffs were not the successors of the defendants in the former suit, the title litigated under in both the suits was the same, as they both claimed the title to the property in the temple. The plaintiffs were therefore litigating under the same title, even though the agency asserting the title in the former suit was different from the one in the subsequent suit. The suit was therefore barred by res judicata. [P 501 C 1]

Held further that the burden of proving collusion, negligence and want of bona fides on the part of the defendants in the former suit lay on the plaintiffs as they asserted that the decision in the former suit was not res judicata : A I R 1937 P C 1 Rel. on. [P 501 C 2]

Achhru Ram and Harbhajan Das —
for Appellants.

Dev Raj Sawhney — for Respondents
(Plaintiffs).

Judgment. — This appeal arises out of a suit instituted by Sher Gir and Amar Gir plaintiffs-respondents, for a declaration that a certain shop and kothri described in the plaint are religious property, being attached to Shiwala Boharwala in Chauk Wazir Khan, Lahore. The suit was resisted by defendants 1 and 2, Piyare Lal and Kishen Chand, sons of Nathu Ram, who claimed the property as their own. They also pleaded that the question of title involved was res judicata by reason of the decision in a former suit. This plea was traversed by the plaintiffs, who further averred in their replication that the former suit had been brought by Nathu Ram in collusion with his co-trustees and the then mahant, all of whom were guilty of gross negligence in conducting it. The trial Judge framed a preliminary issue as to whether the suit was barred by res judicata and holding in favour of the defendants dismissed the suit without going into the merits. On appeal by the plaintiffs the learned District Judge came to a contrary conclusion. He accordingly accepted the appeal and remanded the case under O. 41 R. 23, Civil P. C., for decision on the merits.

Defendants 1 and 2 have come in second appeal and it has been contended on their behalf that the learned District Judge is in error in holding that the defendants in the previous suit were litigating in a capacity different from that in which the plaintiffs have brought the present suit and consequently the suit is barred by res judicata. Before examining this argument,

it is necessary to set out a few preliminary facts. It is common ground that in the nineties of the last century a sanyasi, Hira Gir by name, was the mahant of this temple. He was succeeded by Piyar Gir, who died in 1919. His successor was Bir Gir, who died in 1932. On his death, Mohan Gir defendant 3 became the mahant. Some time before his death, Hira Gir had associated with himself three persons, Sohan Lal, Waziri Mal and Nathu Ram (father of defendants 1 and 2) as trustees of the temple, and it appears that for a number of years these persons and the mahant, for the time being, jointly continued to look after the temple and manage the properties attached to it. In 1911, mahant Piyar Gir, Sohan Lal and Waziri Mal brought a suit in the Small Cause Court against the third trustee, Nathu Ram, for recovery of Rs. 51 as arrears of rent of the shop and the kothri now in dispute, which he was alleged to have rented from the temple. In this suit a decree was passed against Nathu Ram. Shortly afterwards, Nathu Ram instituted a suit against mahant Piyar Gir and Waziri Mal and Sohan Lal, for a declaration that he was the owner of the shop and the kothri and that it did not belong to the temple. The suit was decreed by the Subordinate Judge on 31st July 1912, who held that Nathu Ram had succeeded in proving that the shop and the kothri were his private property, and that they were not attached to the temple. The other trustees, Waziri Mal and Sohan Lal appealed to the Divisional Judge, but the appeal was dismissed on 21st April 1913. A second appeal was lodged in the Chief Court but was dismissed in limine on 10th October 1913. Some time afterwards Nathu Ram died and since then his sons, defendants 1 and 2, have been in possession of the shop and the kothri.

In 1934, the present mahant Mohan Gir applied to the Municipal Committee for sanction to construct certain buildings, in which he proposed to include a portion of the shop and the kothri in dispute. Defendants 1 and 2 successfully raised objections before the Committee and the sanction was refused. On 30th March 1935, the present plaintiffs, claiming to be members of the Sanyasi fraternity and worshippers of the temple, brought the present suit for a declaration that the shop and the kothri in dispute belonged to the temple and that defendants 1 and 2 were wrongfully claiming it as their own. In rejecting the plea of

bar of *res judicata*, the learned District Judge has held that the plaintiffs in the present suit are not litigating under the same title, under which the defendants of the suit of 1912-13 had resisted the suit of Nathu Ram. He has observed, that in that suit Piyar Gir had sued as a mahant of the Shivala and as such his position was that of "a representative of the property of the idol Shri Shivaji Maharaj, preserved in the Shivala", while in the present suit the plaintiffs do not claim as representatives of the idol, but sue "as Hindus entitled to worship at the Shivala and as members of the *bhek*". This reasoning is based on a misapprehension of the real nature of the two suits. The previous suit was defended by the then mahant and two of the trustees on the ground that title in the property was in the Shivala. In the present suit, the plaintiffs are also suing for a declaration that the property is attached to the same Shivala. There can be no doubt therefore that they are litigating under the same title, under which Prem Gir and the two trustees had resisted Nathu Ram's suit in 1912. It is no doubt true, that the present plaintiffs are not the successors of the mahant and the trustees who were defendants in the former suit, but this is immaterial. They allege themselves to be worshippers of the temple and as such are persons interested in it, and have a *locus standi* to sue to protect its property from being wrongfully claimed by third parties. Admittedly, they do not claim any personal right of their own in the property; nor have they set up a *jus tertii*; they sue for the benefit of the Shivala. The title litigated under is clearly the same, though the agency asserting the title in 1912 was different from that which asserts it now.

The learned counsel appearing for the respondents, after making a faint hearted attempt to support the reasoning of the learned Judge, frankly admitted that his decision could not be supported on the ground on which it proceeded. He pointed out however, that in the replication, the plaintiffs had definitely pleaded that the previous suit could not operate as *res judicata*, as it had been brought collusively by Nathu Ram, who was one of the trustees against the co-trustees and mahant Piyar Gir who appears to have been appointed by them, and that the then defendants did not produce all the available documentary evidence, but merely

made a show of defending the suit, or at any rate, acted with gross negligence in the defence of the suit. He contends that a separate issue should have been framed by the trial Judge on the point, and the allegations investigated before the plea of *res judicata* could be finally decided. But the preliminary issue framed by the trial Judge was comprehensive in its terms, and it was open to the parties to produce evidence bearing on these points if they chose to do so. There was however some confusion in the rulings, as to whether the onus to prove collusion, negligence and want of bona fides lay on the party who asserted that the former decision was not *res judicata*, or on those who had pleaded the decision in bar of the subsequent suit. This question has since been finally settled by their Lordships of the Privy Council in A I R 1937 P C 1.¹ But as the matter had not been settled authoritatively at the time of the trial, there is some force in the contention of counsel that the plaintiffs-respondents refrained from placing on the record the materials bearing on the point, in the belief that the onus was on the defendants. I think therefore that they should have another opportunity to prove these allegations.

I accept the appeal, set aside the judgment of the learned District Judge and remand the case to the Court of first instance with the direction that it will try the issue as to whether the previous decision is not *res judicata* by reason of there being collusion, gross negligence or want of bona fides on the part of the defendants of that suit. The plaintiffs will first lead evidence on this issue, and then the defendants will produce evidence in rebuttal, if they so desire. If the decision of this issue goes against the plaintiffs, the suit shall be dismissed as barred by *res judicata*; if the Court finds otherwise, it will proceed to try the case on the merits. Court-fee on this appeal will be refunded; other costs will be costs in the cause.

K.B./A.L.

Case remanded.

1. Venkata Seshayya v. Kotiswara Rao, A I R 1937 P C 1=166 I C 1=64 I A 17=I L R 1937 Mad 263.

A. I. R. 1938 Lahore 502

ABDUL RASHID J.

Roshan Din — Defendant — Petitioner.
v.*Mt. Malan Bibi* — Plaintiff —
Respondent.

Civil Revn. No. 848 of 1936, Decided on 23rd April 1937, from order of decree of Judge, Small Cause Court Lahore, D/- 19th August 1936.

Civil P. C. (1908), S. 10—Suit for rent for period subsequent to that included in previously instituted pending suit—Suit is not barred although same question may arise in both suits.

The expression 'matter in issue' in S. 10 of Civil P. C., has reference to the entire subject-matter in controversy between the parties, and is not equivalent to 'any of the questions in issue'. The section does not bar the trial of a suit for rent for a period subsequent to that included in the previously instituted suit which is pending, although the same question may be involved in both the suits: *A I R 1917 Cal 248, Foll.*
[P 502 C 2]

Nain Sukh Gauba — for Petitioner.

Achhru Ram and Inder Dev —
for Respondent.

Order.—This petition for revision arises out of a suit instituted by Mt. Malan Bibi against Roshan Din for recovery of Rs. 42 on account of arrears of rent of a shop bearing No. 720, situate in Lahore Cantonment. The Judge, Small Cause Court, Lahore, granted the plaintiff a decree for Rs. 33 and the defendant has preferred a petition for revision to this Court. The suit was based on a rent deed dated 29th September 1930, executed by Roshan Din defendant in favour of the plaintiff. In his written statement the defendant admitted the execution of the rent deed but stated that he was induced to execute it by means of fraud and misrepresentation practised on him by Khushal Singh, the agent of Mt. Malan Bibi, plaintiff. In his oral statement, however, Roshan Din defendant denied the execution of the rent deed. This took place on 26th June 1936. On 19th August 1936, the parties were examined again. On that date Roshan Din admitted the execution of the rent deed and pleaded fraud and misrepresentation. The Court framed four issues. After the framing of the issues, the statements of two witnesses, namely Khushal Singh and Dewa Ram, were recorded on behalf of the plaintiff. The statement of Bishan Das was recorded on behalf of the defendant. The defendant then made a state-

ment that he had no further evidence to produce. After a consideration of the entire evidence, the Court came to the conclusion that the defendant had failed to establish that any fraud was practised on him by Khushal Singh. The rent deed, dated 29th September 1930 had been lost but the statement of Deva Ram and the entries from his register were given in evidence to prove the contents of the rent deed. On these findings a decree was passed in favour of the plaintiff.

It was urged by the learned counsel for the petitioner that a suit with respect to the rent of the shop in dispute for the months of November and December 1935, and January 1936 is pending in the Court of Mr. Teal, Subordinate Judge, Lahore Cantonment, and that as that suit was instituted prior to the present suit, the present suit ought to have been stayed under S. 10, Civil P. C., and that the lower Court had erred in proceeding to judgment in the present case. The present suit relates to rent for the months of February, March and April 1936. It was held by a Division Bench of the Calcutta High Court in 36 I C 641¹ that:

The expression 'matter in issue' in S. 10 has reference to the entire subject-matter in controversy between the parties and is not equivalent to 'any of the questions in issue'. The section does not bar the trial of a suit for rent for a period subsequent to that included in the previously instituted suit for rent, although the same question may be involved in the two suits.

The defendant therefore was not entitled to have the present suit stayed under S. 10, Civil P. C. It was next contended that the case should be remanded for retrial as the trial Court had not given sufficient opportunity to Roshan Din to produce evidence on the question of fraud. In view of the statement of Roshan Din, dated 19th August 1936, there is no force in this argument. I therefore dismiss this petition for revision with costs. I have no doubt that the suit pending in the Court of Mr. Teal will be decided by him on the evidence recorded in that case. He is not in any way to be influenced by any observations contained in my judgment in the present case.

T.M./D.S.

Petition dismissed.

1. *Bepin Behary v. Jogendra Chandra*, A I R 1917 Cal 248=36 I C 641=24 C L J 514.

* A. I. R. 1938 Lahore 503

TEK CHAND AND DALIP SINGH JJ.

*Firm Tek Chand-Daulat Ram —**Plaintiffs — Petitioners.*

v.

*Ata Mohammad and another —**Defendants — Respondents.*

Civil Revn. No. 380 of 1936, Decided on 7th December 1937, from order of Senior Sub-Judge, Ferozepore, D/- 13th May 1936.

* Bond — Entry in bahi khata — Entry should be scrutinized — Balance struck—Entry as "baqi rahe" signed by debtor and attested by witnesses — Entry amounts to acknowledgment — Entry as "baqi dena" by debtor is agreement— If attested, it amounts to "bond" and requires stamp duty.

In each case where the entries in bahi khata are under consideration as regards their nature as a bond or as a mere acknowledgment, the entry should be carefully scrutinized. Ordinarily, a balance struck by the debtor, followed by the words "baqi rahe" and signed by the debtor would be a mere "acknowledgment," on which the stamp duty of one anna will be sufficient. In such a case, it will be immaterial that the entry is or is not attested by witness. If however the words used are "baqi dene" that would amount to an agreement and be liable to be stamped as such. If further such an entry is attested by one or more witnesses it would be a "bond" and must be stamped accordingly: 35 P R 1903 (F B), *Expl.*; Case law referred. [P 505 C 1]

J. L. Kapur — *for Petitioners.*M. A. Majid and Darbari Lal —
*for Respondents.*Jeremy — *for Revenue Authority.*

Tek Chand J. — This is a petition for revision of the order of the Senior Subordinate Judge, Ferozepore, holding that an entry of Rs. 17,280 which forms the basis of this suit amounts to a bond and is therefore liable for payment of stamp duty and penalty as such. The entry is set out in detail in the judgment and it is not necessary to repeat it here. The entry is in the account book of the plaintiffs. The first portion is in the handwriting of the scribe in which it is expressly stated that "Rupees 17,280 *baqi lene*" from the defendants on the above account. It is then signed by the two defendant and is attested by two witnesses. Below the signature of each defendant separate writings appear in their handwritings. The first one is by Ghulam Mohy-ud-din which states that "*mabligh satra hazar do sau assi rupia baqi dena. Pichhla hisab samajh liya.*" The writing by Atta Mohammad is to the effect: "*Mub-*

ligh satra hazar do sau assi rupia baqi dene mushtarqa ham donon bhayon ko hai." The entry bears a stamp of one anna only. The lower Court has held that taking the entry as a whole there can be no doubt that the instrument is a "bond" as defined in S. 2 (4) (b), Stamp Act, and should have been stamped as such. In coming to this conclusion, the lower Court has relied upon a decision of the Chief Court in 35 P R 1903.¹ That decision however is in conflict with a recent Division Bench ruling of this Court in 38 P L R 269.² In that case it was held that in order to bring an instrument within the definition of bond in the Stamp Act "there must be an express obligation to pay". An implied obligation cannot convert an acknowledgment into a bond. Therefore an acknowledgment entry attested by two witnesses and containing an implied promise to pay interest but without any express obligation to pay the amount due is not a bond." The learned Judges referred to a decision of Bhide J. in 34 P L R 417,³ in support of the same view. In 22 Cal 757⁴ also, it was held that the obligation must be denoted by express words. See also Abdul Haque's Indian Stamp Act, p. 16.

Counsel for the respondent besides relying upon 35 P R 1903,¹ referred to 33 P L R 940⁵ and 5 Lah 406.⁶ The two last-mentioned cases however did not relate to the question of stamp duty, and they do not seem to be of much assistance. In view of this conflict of authority and having regard to the importance of the question, I think the matter should be decided by a larger Bench. I accordingly refer the case to a Division Bench. An early date after the vacation should be fixed.

Judgment of Division Bench.

Tek Chand J.—The question for decision in this case is whether an entry of Rs. 17,280, which forms the basis of the suit brought by the plaintiff against the

1. Daula v. Ganda, (1903) 35 P R 1903=101 P L R 1903 (F B).

2. Dewan Chand v. Punjab & Kashmir Bank Ltd., (1937) 24 A I R Lah 220=170 I C 68=38 P L R 269.

3. Jagan Nath v. Mt. Chauhi, (1933) 20 A I R Lah 271=142 I C 535=34 P L R 417.

4. Hira Lal v. Queen-Empress, (1895) 22 Cal 757.

5. Kanshi Ram Banshi Ram v. Arjan Das, (1932) 19 A I R Lah 470=137 I C 840=33 P L R 940.

6. Narain Das v. Miran Bakhsh, (1925) 12 A I R Lah 75=84 I C 524=5 Lah 406.

defendants, amounts to a "bond" within the meaning of S. 2 (5), Stamp Act and is liable to payment of stamp duty and penalty as such. The learned Senior Subordinate Judge has held the entry to be a "bond" and has directed the plaintiff to pay Rs. 131-14-0 as stamp duty and Rs. 1312-8-0 as penalty, before further proceedings can be taken in the suit. The plaintiff has applied for revision of this order. The entry is in the bahi of the defendants. The first portion is in the handwriting of the scribe in which it is stated that the account had been gone into and the balance recoverable from the defendants is Rs. 17,280 "*satra hazar do sau assi rupia baqi lene*". It is then signed by the two defendants, and is attested by two witnesses. Below the signature of each defendant separate writings appear in his handwriting. The first one is by Ghulam Mohy-ud-Din (defendant 2) and states "*mubligh satra hazar do sau assi rupia baqi dene. Pichhla hisab samajh liya*". The writing by Atta Mohammad (defendant 1) runs as follows: "*Mubligh satra hazar do sau assi rupia baqi dena mush-tarka ham donon bhayon ko hai*." The entry bears a one-anna stamp only. It appears that on the same day, another document was executed by the defendants in favour of the plaintiff in the form of a letter in which the former admitted their liability to pay interest at 12 per cent. per annum on the amount due to the plaintiff.

For the defendants, it was contended that the entry in the bahi and this letter are parts of the same transaction, and should be taken together in construing whether or not the bahi entry amounts to a "bond." The learned Subordinate Judge has held, in my opinion rightly, that the letter is not a counter-part of the entry in the bahi, and cannot be looked at for the purpose of determining as to whether the entry in the bahi is liable to be stamped as a "bond". He has however held that the entry itself, apart from the letter, contains a promise to pay and having been attested by the witnesses is a "bond". Before us, several rulings have been cited by counsel for both sides, but it is unnecessary to refer to all of them, as every instrument must be considered on its own wording and it is not possible to lay down a hard and fast rule, which might govern all cases. The word "bond" is defined in S. 2 (5) as including

any instrument attested by a witness and not payable to order or bearer, whereby a person obliges himself to pay money to another.

The entry in question is attested by two witnesses and the only question is whether the defendants "obliged" themselves to pay to the plaintiff the sum of Rs. 17,280 which was the balance found due after going through the account. In other words, does the entry contain an express promise to pay the amount mentioned by the plaintiff? As stated already, the first portion of the entry is in the handwriting of the scribe and says: "Rs. 17,280 baqi lene." Below it is the endorsement by the defendants in which each of them states that "Rs. 17,280 baki dene." Taking the entry as a whole, it seems to me that it does contain an express obligation by the defendants to pay the amount to the plaintiff. This clearly follows from the use of the expression "baqi lene" by the creditor and "baqi dene" by the debtors, below the balance struck in the creditor's bahi after going through the previous account between them. See the judgment of Plowden J. in 72 P R 1879⁷ and 35 P R 1903¹; see also the observations of Dalip Singh J. in L P A 164 of 1936⁸ recently decided by the Full Bench where it was stated that a long course of rulings has held that not only on the question of interest but where the words used amount to words 'is payable' or 'to be paid' or 'to be taken' or 'to be given', 'baqi lene', 'baqi dene' etc., almost invariably such words amount to a promise to pay within the meaning of S. 25 (3), Contract Act.

See also 10 Lah 745,⁹ 10 Lah 748¹⁰ and 33 P L R 940⁵ where the same conclusion was reached. In the referring order it was stated that 35 P R 1903¹ appeared to be in conflict with two recent decisions of this Court reported in 34 P L R 417³ and 38 P L R 269.² But after examining the original records it appears that there is no real conflict. We have seen the Urdu entries in those cases and find that their wording was different. In 34 P L R 417,³ the debtor had written below the balance the words "baqi rahe". He did not use the expression "baqi dene" and it was held that this was a mere "acknowledg-

7. *Ladhu Shah v. Fazal Dad*, (1879) 72 P R 1879.

8. *Shanti Parkash v. Harnam Das*, (1938) 25 A I R Lah 234=174 I C 277 (F B).

9. *Khan Chand Dularam v. Daya Ram Amrut Lal*, (1929) 16 A I R Lah 263=115 I C 764=10 Lah 745=30 P L R 240.

10. *Fateh Chand v. Ganga Singh*, (1929) 16 A I R Lah 264=115 I C 853=10 Lah 748=30 P L R 226.

ment" and not an agreement, and the circumstance that the entry was attested by two witnesses did not make it a "bond". As pointed out by the learned Judge, there is a clear distinction between an "acknowledgment" and an "agreement", and there being no words from which an express obligation could be inferred there was no "agreement" and therefore the entry did not amount to a bond. In 38 P L R 269² the words "baqi dene" did not occur over the endorsement by the debtor and that case also is clearly distinguishable. In each case, the entry should be carefully scrutinized. Ordinarily, a balance struck by the debtor, followed by the words "baqi rahe" and signed by the debtor would be a mere "acknowledgment", on which a stamp duty of one anna will be sufficient. As held in 34 P L R 417,³ in such a case, it will be immaterial that the entry is or is not attested by witnesses. If however the words used are "baqi dene" that would amount to an "agreement" and be liable to be stamped as such. If further such an entry is attested by one or more witnesses it will be a 'bond' and must be stamped accordingly. It must therefore be held that the decision of the learned Senior Subordinate Judge is correct. I would accordingly dismiss this petition, but would leave the parties to bear their own costs in this Court. As the time fixed by the lower Court for making good the deficiency in stamp duty and payment of penalty has long since passed, I would allow the plaintiff a period of two months from today, within which to pay the amount. Both counsel have been directed to cause their clients to appear before the Senior Subordinate Judge, Ferozepore on 10th January 1938, when a date for further proceedings before him will be fixed.

Dalip Singh J. — I agree.

B.D./R.K. *Order accordingly.*

A. I. R. 1938 Lahore 505

TEK CHAND J.

Punjab Zamindars Bank Ltd., Lyallpur, through Sardar Desa Singh — Plaintiff — Petitioner.

v.

Babu Mohammad Shaffi — Defendant — Respondent.

Civil Revn. No. 576 of 1937, Decided on 24th February 1938, from decree of Senior Sub-Judge, Lyallpur, D/- 28th April 1937.

(a) Stamp Act (1899), S. 12—"Effectually cancelled"—Object of cancellation is to make stamp unfit for further use in ordinary course of business — Executant of promissory note clearly initialling stamps on it—No date of initialling mentioned—Stamps are effectually cancelled.

The Legislature has not attempted any exhaustive list of the modes in which cancellation may be done in sub-s. 3 of S. 12. The object of the cancellation obviously is to make the stamp unfit for further use in the ordinary course of business, and whether this has been done in any particular case is a question to be determined on an examination of the instrument in question. The section does not lay down that the cancellation must be such that it would be impossible for a criminally inclined person to use the stamp again.

[P 506 C 1]

Thus, where the executant of a promissory note clearly initials his signature on the adhesive stamps on it, the mere fact that the date on which the executant initialled does not appear on any of them, does not make it "not effectually cancelled": *Case law referred.*

[P 507 C 1]

(b) Acknowledgment—Acknowledgment containing promise to pay balance due on pronote —Original pronote inadmissible—Acknowledgment can be basis of suit.

A subsequent acknowledgment containing clearly a promise to pay the balance due on a promissory note can be the basis of a suit, even though the original promissory note is not admissible in evidence: *A I R 1938 Lah 503, Rel. on.*

[P 507 C 2]

S. S. Iqbal Singh — *for Petitioner.*

Manzur Qadir — *for Respondent.*

Order. — The plaintiff instituted a suit against the defendant for recovery of Rs. 214-0-9 as the balance due on a loan which the defendant had raised from him. It was alleged in the plaint, that on 5th September 1925 the defendant had executed a pronote for Rs. 512-8-0 in favour of the plaintiff, bearing interest at Rupees 12-8-0 per cent. per annum, with half-yearly rests, that the defendant had paid Rs. 653-0-9 on account on different dates, and that on 8th December 1933 he had sent an "acknowledgment letter" admitting that on that date Rs. 141-3-6 was due by him and promising to pay it on 18th January 1934. The plaintiff accordingly claimed Rs. 141-3-6 as principal and Rs. 72-13-3 as interest, or Rs. 214-0-9 in all. Along with the plaint, the pronote of 5th September 1925 and the "acknowledgment letter" of 8th December 1933 were filed. The defendant raised two preliminary objections, and pleaded them in bar of the suit. It was urged that the pronote was not properly stamped and was therefore inadmissible in evidence; and, secondly, that the suit was barred by limitation. The trial

Judge sustained the first objection and, holding that the pronote was not properly stamped, dismissed the suit, without going into the question of limitation. On appeal, the learned Senior Subordinate Judge has affirmed this decision.

The promissory note, dated 5th September 1925, bears two adhesive stamps of one anna each. On each stamp, the initials of the executant are written very clearly in his own hand, but the date on which he initialled the stamps does not appear on any of them. It has therefore been held that the stamps had not been effectually "cancelled," in the manner required by sub-s. (3) of S. 12, Stamp Act, and, consequently under sub-s. (2), the instrument must be "deemed to be unstamped." After examining the promissory note in question and hearing counsel for the parties, I am unable to accept the view of the Courts below. They appear to be under the impression that sub-s. (3) of S. 12 lays down a rigid and hard and fast rule that when an adhesive stamp has been affixed on an instrument, and the person executing it writes his name or initials on the stamp it is essential that the "true date" of his so writing must appear on the stamp, and that if this had not been done the stamp cannot be held to have been effectually cancelled. This however is not the only mode in which such a stamp can be cancelled. In sub-s. (3) itself, it is stated at the end that the stamp may be cancelled "in any other effectual manner." Reading S. 12 as a whole, it will appear that all that is legally necessary is that where an adhesive stamp is affixed on any instrument chargeable with duty, the person executing it shall, when affixing such stamp, cancel the same "so that it cannot be used again." The Legislature has not attempted any exhaustive list of the modes in which cancellation may be done. In the first part of sub-s. (3) one of such modes is mentioned, and it is then said that the executant may cancel the stamp "in any other effectual manner." The object of the cancellation obviously is to make the stamp unfit for further use in the ordinary course of business, and whether this has been done in any particular case is a question to be determined on an examination of the instrument in question. The section does not lay down that the cancellation must be such that it would be impossible for a criminally inclined person to use the stamp again.

The learned counsel for the parties have cited a large number of rulings, but I do not think it necessary to discuss them in detail, as each case was decided on its particular facts and the observations made therein must be taken to have been made in reference to its peculiar facts. The learned counsel for the respondents has relied largely upon 14 Bom 102¹ and 28 Bom 432.² The correctness of the case last mentioned was however doubted by Rattigan J. in 108 P R 1908³ and more recently these cases have been dissented from by the Bombay High Court also. In 108 I C 465⁴ at pp. 474-75, Crump J. after pointing out that the question in each case is one which is to be determined upon the facts of the case and that no one case can really be an authority for another, observed as follows:

The Legislature, I take it, says what it means and that is that the stamp in its cancelled condition cannot be used again. It does not say that the process must be so thorough that no evilly-disposed person can, in any manner, render the stamp fit for further use. Indeed, the process which the Legislature declared to be adequate in S. 12 (3) might be defeated by criminal ingenuity.

The learned Judge then referred to the English case in (1902) 71 L J Ch 766⁵ where the opinion was expressed that "lines or a cross on the stamp might amount to sufficient cancellation", and following this decision he disapproved the dicta in the previous decisions of his own Court referred to above. The Rangoon High Court considered the question at length in 3 Rang 39⁶ and there also the decisions in 14 Bom 102¹ and 28 Bom 432² were dissented from, and it was held that all that is necessary is that it should be apparent on the face of the stamp that it has once been used. This is all that could reasonably be expected from the person executing it, and is all that is in fact required by S. 12. Reference may also be made to 3 A L J 326.⁷ The learned Judges of the Courts below have referred to three Punjab cases, reported in

1. S. A. Ralli v. Caramalli Fazal, (1890) 14 Bom 102.
2. Virbhadrappa v. Bhimaji Balaji, (1904) 28 Bom 432=6 Bom L R 436.
3. Piran Ditta v. Mangal Singh, (1908) 108 P R 1908=207 P W R 1909.
4. In re Tata Iron & Steel Co; Ltd. (1928) 15 A I R Bom 80=108 I C 465=30 Bom L R 197.
5. Mc Mullen v. Sir Alfred Hickman Steamship Co. Ltd., (1902) 71 L J Ch 766=10 Manson 106=18 T L R 650.
6. Kolai Sai v. Balai Hajam, (1925) 12 A I R Rang 209=88 I C 933=3 Rang 39.
7. Kirpa Ram v. Barumal, (1906) 3 A L J 326=1906 A W N 95.

148 P R 1919,⁸ 15 I C 202⁹ and A I R 1935 Lah 716.¹⁰ The first two of these cases however do not in any way support their conclusion. In 148 P R 1919⁸ it was observed that the question whether or not a stamp has been effectually cancelled is one purely of fact to be decided on an examination of the stamp itself. In that particular case, the stamp had been cancelled by drawing diagonal lines right across the stamp, their ends extending to the paper, and it was held that this was an effectual cancellation. In 15 I C 202⁹ lines had been drawn across the stamp and this was held to be sufficient. It was nowhere laid down in those cases, as appears to have been supposed, that it is essential that the writing on the stamp, to be effectual, must necessarily extend on to the paper. In the third case, A I R 1935 Lah 716¹⁰ the promissory note in question bore four one anna stamps, and it was held that at the time of the execution of the note only three stamps had been affixed, and that the fourth stamp was affixed subsequently. On this finding, the instrument could not be said to have been properly stamped and was therefore held to be inadmissible.

A further objection was raised that this fourth stamp, which had been found to have been subsequently affixed, was not effectually cancelled as all that had been done was that a long straight line had been drawn in faint ink, and that this line did not extend over the margin of the stamp. In the discussion on this last point, there are some observations which lend some support to the view of the Courts below. But they were really made in reference to the particular document concerned, and cannot be said to lay down any rule of universal application. In any case, the whole discussion on this point was obiter, as the fourth stamp had been found to have been affixed subsequent to the execution of the promissory note and for that reason it was not admissible in evidence. In the case before me, I have no doubt that the stamps had been effectually cancelled so that they could not be used again, and the pronote was admissible in evidence.

Before concluding, I think it necessary to remark that even if the decision of the Courts below on the question of the inadmissibility of the pronote is correct, the suit could not have been dismissed forthwith. As already pointed out, the cause of action mentioned in the plaint was the "acknowledgment letter of 8th December 1933". This letter clearly contained "a promise to pay" Rs. 141-3-6 and being itself an "agreement" it could be the basis of the suit, even though the original note were held to be inadmissible in evidence see Civil Revision No. 380 of 1936,¹¹ and the rulings cited therein. The learned Judges therefore should have gone into this aspect of the matter, before dismissing the suit, even if they were right in their view as to the cancellation of the stamp. I accept the petition for revision, set aside the judgments and decrees of the Courts below, and remand the case to the Court of first instance for disposal of the other points involved in the case in accordance with law. Costs shall abide the event. Both counsel have been directed to cause their clients to appear before the trial Court on 28th March 1938 when a date for further proceedings in the suit will be fixed.

V.B.B./R.K.

Case remanded.

11. Tek Chand Daulat Ram v. Ata Mohammad, Reported in (1938) 25 A I R Lah 503=40 P L R 193.

A. I. R. 1938 Lahore 507

DIN MOHAMMAD J.

Diwan Chand and another—Petitioners,
v.

Bihari Lal — Respondent.

Civil Review Appln. No. 57 of 1937, in Civil Revn. No. 179 of 1937, Decided on 11th November 1937, from order of Din Mohammad J., D/- 21st May 1937.

Revision—Case decided.

An order by Court holding the suit of a plaintiff time-barred in respect of certain reliefs claimed by him is a 'case decided' to that extent. [P 508 C 1]

Dr. Nand Lal — *for Petitioners.*

Amar Nath Chopra — *for Respondent.*

Order.—Counsel for the petitioner has urged that arguments on the question of limitation were heard on 17th, 18th and 19th August, but even if this were so, it would not alter the position. It is further contended that revision was not competent

8. Mela Ram v. Brij Lal, (1920) 7 A I R Lah 874=54 I C 976=148 P R 1919=122 P L R 1919.

9. Narayana Iyer v. Venkatarama Aiyar, (1912) 15 O C 58=15 I C 202.

10. Allah Bakhsh v. Dost Mahomad, (1935) 22 A I R Lah 716=161 I C 487,

as the order sought to be revised was interlocutory. Here too I do not agree. An order holding the suit of a plaintiff time-barred in respect of certain reliefs claimed by him is to my mind a case decided to that extent. I am not therefore convinced that there are any grounds for review. I dismiss this petition with costs. Parties have been directed to appear before the trial Court on 22nd November 1937.

R.M./R.K.

*Petition dismissed.***A. I. R. 1938 Lahore 508**

TEK CHAND J.

Sardarni Kishan Kaur — Judgment-debtor — Appellant.

v.

Channu Mal and others, Decree-holders and another — Judgment-debtor — Respondents.

Exn. First Appeal No. 116 of 1937, Decided on 17th November 1937, from order of Sub-Judge, First Class, Amritsar, D/- 14th December 1936.

(a) Civil P. C. (1908), O. 21, R. 90, Proviso (Lahore amendment) — Objections as to contents of proclamation ought to be raised before sale—Sale cannot be set aside merely on ground of omission to give approximate value or rental of properties.

The objections as to the contents of the proclamation ought to be raised before the sale and cannot be considered at the stage of appeal under the Proviso to R. 90, O. 21 added by the Lahore High Court under its rule-making power. Moreover, even according to the law as it stood before the amendment, a sale could not be set aside merely because of the omission to give the approximate value or rental of the properties: *A I R 1922 Lah 35*; *A I R 1917 Lah 136* and *A I R 1928 Lah 918*, *Rel. on.* [P 508 C 2]

(b) Civil P. C. (1908), O. 21, R. 90—Inadequacy of price.

Inadequacy of price fetched is by itself no ground for setting aside sale. [P 508 C 2]

Charan Singh — *for Appellant.*

Nand Lal Bhalla — *for Respondents.*

Judgment. — On 14th March 1933, a mortgage decree for Rs. 20,417 was passed in favour of the respondent against the appellant Sardarni Kishan Kaur. In execution, the decree-holder took out proceedings for sale of three houses which had been mortgaged to him. The auction was held on 10th and 11th March 1936 and the highest bid, which was that of the decree-holder for Rs. 4700, was accepted. The judgment-debtor filed objections under O. 21, R. 90, Civil P. C. The objections have been overruled and the Subordinate

Judge has passed an order confirming the sale. The judgment-debtor appeals. Before me the sale is attacked on the ground that there were the following irregularities in publishing and conducting it: (1) that the value, or the rent, of the houses which were to be sold was not given in the proclamation of sale, or the printed handbills circulated by the auctioneer; (2) that the dimensions of the houses were not stated in the proclamation nor were the houses otherwise sufficiently described; (3) that the drum was not beaten and the auction was a hole and corner affair; and (4) that the price fetched was inadequate.

The first two objections as to the contents of the proclamation ought to have been raised before the sale and cannot be considered at this stage under the proviso to R. 90, added by the Lahore High Court under its rule-making power. Moreover, even according to the law as it stood before the amendment, a sale could not be set aside merely because of the omission to give the approximate value or rental of the properties: see 67 I C 885,¹ 11 P L R 1917² and 110 I C 339.³ The dimensions of the houses were, no doubt, not given in the proclamation, but it contained the khana shumari numbers of the houses and also gave full details of the boundaries. In the handbills, issued by the auctioneer, all these particulars were duly entered. The evidence that the drum was not beaten or that the sale was not properly conducted and was a hole and corner affair is of the flimsiest kind, and has been rightly rejected by the Subordinate Judge, with whose conclusions I entirely agree. The three houses were separately auctioned and there were eight bids for each of them, some of the bidders being persons who have now appeared as witnesses for the judgment-debtor. The price fetched no doubt appears to be inadequate, but that by itself is no ground for setting aside the sale. It has not been established that there were any illegalities or material irregularities in publishing or conducting the sale, which have resulted in substantial loss to the appellant. The appeal fails and is dismissed with costs.

D.S./R.K.

Appeal dismissed.

1. Muhammad Nizam Uddin v. Amin Uddin, (1922) 9 A I R Lah 35=67 I C 885.
2. Mani Ram v. Lachman Das, (1917) 4 A I R Lah 136=39 I C 59=11 P L R 1917.
3. Mahna Singh v. Salig Ram, (1928) 15 A I R Lah 918=110 I C 339.

A. I. R. 1938 Lahore 509

TEK CHAND J.

Tirath Ram — Decree-holder — Appellant.

v.

Official Receiver, Ferozepore — Judgment-debtor — Respondent.

Exn. Second Appeal No. 1577 of 1937, Decided on 17th February 1938, from order of Addl. Dist. Judge, Ferozepore, D/- 25th August 1937.

Charge — Creation of — Compromise deed besides continuing attachment specifically prohibiting transfer of mortgaged property by judgment-debtor — Further failure in payment of instalments fixed entitling decree-holder to realize entire decretal amount — Deed creates charge in favour of decree-holder.

Mere attachment of property, whether before or after judgment, does not create a charge on the property in favour of the attaching creditors. But where by a compromise deed not only the attachment of the property was continued but it was specifically stated that until the payment of the entire decretal amount the judgment-debtor shall not transfer the attached property by mortgage, sale or gift to any other person and that in default of payment of the instalments fixed the decree-holders would be entitled to realize the entire decretal amount from this land, a charge upon the land is clearly created in favour of the decree-holder : *A I R 1914 All 187 and 32 Bom 386, Rel. on; A I R 1936 Lah 610, Disting.* [P 510 C 1]

Shamair Chand — for Appellant.

R. P. Khosla — for Respondent
(Official Receiver).

Judgment.—The appellant, Tirath Ram, instituted a suit for recovery of a certain sum of money against Partap Singh. The latter failed to appear and an ex parte decree was passed against him on 30th August 1935. The decree-holder took out proceedings in execution of the decree by attachment of certain agricultural land belonging to the judgment-debtor and by his arrest. The warrants of attachment and arrest were issued on 3rd October 1934. The next day (4th October 1934) the judgment-debtor applied to have the ex-parte decree set aside alleging that he had not been duly served in the suit. The Subordinate Judge issued notice of this application to the decree-holder and stayed the execution of the warrants meanwhile. On 24th October 1934, both parties appeared before the Subordinate Judge and presented an application stating that they had compromised and that orders be passed accordingly. The compromise was to the effect that the decretal debt would be paid in two instalments, that till the payment

of the entire decretal amount the agricultural land of the judgment-debtor (34 killas), particulars of which were specified therein, would remain under attachment and that "so long as the entire decretal amount has not been paid the judgment-debtor shall not transfer by mortgage, sale or gift any portion of this property." It was also stipulated that in the event of failure to pay any instalment at the time fixed, the decree-holder would be entitled to "recover the entire decretal amount from the aforesaid property or from the person or other property of the judgment-debtor." Both parties appeared before the Subordinate Judge and verified the terms of the compromise, and the learned Judge, accepting the compromise, dismissed the application for setting aside the ex parte decree and consigned the execution to the record room.

The judgment-debtor made default in payment of the instalments, and the decree-holder restarted the execution proceedings praying that the decretal amount be realized by sale of the land mentioned in the compromise. The executing Court granted the application and ordered the sale of the land through the Collector. In the meantime, the judgment-debtor was adjudicated insolvent and the Official Receiver sent a rokbar to the executing Court asking for stay of the sale. The decree-holder filed a replication objecting to the stay on the ground that he was a secured creditor. He however stated that he had no objection to the Official Receiver being made a party to the execution proceedings as the representative of the judgment-debtor. The Court accordingly made the Official Receiver a party to the execution proceedings, and issued another warrant for sale of the land through the Collector. The sale was actually held on 9th September 1936, and the sale proceeds were forwarded by the Collector to the executing Court. The receiver again applied to the executing Court that the entire amount realized by the sale of the land be made over to him for pro rata distribution among the creditors of the judgment-debtor. Tirath Ram however claimed that he had a charge over the land, which had been created by the compromise long before the adjudication of the judgment-debtor as an insolvent and that he alone was entitled to the sale proceeds of the land. The executing Court upheld the contention of the Official Receiver and directed that the whole

amount be made over to him for distribution among the creditors. This decision has been maintained on appeal by the Additional District Judge. Both Courts, in support of their decision have relied upon a Division Bench ruling of this Court reported in A I R 1936 Lah 610.¹

The decree-holder, Tirath Ram, has come in second appeal and it has been contended on his behalf that the learned Judges of the Courts below have erroneously held that there was no charge created over the land in his favour by the compromise of 24th October 1934 and that the ruling relied upon is distinguishable.

After hearing both counsel and examining the record, I have no doubt that this contention is well-founded and must succeed. It is settled law that mere attachment of property, whether before or after judgment, does not create a charge on the property in favour of the attaching creditors, but in this case there was something more. By the compromise, not only the attachment of the property was continued but it was specifically stated that until the payment of the entire decretal amount, the judgment-debtor shall not transfer the attached property by mortgage, sale or gift to any other person, and that in default of payment of the instalments fixed the decree-holders would be entitled to realize the entire decretal amount from this land. There can be no doubt, that a charge upon the land was clearly created in favour of the appellant. In this connexion, reference may be made to 36 All 201² which is analogous to the present case. There a deed stated that the executant had borrowed a sum of money from certain persons and then proceeded to refer to a certain share of the executant in a property and finally the deed contained a clause by which the executant undertook that until payment of the amount he would not transfer the property by sale, mortgage, gift or in any other way, but there was in no part of the document any expression conveying the idea of mortgage or hypothecation, nor was there any reference to any right of sale in the property. It was held by Richards C. J. that:

It was the intention of the parties to make the property mentioned therein security for the loan

1. Basanti Devi v. Official Receiver, Estate of Ghulam Rasul, (1936) 23 A I R Lah 610=164 I C 940.

2. Jawahir Mal v. Rani Indomati, (1914) 1 A I R All 187=22 I C 973=36 All 201=12 A L J 290.

and interest and that the document created a charge within the meaning of S. 100, T. P. Act.

To the same effect is 32 Bom 386.³ In the case relied upon by the lower Courts, A I R 1936 Lah 610,¹ the facts were entirely different. There the decree-holder had attached before judgment certain property belonging to the judgment-debtor. Subsequently, the parties had entered into a compromise whereby the judgment-debtor promised to pay a certain sum to the decree-holders by a certain date. A clause was inserted in the deed to the effect that attachment was to continue till the payment of the amount due in full. The compromise did not contain any stipulation, that the executant would not transfer the property mentioned till the repayment of the amount in full. The learned Judges held, if I may say so with all respect, rightly that in the absence of any such stipulation no charge was created on the property in dispute in favour of the creditors. In a matter like this, each case has to be decided on its own facts; and what has to be seen is whether the words of the particular document in question make a property security for the payment of money to another. If the words expressly or by necessary implication make the property mentioned security for the payment of the money due by the executant to another person, there can be no doubt that a charge on the property is created in favour of the latter. I hold that in this case a charge had been created in favour of Tirath Ram. I accept the appeal, set aside the judgments of the Courts below and direct that the amount realized by the sale of the land in dispute be adjusted in the first instance towards the amount due to the appellant on his decree. The appellant will get his costs in all Courts from the Official Receiver.

V.B.B./R.K.

Appeal allowed.

3. Janardana v. Anant, (1908) 32 Bom 386=10 Bom L R 575.

A. I. R. 1938 Lahore 510

DALIP SINGH AND BHIDE JJ.

Mahabir Singh — Defendant —

Appellant.

v.

Badh Singh, Plaintiff and others,

Defendants — Repondents.

First Appeal No. 456 of 1936, Decided on 8th December 1937, from decree of Senior Sub-Judge, Sargodha, D/- 26th August 1936.

Pre-emption — Sale of land by B to S — Suit by D for pre-emption—Only three days before suit, land sold by S to M, the son of B on notice of pre-emption—M being a student and admittedly having no means of his own — Sale by S to M held benami.

One B sold land to S. Thereupon D filed a suit for pre-emption. It appeared that only three days before the institution of the suit for pre-emption, the original vendor's son M had given notice of pre-emption to S and S had sold the land to M. M was admittedly a student learning in a college and had no means of his own whereby he could have purchased the land from S :

Held that in these circumstances the sale by S to M was benami. [P 511 C 1, 2]

J. N. Aggarwal and J. L. Kapur —
for Appellant.

Shamair Chand — for Respondent
(Plaintiff.)

Bhide J. — This appeal arises out of a suit for pre-emption with respect to land sold by Sardar Bakhshish Singh, defendant 1 to Sardar Khan, defendant 2, on 10th March 1934. Sardar Khan pleaded that he had already sold the land to Sardar Mahabir Singh, son of Sardar Bakhshish Singh, in recognition of his right of pre-emption as he had given him a notice that he wanted to pre-empt the land. Sardar Mahabir Singh was accordingly impleaded as a defendant. The plaintiff contended that the alleged sale in favour of Sardar Mahabir Singh was benami and that in any case he had no right of pre-emption as he and his father were members of a joint Hindu family. The trial Court has upheld these pleas and decreed the suit. From this decision Sardar Mahabir Singh has preferred the present appeal. The learned counsel for the appellant contended that the trial Court has found that the sale in favour of the appellant had taken place and in the circumstances there is no justification for holding the sale to be 'benami' merely on the ground that the purchase money had been supplied by Sardar Bakhshish Singh, the original vendor. Bakhshish Singh and Sardar Iqbal Singh, Advocate, who gave notice to the vendee on behalf of Sardar Mahabir Singh, have gone into the witness-box and have stated that the notice to the vendee was given at the instance of Mahabir Singh as he wanted to pre-empt the property, but it appears from the evidence that Mahabir Singh was only a student (his age was stated to be about 22) at the time of the transaction reading in a college at Poona and no explanation has been given why he should have thought of pre-empting the property

when he had admittedly no means of his own. Mahabir Singh has not appeared in the witness-box. The notice of pre-emption was given to the vendee only three days before the institution of the present suit.

Taking into consideration all these circumstances, the finding of the learned Judge of the trial Court that the transaction of sale in favour of Mahabir Singh was a benami one appears to be amply justified. In the circumstances, it is unnecessary to go into the further question whether Mahabir Singh and his father Bakhshish Singh formed a joint Hindu family or not. I would therefore uphold the decision of the learned Judge of the trial Court and dismiss this appeal with costs.

Dalip Singh J.—I agree.

D.S./R.K.

Appeal dismissed.

A. I. R. 1938 Lahore 511

JAI LAL J.

Firm Duli Chand Maidhan —

Plaintiff — Petitioner.

v.

Panthi and another — Defendants — Respondents.

Civil Revn. No. 938 of 1937, Decided on 1st February 1938, from decree of Senior Sub-Judge, Rohtak, D/- 7th October 1937.

(a) Stamp Act (1899), S. 35 (a) — Balance struck in account book of creditor followed by statement signed by debtor that certain amount is still due — Document is agreement and not acknowledgment — Document although not duly stamped is admissible in evidence after payment of penalty.

Where a balance is struck in the account book of a creditor and is followed by a statement "baqi reहे lene lekha ker ke char so tees rupiya" which is signed by the debtor, the document is an agreement and not a mere acknowledgment, as it contains a promise to pay. Such a document although not duly stamped is admissible in evidence, after payment of the stamp duty penalty by the party relying on it: *A I R 1931 Lah 631 and A I R 1935 Lah 567 (S B), Rel. on; A I R 1933 Lah 271, Dissent.* [P 512 C 1, 2]

(b) Stamp Act (1899), S. 36 — Suit for money instituted on basis of document executed by two persons — Execution of document admitted by one of the executants — Court is not entitled to reject document as against him, although it is not duly stamped.

Where a suit for recovery of money is brought on the basis of a document executed by two persons and one of the executants admits the execution of the document during the trial of the suit, it is not open to the Court to reject the document as

against him, even if the document is not duly stamped. [P 512 C 1, 2]

Prakash Chandra for Shamair Chand and Shamair Chand — *for Petitioner.*

L. M. Datta — *for Respondents.*

Order. — This is a petition for revision of an order passed by the Senior Subordinate Judge of Rohtak dismissing the plaintiffs' appeal. The appeal was against a decree of the trial Judge dismissing the suit on the ground that the document on which the suit was based was inadmissible in evidence as the stamp thereon had not been properly cancelled. The document was held to be an acknowledgment of liability. The Senior Subordinate Judge agreed with the trial Judge and dismissed the plaintiff's appeal. It appears that the suit is based on a balance struck in the account-book of the petitioner. The phraseology of the account is "*baqi rehe lene lekha ker ke char so tees rupiya*". This is signed by the defendants. It is contended for the petitioners that the document in suit is an agreement and not a mere acknowledgment because it contains a promise to pay. This contention of the learned counsel is supported by A I R 1931 Lah 631¹ which incidentally was approved in A I R 1935 Lah 567.²

In view of this finding, it is not necessary to deal with the other two grounds taken by the petitioners that even if it were held that the document is an acknowledgment it was not open to the trial Court to entertain the objection after it had once been admitted in evidence, and further that, in any case, one of the defendants having admitted the execution of the document, it was not open to the trial Judge to hold the document inadmissible even as against him. Reliance with regard to the first objection was placed on S. 36, Stamp Act. What happened in this case was that the document was mentioned in the plaint and an issue was framed whether the document was executed by the defendant. Evidence was led by the plaintiffs and at the conclusion of oral evidence the document was sent to Phillaur for comparison of the thumb-impressions. That evidence was also in favour of the plaintiffs. It was after the evidence of the expert from Phillaur had been recorded that an objection was taken by the defendants that the document was

not duly stamped. I am inclined to agree with the contention of the learned counsel for the petitioners in spite of the judgment which has been relied on by the lower Courts, which is A I R 1933 Lah 271.³ With great respect I am inclined to differ from the view taken in that case and would have referred the matter to a Division Bench were it not that the petitioners' counsel is prepared to pay penalty on the document and therefore the question does not then arise.

On the second ground also the learned Senior Subordinate Judge has gone wrong. The document having been admitted by one of the defendants could not be rejected as against him. I accept this petition, set aside the decrees of the Courts below and remand the case to the trial Court with direction to admit the document in evidence on payment of the requisite stamp duty of Re. 1 and Rs. 10 penalty by the petitioners and then to proceed with the decision of the case on the merits. Court-fee on the memorandum of appeal in the Court of the Senior Subordinate Judge and in this Court shall be refunded to the petitioners. The other costs shall abide the result. Parties have been directed to appear before the trial Judge on 1st March 1938.

R.M./R.K.

Petition allowed.

3. Jagan Nath v. Mt. Chauhi, (1933) 20 A I R Lah 271=142 I C 535=34 P L R 417.

A. I. R. 1938 Lahore 512

ABDUL RASHID J.

Prabu Mal — Defendant — Appellant.

v.

Chandan, Plaintiff and another — Defendant — Respondents.

Second Appeal No. 1415 of 1937, Decided on 31st January 1938, from preliminary decree of Senior Sub.Judge, Rohtak, D/- 8th July 1937.

Punjab Redemption of Mortgages Act (2 of 1913), Ss. 10, 12—Application for redemption dismissed by Collector on the ground that it was improper dispute between parties in summary proceedings—Suit for redemption subsequently filed by applicant is not one to set aside order of Government officer within the meaning of Art. 14, Limitation Act—Art. 14 does not apply—Suit although instituted more than one year from date of Collector's order is not barred.

Where a Collector dismisses an application for redemption under the Redemption of Mortgages Act on the ground that it was improper to order redemption of the mortgage in summary proceedings as the dispute between the parties was of a

1. Pablad v. Shiblal, (1931) 18 A I R Lah 631=132 I C 881.

2. Nanak Chand v. Fattu, (1935) 22 A I R Lah 567=158 I C 234=17 Lah 1 (S B).

complicated nature and directs the applicant to seek redemption in a Civil Court, he does not decide anything against the applicant; and a suit for redemption subsequently filed by the applicant in a Civil Court is not one, to set aside any act or order of an Officer of the Government made in his official capacity within the meaning of Art. 14, Lim. Act. Art. 14 is inapplicable to such a suit and the suit, although filed more than one year from the date of the Collector's order, is not barred by limitation: *A I R 1929 Lah 513, Foll.; A I R 1925 Lah 385 and A I R 1934 Lah 384, Disting.*
[P 513 C 2; P 514 C 1]

Achhru Ram — *for Appellant.*

Shamair Chand — *for Respondents.*

Judgment.—On 30th May 1901, Shadi mortgaged 3 bighas of land for Rs. 125 in favour of Prabhu Mal defendant 1. Chandan plaintiff, the grandson of Shadi, presented an application for redemption under the Redemption of Mortgages Act 1913, in the Court of Diwan Prithwi Chand, Assistant Collector, Rohtak, on 23rd September 1927, and deposited a sum of Rs. 125 for payment to the mortgagee. The Assistant Collector came to the conclusion that it was improper to order redemption of the mortgage in summary proceedings as the dispute between the parties was of a complicated nature. He held that the parties should have recourse to the Civil Court. After giving this finding he dismissed the application of the plaintiff. The suit out of which the present appeal has arisen was instituted by Chandan on 6th December 1935 for possession of the land by redemption on payment of Rs. 125. It was pleaded by the defendants *inter alia* that as the plaintiff had not instituted his suit within one year of the order of the Assistant Collector, his suit was barred by time under Art. 14 Lim. Act. The trial Court came to the conclusion that Art. 14 was inapplicable. A preliminary decree for redemption on payment of Rupees 125 was consequently granted to the plaintiff. The appeal preferred by Prabhu Mal, defendant, having been dismissed by the learned Senior Subordinate Judge, he has come up in second appeal to this Court.

It was contended by Mr. Achhru Ram on behalf of the appellant that the dismissal of the application of the plaintiff by the Assistant Collector amounted to an order under S. 10, Redemption of Mortgages Act. It was incumbent on the plaintiff therefore to institute a suit under S. 12 of the Act to establish his right in respect of the mortgage within a period of one year. If he failed to institute such a suit,

the order of the Assistant Collector was to be regarded as conclusive. It was further urged that a suit under S. 12, Redemption of Mortgages Act falls within the purview of Art. 14, Lim. Act and the limitation for such a suit is one year from the date of the order dismissing the application under the Redemption of Mortgages Act. Reliance was placed by the learned counsel on 6 Lah 206¹ and 15 Lah 389.² In my opinion both of these rulings are distinguishable from the present case. In 6 Lah 206¹ the Collector had decided that there was no subsisting mortgage and redemption was therefore barred. The Collector has therefore decided the application under the Redemption of Mortgages Act on the merits. In 15 Lah 389² redemption was allowed by the Assistant Collector and the application was accepted on the merits. In the present case there has been no trial of the question on the merits in the Court of the Assistant Collector. A case which is practically on all fours with the present case was decided by a Division Bench of this Court, and is reported in *A I R 1929 Lah 513*.³ In that case it was held that the rejection of an application by a Collector under S. 9, without considering the merits of the dispute and after recording the objections raised by the defendants on the ground that the dispute cannot be settled summarily practically amounts to denial of jurisdiction by the Collector and in order to enable the plaintiff to succeed in his suit for redemption it is by no means necessary to set aside any order passed by the Collector. The suit of the plaintiff does not therefore fall within Art. 14, Lim. Act. 6 Lah 206¹ was considered and distinguished in this ruling.

In the present case the Assistant Collector definitely stated that it was improper for him to order redemption in summary proceedings, as the question was of great complexity. He directed the applicant to seek redemption in a Civil Court. In order to strike off the application he had to state that the application was dismissed. The substantive part of the order of the Assistant Collector in my opinion is not against the plaintiff. He is not therefore

1. *Kaura v. Ram Chand*, (1925) 12 A I R Lah 385=88 I C 945=6 Lah 206=26 P L R 388.

2. *Gangu v. Mahan Rajchand*, (1934) 21 A I R Lah 384=149 I C 661=15 Lah 389=36 P L R 337 (F B).

3. *Asa Ram v. Darbamal*, (1929) 16 A I R Lah 513=121 I C 379=30 P L R 440.

suing to set aside any act or order of an officer of the Government made in his official capacity. In these circumstances, Art. 14, Lim. Act is inapplicable. For the reasons given above I dismiss this appeal with costs.

R.M./R.K.

Appeal dismissed.

* A. I. R. 1938 Lahore 514

FULL BENCH

YOUNG C. J., TEK CHAND AND
MONROE JJ.*Mohammad Yar — Convict*
Petitioner.

v.

Emperor.

Criminal Revn. No. 781 of 1937, Decided on 19th April 1938, from order of Sess. Judge, Multan, D/- 8th May 1937.

* Penal Code (1860), S. 441 — Person one night passing stealthily through court-yard of one house to commit adultery in another adjoining house—He is guilty of trespass in respect of former house not under second alternative of S. 441 but under first alternative.

Where a person one night passes stealthily through the court-yard of one house with the intention of committing adultery in another adjoining house, such person is not guilty of trespass in respect of the former house under second alternative of S. 441. It cannot be said that such person had intention to annoy or insult the occupant of the former house and even if he could be supposed to have known that, if discovered his presence there might cause annoyance to any person living there, this would not make him guilty of committing trespass in that house. [P 515 C 1]

Such person is, however, guilty of trespass in respect of the former house under first alternative of S. 441, because S. 441 means that if a person enters upon the property with intent to commit an offence on that property or on any other property or with respect to a person who is or is not in possession of the property entered upon he is guilty under it. [P 515 C 1, 2]

J. G. Sethi — *for Petitioner.*Mohammad Monir, Asst. Advocate-
General — *for the Crown.*

Tek Chand J.—The petitioner Mohammad Yar was convicted under S. 456, I. P. C., and sentenced to suffer imprisonment till the rising of the Court and pay a fine of Rs. 100. His appeal having been rejected by the Sessions Judge, he applied for revision to this Court. His petition was heard in the first instance by Jai Lal J. sitting in single Bench. The learned Judge accepted the findings of fact arrived at by the

Courts below as correct, but referred the case to a Division Bench, as there was some conflict of judicial opinion on the questions of law involved. In view of the importance of the question, the Division Bench referred this case, along with another case (Cr. R. 1472 of 1937), for decision by the Full Bench. The facts found are that one Ilahi Bakhsh was the owner of two contiguous houses. These houses had separate entrances and separate courtyards. There was however an intervening door, through which access could be had from the courtyard of one house into that of the other. This door usually remained shut and chained. One of the houses was occupied by the owner Ilahi Bakhsh himself, and his married sister Mt. Kariman also lived with him in it. At the time of the occurrence, the adjoining house was let to one Manzur Ahmad Shah, a police constable, who was living in it with his wife. Formerly, this latter house was let to the petitioner, Mohammad Yar, who is an Ahlmad in one of the local Courts. But as he was suspected of having intimacy with Mt. Kariman, sister of the landlord Ilahi Bakhsh who, as already stated, lived in the adjoining house, the petitioner was made to vacate the house and it was let to Manzur Ahmad. After vacating the house however the petitioner continued his improper relations with Mt. Kariman and clandestinely visited her in the house occupied by her brother Ilahi Bakhsh.

On the evening of 30th January 1937, at about 9.30 P. M. the petitioner unchained the outer door of the courtyard of Manzur Ahmad's house and was passing through this courtyard in order to go to the adjoining house occupied by Ilahi Bakhsh and Mt. Kariman, with the object of having sexual intercourse with the latter when he was seen by Manzur Ahmad's wife. She raised an alarm, and the petitioner was arrested while he was still in the courtyard of Manzur Ahmad's house. These facts are no longer in dispute and the sole question is whether they fall within S. 456, I. P. C. The offence made punishable under that section is lurking house-trespass by night; this is an aggravated form of criminal trespass as defined in S. 441, I. P. C. The contention for the Crown is that the act of the petitioner is covered by both the alternatives, described in Para. 1 of S. 441, which reads as follows:

Whoever enters into or upon property in the possession of another with intent to commit an

offence, or to intimidate, insult or annoy any person in possession of such property is said to commit criminal trespass.

It was contended that in entering into the courtyard of Manzur Ahmad, the petitioner had (i) the 'primary' intent to commit adultery with a married woman, Mt. Kariman, which is an offence under the Penal Code, and (ii) he had also the 'secondary' intent to annoy Manzur Ahmad Shah and his wife who admittedly were in possession of the house entered upon. It is therefore argued that the petitioner is guilty under the first as well as the second alternative. I have no doubt that the second alternative cannot possibly apply to this case. In the circumstances above-mentioned, it cannot be held that the petitioner had any intention to insult or to annoy Manzur Ahmad, his wife or any other person living in that house. His sole object in stealthily passing through the courtyard of Manzur Ahmad's house was to find access, through a back-door to the adjoining house occupied by Mt. Kariman. He did not expect to find any person in that courtyard and hoped that he would get entry into Mt. Kariman's house unnoticed. Even if he could be supposed to have known that, if discovered, his presence in Manzur Ahmad's courtyard might cause annoyance to any person living there, this would not make him guilty of committing criminal trespass in that house. This question has been discussed at length in the connected case (Cr. R. 1472 of 1937) decided today, and for the reasons given there I have no hesitation in holding that on the facts of this case the second alternative does not apply.

The petitioner's act however clearly falls within the first part of S. 441. It has been found that he entered Manzur Ahmad's house with the intention of having sexual intercourse with Mt. Kariman who lived in the adjoining house. The petitioner himself stated that Mt. Kariman was a married woman. Under the law of India, adultery is a criminal offence. S. 497, I. P. C. provides that whoever has sexual intercourse with a person, who is, and whom he knows or has reason to believe, to be the wife of another man, without the consent or connivance of that man, such intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and is punishable with imprisonment which may extend to five years. The petitioner therefore entered into the house with the intent of

committing an offence. It is however argued by the learned counsel for the petitioner that in order to bring a case within this section, it is essential that the intent must have been to commit an offence in the particular premises entered upon and not in a neighbouring house. In other words the learned counsel wants the word 'there' to be read after the phrase "commit an offence" in the second line of the section. I have no doubt that this contention is without force. The phraseology used by the Legislature is clear and explicit, and it is not permissible to us to add any words to it, so as to give it an extended or restricted meaning. The section, as worded, means that if a person enters upon property with intent to commit an offence on that property, or on any other property, or with respect to a person who is, or is not, in possession of the property entered upon, he is guilty under it.

I hold therefore that in this case the petitioner has been rightly convicted under S. 456, I. P. C., he having been found to have entered into the courtyard of the house in possession of Manzur Ahmad with intent to commit adultery with a married woman in the adjoining house. I consider however that the offence is only a technical one and, in the circumstances, the ends of justice would be met by maintaining the sentence of imprisonment till the rising of the Court and reducing the fine from Rs. 100 to Rs. 5. With this modification in the sentence, I would dismiss the petition for revision. •

Young C. J. — I agree.

Monroe J. — I agree.

D.S./R.K.

Petition dismissed.

A. I. R. 1938 Lahore 515

ADDISON AND DIN MOHAMMAD JJ.

Pir Taj-ud-Din and another —

Judgment-debtors — Appellants.

v.

Khambatta and others —

Decree-holders — Respondents.

First Appeal No. 434 of 1936, Decided on 23rd November 1937, from order of Sub.Judge, First Class, Lahore, D/. 17th November 1936.

(a) Execution—Arrest by judgment-debtor—Punjab Act 7 of 1934 and Civil P. C. Amendment Act 21 of 1936 have retrospective effect—When judgment-debtor can obtain immunity from arrest stated—Onus of proof.

Section 34 of Act 7 of 1934 (Punjab Relief of Indebtedness Act) and O. 21, R. 40, Civil P. C. read with S. 51, Civil P. C. as amended by Indian Act 21 of 1936, have a retrospective effect and give immunity to judgment-debtors from arrest unless provisions of those Acts are fulfilled. The onus under the new provisions of law lies on the decree-holder to establish on the record that the judgment-debtor has the means to pay and if no such evidence is brought on the record and it is not apparent on the record otherwise that he has such means, no presumption adverse to the judgment-debtor can be drawn. [P 518 C 1; P 519 C 1]

(b) Minor — Decree against unrepresented minor — Decree is nullity — Executing Court can refuse to execute it.

A decree obtained against an unrepresented minor is a nullity and if it is brought to the notice of an executing Court that the decree sought to be executed was obtained against a judgment-debtor when he was a minor and was not represented by guardian ad litem, it is necessary for it before it executes the decree to determine whether there is a decree which can be executed. The rule is that an executing Court can go behind a void decree: *A I R 1925 Cal 907 (F B)*; *A I R 1929 Lah 449* and *A I R 1933 P C 61, Rel. on*; *A I R 1924 Lah 448 Doubt.* [P 519 C 2]

(c) Minor—Representation—Minor impleaded as defendant with other relation — Minor held not validly represented.

Where a minor was impleaded as a defendant along with his father as well as some other relations whose interest was joint with the minor, it cannot be said that he was properly represented before the Court and that his interests were sufficiently safeguarded by the other members of his family: *A I R 1930 Pat 521* and *A I R 1924 P C 50, Disting.* [P 520 C 1]

(d) Execution — Applications under O. 21, Civil P. C. — Provisions of Order 21 should be strictly complied — If not, application is not proper.

An application, to take effect under Order 21 should be presented in accordance with the provisions as laid down therein, and unless the Court rejects the application or calls upon the decree-holder to amend it under sub-r. (1) of R. 17, there is no proper application before the Court. [P 520 C 2]

Barkat Ali — *for Appellants.*

E. H. Banerji and C. L. Gulati —
for Respondents.

Order of Reference

Abdul Rashid J. — On 21st January 1922, Mr. Khambatta and Mr. Taj Mohammad Nasar obtained a decree for Rs. 53,500 against Mr. Pir Taj-ud-Din, Barrister-at-law, Mrs. Pir Taj-ud-Din, Razia Sultan daughter, and Lieutenant Jalal-ud-Din, Rashid-ud-Din and Rafi-ud-Din, sons of Pir Taj-ud-Din. On 14th November, there was a partition of this joint decree between the decree-holders. As a result of this partition, Mr. Khambatta became a decree-holder to the extent of Rs. 27,000 and Mr. Taj Mohammad Nasir to the extent of Rupees

26,500. After 14th November 1922, the two decree-holders presented separate applications for execution of their respective decrees against the judgment-debtors. By his order dated 17th November 1936, the executing Court ordered the detention of Pir Taj-ud-Din, Barrister-at-law, in civil prison for a period of six months. It also ordered the attachment of the salary of Lieutenant Jalal-ud-Din and the moveable property of the other male judgment-debtors. Against this decision Pir Taj-ud-Din and Lieutenant Jalal-ud-Din have preferred an appeal to this Court. At the hearing a preliminary objection was taken by Mr. Ghulati to the effect that this appeal was incompetent. It was urged by the learned counsel that as the executing Court disposed of the respective applications of Mr. Khambatta and Mr. Taj Mohammad Nasir by its order dated 17th November 1936, two separate appeals ought to have been preferred by the judgment-debtors to this Court.

There are several complicated law points involved in this appeal, and whichever side is the loser is likely to go up in appeal under the Letters Patent as the case is one of large valuation. The Letters Patent appeal would be competent in this case without a certificate. Some of the law points which are likely to be raised at the hearing are as follows: (1) Whether the provisions of the Punjab Relief of Indebtedness Act, 1934, are applicable to the present case. (2) Whether the execution application presented against Lieutenant Jalal-ud-Din is barred by limitation. (3) Whether Lieutenant Jalal-ud-Din is personally liable in view of the fact that he was a minor at the time of the passing of the decree; and (4) whether there has been proper presentation of an application on behalf of Lieutenant Jalal-ud-Din in view of the fact that no power of attorney was obtained from him before the filing of such an application. In view of the importance of the questions involved, and in view of the fact that the filing of a Letters Patent appeal in this case would considerably delay the execution of the decrees, I refer this case to a Division Bench subject to the order of the Hon'ble the Chief Justice.

Judgment of the Division Bench

Din Mohammad J. — This appeal has arisen out of certain execution proceedings taken against the appellants at the instance of the decree-holders, Messrs. Khambatta and Nasar. The executing Court issued orders

for the arrest of Pir Taj-ud-Din, Barrister-at-law, and for the attachment of the pay of Lieutenant Jalal-ud-Din and it is against this order that the present appeal has been lodged. The material facts are these: On 26th September 1920, Pir Taj-ud-Din entered into an agreement with Col. Powell for the purchase of 13 houses and a vacant site for Rs. 2,08,000. In order to raise money for this transaction, Pir Taj-ud-Din arranged to sell nine out of the 13 houses mentioned above to various purchasers and further raised a loan of Rs. 20,000 from Mr. Nasar and a similar amount from Mr. Khambatta. Out of the rest of the property one item he transferred to his wife, one to his daughter and a son Rafi-ud-Din, one in favour of his two sons Rashid-ud-Din and Jalal-ud-Din, and the remaining item of property he kept for himself. On 14th March 1921, Col. Powell executed a regular sale deed in favour of all the vendees mentioned above. As a result of this bargain, in addition to an item of property referred to above, Rs. 20,000 also fell to the share of Pir Taj-ud-Din which were deposited in the Punjab National Bank. Immediately after, two cases were launched by Messrs. Khambatta and Nasar against Pir Taj-ud-Din. One was a complaint for criminal breach of trust and the other a civil suit alleging partnership in the bargain in question. The criminal breach of trust case ultimately came to the High Court in its initial stages and, on 21st January 1922, a compromise was effected between the parties settling all their disputes.

By that compromise, Pir Taj-ud-Din had to pay a lump sum of Rs. 53,500 to Messrs. Khambatta and Nasar. Out of this sum, Rs. 10,000 were to be paid on 1st February 1922 and the balance on 1st March 1923. The whole of this sum was charged on the four items of property which had been transferred in favour of Pir Taj-ud-Din and his relations. The decree-holders were entitled to take possession of these properties as mortgagees and they could bring the properties to sale if their dues were not paid on 1st March 1923. It was further provided that if the sale proceeds of these properties fell short of the entire mortgage money, a personal decree could be obtained by the decree-holders against the male defendants, thus excluding the wife and the daughter of Pir Taj-ud-Din. On 14th November 1922, Messrs. Khambatta and Nasar effected a private partition of the rights that accrued to them

under the decree, by which Mr. Nasar was to get Rs. 27,500 and Mr. Khambatta Rs. 26,000. Default having been made by Pir Taj-ud-Din, the properties under mortgage were put to sale and Rs. 38,000 were realized. After paying the necessary commission and the miscellaneous expenses incurred in connexion with the sale, Rupees 35,000 odd were credited towards the decretal amount and the balance of Rupees 19,000 remained undischarged, of which Rupees 9000 were due to Mr. Nasar and Rs. 10,000 to Mr. Khambatta.

On 7th February 1925 Mr. Nasar obtained a transfer certificate from the Court which had passed the decree and started execution proceedings against Pir Taj-ud-Din at Lahore for the amount due to him. In the course of these proceedings, he realized Rs. 4500 on different occasions. In 1932 Mr. Khambatta also obtained a transfer certificate and presented an application for execution at Lahore on 22nd April 1932. He however, did not produce the certificate before the transferee Court and the proceedings were consequently consigned to the record room on 1st July 1932. On 19th January 1933 he put in a fresh application for the same purpose. On 18th January 1934 the present application for execution was put in by Mr. Khambatta, in column 9 of which the only judgment-debtor mentioned was Pir Taj-ud-Din and in column 10 of which a prayer was made for warrants of attachment and arrest against him alone. On 27th February 1934 a warrant of arrest was issued and on 27th March 1934, Pir Taj-ud-Din was arrested but released on furnishing security. On 27th April 1934, Pir Taj-ud-Din objected that he could not be arrested on account of poverty and that the application was time barred. On 4th May 1934 certain issues were framed. On 15th June 1934 the parties agreed to refer the matter to arbitration. On 20th October 1934, Mr. Nasar presented a fresh application for the arrest of Pir Taj-ud-Din, for the attachment of Mrs. Taj-ud-Din's property and for the attachment of Lieutenant Jalal-ud-Din's pay. On 24th October 1934 necessary orders were issued in pursuance of which Pir Taj-ud-Din was arrested once more, produced before the Court and released on security.

Against this order he made an appeal to this Court which came on before a Motion Bench on 4th April 1935 and execution

proceedings were stayed meanwhile. In the meantime, the arbitrators having failed to make an award, the arbitration proceedings were terminated and on 23rd February 1935, Pir Taj-ud-Din made another application under O. 21, Rule 40, Civil P. C., stating that he was too poor to pay the decretal amount and that the application for execution was time-barred. The executing Court made an order calling upon Pir Taj-ud-din to apply for insolvency, if he so chose, within thirty days. Pir Taj-ud-Din preferred an appeal from this order too. Both the appeals were disposed of by a learned Judge of this Court on 16th December 1935. By one order the executing Court was directed to act according to the provisions of O. 21, R. 40, and inquire into the objections raised by Pir Taj-ud-Din and by another order a direction was issued to the executing Court not to proceed against Mrs. Taj-ud-Din and to investigate the objections of Lieutenant Jalal-ud-Din in accordance with law. On 29th February 1936, further objections were put in, which were ultimately decided on 17th November 1936 with the result stated above.

We first propose to deal with Pir Taj-ud-Din's objections. He seeks shelter under S. 34 of Act 7 of 1934 and O. 21, R. 40, read with S. 51, Civil P. C., as amended by Act 21 of 1936. Act 7 of 1934 came into force on 19th April 1935, while the amending Act came into operation on 27th October 1936. His contention is that as both provisions related to procedure, they had retrospective effect and that he was consequently entitled to claim protection as afforded by them inasmuch as both these Acts were in force before the final order of his arrest on 17th November 1936 was made. On behalf of the respondent it is urged that as Pir Taj-ud-Din had on more than one occasion been arrested before the coming into operation of these Acts and released on furnishing security, he could not avail himself of these provisions of law. We are however inclined to agree with the contention raised on behalf of Pir Taj-ud-Din as it is well settled that no party has any vested right in procedure which must therefore be given effect to as soon as it comes into force. Under S. 34 of Act 7 of 1934, no judgment-debtor is liable to arrest for default in the payment of any money due under a decree unless the Court is satisfied that the judgment-debtor has without just cause contumaciously refused to pay the amount of the

decree in whole or in part within his capacity to make payment,

and the Court is further bound to give an opportunity to the judgment-debtor to show cause against the issue of a warrant of arrest. Similarly, under O. 21, R. 40, Civil P. C., as amended by Act 21 of 1936, the Court is bound to give the judgment-debtor an opportunity of showing cause why he should not be committed to the civil prison; and under S. 51 as amended by the same Act, the Court is enjoined not to

order execution by detention in prison unless it is satisfied: (a) that the judgment-debtor with the object or effect of obstructing or delaying the execution of the decree (i) . . . (ii) has after the institution of the suit in which the decree was passed, dishonestly transferred, concealed or removed any part of his property or committed any other Act of bad faith in relation to his property; or

(b) that the judgment-debtor has or has had since the date of the decree the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same;

(c) . . .

Under sub-r. (3) of R. 40 of O. 21, an order for the detention of the judgment-debtor in the civil prison can only be made subject to the provisions of S. 51. Reading these provisions of law together, it is obvious that at the time when the order of arrest was made, Pir Taj-ud-Din could not be arrested unless and until it was established by the decree-holder that he had after the institution of the suit dishonestly transferred, concealed or removed any part of his property or committed any other act of bad faith in relation to his property or that he had since the date of the decree the means to pay the amount of the decree or some substantial part thereof and had refused or neglected to pay the same; or, in other words, as required by S. 34 of Act 7 of 1934,

without just cause, contumaciously refused to pay the amount of the decree in whole or in part within his capacity to make payment.

It is not denied that Pir Taj-ud-Din had no property at the timewhen the order of arrest was made nor is it denied that he had not dishonestly transferred or concealed or removed any part of his property or committed any other act of bad faith in relation to his property after the institution of the suit in which the decree was passed. The only argument that has been addressed to us in this connection is that the statements of the witnesses who had appeared to support the plea of his poverty are interested and that as he has

been accepting briefs in certain cases, it should be presumed that he had since the date of the decree the means to pay the amount of the decree and that consequently his refusal to pay the decretal amount was without just cause and contumacious. In our opinion this is an erroneous view of looking at the matter. The onus under the new provisions of law lies upon the decree-holder to establish on the record that the judgment-debtor has the means to pay and if no such evidence is brought on the record and it is not apparent on the record otherwise that he has such means, no presumption adverse to the judgment-debtor can be drawn. On behalf of the decree-holders it is contended that as the onus had been wrongly placed on the judgment-debtor, they could not lead positive evidence to prove the financial condition of the judgment-debtor. We however consider that in view of the fact that Act 7 of 1934 was in force long before the proceedings were recorded in this case, the decree-holders had sufficient warning and should have proved their case in the manner contemplated by law. Taking the record as it stands at present, we have no hesitation in holding that there were no materials on the record justifying the rejection of the evidence adduced by the judgment-debtor as well as the order of his detention in the civil prison consequently made. Our conclusion therefore is that Pir Taj-ud-Din has no means to pay the decree nor is his refusal to pay the decretal amount contumacious and on this ground we set aside the order of the executing Court as passed against him and accept his appeal.

Coming now to Lieutenant Jalal-ud-Din's appeal against the order attaching his pay. The main contentions raised on his behalf are: (1) that he was a minor on the date when the decree was passed and consequently the decree being a nullity could not be executed against him; (2) that no proper application for execution had been made against him; and (3) that in any circumstances the application of Mr. Khambatta is time-barred having been made 12 years after the decree. In support of the contention of Lieutenant Jalal-ud-Din's minority, reliance is being placed on the statement on solemn affirmation made by Pir Taj-ud-Din, according to which Lieutenant Jalal-ud-Din was born some time in December 1904. As against this there is no statement in rebuttal. It is therefore urged that the statement made

by Pir Taj-ud-Din should be acted upon in these circumstances. A copy of the Punjab Government Gazette, dated 7th October 1921, has also been produced before us, at p. 377, Part III-A, of which Lieutenant Jalal-ud-Din's result in the Matriculation Examination was published and in which he is said to have been born in December 1906. It has been very frankly admitted by his counsel that "1906" is a misprint for "1904" as is apparent from the original certificate granted to him by the Punjab University, according to which his date of birth is 5th December 1904. We have no reason to doubt the testimony of Pir Taj-ud-Din in this respect supported as it is by the public records as mentioned above. We hold therefore that Lieutenant Jalal-ud-Din was a minor at the time when the decree was made.

The question now arises, what is the effect of his minority on the decree. It is urged on his behalf that the decree was a nullity having been made against a minor who was not properly represented and that being so, the decree could not be executed against him. Counsel for the respondents, on the other hand, has contended that the executing Court could not go behind the decree and was bound to execute it as it stood irrespective of the alleged defect. Reliance in this connexion has been mainly placed on 5 Lah 54,¹ where a Division Bench of this Court has held that an executing Court has no jurisdiction to criticise or go behind a decree obtained against an unrepresented minor and that the annulment of the decree is not the function of an executing Court but with all respect we are compelled to remark that the correctness of the rule enunciated in that judgment is open to doubt. A decree obtained against an unrepresented minor is a nullity and if it is brought to the notice of an executing Court that the decree sought to be executed was obtained against a judgment-debtor when he was a minor and was not represented by guardian ad litem, it is necessary for it before it executes the decree to determine whether there is a decree which can be executed. The rule that an executing Court can go behind a void decree was laid down in 53 Cal 166² and was re-affirmed in A I R 1929

1. Lahore Bank Ltd. v. Ghulam Jilani, (1924) 11 A I R Lah 448=78 I C 460=5 Lah 54.

2. Gora Chand Haldar v. Profulla Kumar, (1925) 12 A I R Cal 907 = 89 I C 685=53 Cal 166=42 C L J 1=29 C W N 948 (F B).

Lah 449³ and we are in respectful agreement with these judgments. In 60 Cal 670⁴ their Lordships of the Privy Council remarked that a decree that is a nullity cannot be executed. Even in 31 All 572,⁵ which has been relied upon in 5 Lah 54,¹ their Lordships held that an unrepresented minor is no party to the decree which may be passed against him in that condition. If this be so, how can a decree be executed against a person who is no party to it?

It is further urged in this connexion that inasmuch as the minor was impleaded as a defendant along with his father as well as some other relations whose interest was joint with the minor, he was properly represented before the Court and his interests were sufficiently safeguarded by the other members of his family. Reference has been made to A I R 1930 Pat 521⁶ and A I R 1924 P C 50,⁷ but those cases are not to the point inasmuch as they relate to joint Hindu families and were decided on the score of Hindu law applicable to such families, while we are dealing with a case in which no question of joint family arises. We consequently hold that the decree could not be executed against Lieutenant Jalal-ud-Din. We are further inclined to hold that in Mr. Khambatta's case there was no proper application before the Court, on which action could be taken against Lieutenant Jalal-ud-Din. O. 21, R. 11, contemplates that the application should be in writing and that it should contain certain particulars which are mentioned therein. No such application was ever presented against Lieutenant Jalal-ud-Din. The only occasion when a relief was sought against him was on 22nd February 1935 when Mr. Khambatta's counsel wrongly stated that a previous order dated 23rd February 1934 had been passed against Lieutenant Jalal-ud-Din and that the same order should be revived. Counsel for the respondents contends that R. 17 of O. 21 condones the defect in this case but we are not disposed

to agree with him. An application, to take effect under O. 21 should be presented in accordance with the provisions as laid down therein and unless the Court rejects the application or calls upon the decree-holder to amend it under sub.r. (1) of R. 17, there is no proper application before the Court.

On the point of limitation we consider that the judgment-debtors are on weak ground. Under S. 48 (b), Civil P. C., time runs from the date of the decree sought to be executed or where the decree directs any payment of money to be made at a certain date, the date of the default in making the payment. As we read the decree, which is a composite decree and is unfortunately very unhappily worded, it can be reasonably argued on behalf of the decree-holders that 1st March 1923 was the last date fixed for the payment of the decree and calculating from that period the application of Mr. Khambatta and that of Mr. Nasar were both well within time. On the grounds mentioned above however we set aside the order of the executing Court in relation to Lieutenant Jalal-ud-Din too and accept his appeal. The appellants will get their costs from the respondents in all the Courts.

B.D./R.K.

Appeals allowed.

A. I. R. 1938 Lahore 520

ADDISON AND ABDUL RASHID JJ.

P. C. Bhandari—Plaintiff—Appellant.
v.

Punjab National Bank Ltd. and others
— *Defendants—Respondents.*

Letters Patent Appeal No. 125 of 1937, Decided on 11th January 1937, from the Judgment of Bhide J. in S. A. No. 89 of 1937, D/- 28th May 1937.

Negotiable Instruments Act (1881), Ss. 16, 85-A and 10—Bank issuing draft drawn on its branch for payment of certain sum to H and G and endorsed in blank by them—H appearing alone at branch and presenting draft for payment—Branch manager not knowing H but paying amount on identification by L of H and H guaranteeing G's signature—Branch manager not taking steps to see whether G's signature was genuine—Payment held not in due course.

Under S. 16 if the endorser signs his name only the endorsement is said to be in blank and such an endorsement makes the negotiable instrument payable to the bearer. The endorsement must however be a genuine and valid endorsement.

[P 522 C 1].

A bank issued a draft drawn on its branch for payment of certain sum to H and G. H alone appeared at the branch of the bank for the first

3. Parshottam Das Nathu Ram v. Radha Kishan, (1929) 16 A I R Lah 449=120 I C 279.

4. Jnanendra Mohan v. Rabindra Nath, (1933) 20 A I R P C 61=142 I C 324=60 I A 71=60 Cal 670 (P C).

5. Rashid-unnisa v. Mahomed Ismail Khan, (1909) 31 All 572 = 3 I C 864=36 I A 168 (P C).

6. Raghunandan Prasad Singh v. Ghananand Singh, (1930) 17 A I R Pat 521 = 126 I C 377=10 Pat 124=11 P L T 483.

7. Brij Narain Rai v. Mangla Prasad, (1924) 11 A I R P C 50=77 I C 689=46 All 95=51 I A 129 (P O).

time and presented the draft for payment. At that time the draft purported to be endorsed in blank on reverse by both *H* and *G*. The manager of the branch at first refused to cash the draft as he did not know *H*. Subsequently however he paid the amount when one *L* who had an account with the bank identified *H* and *H* guaranteed the signature of *G*. The manager took no steps to have the signature of *G* confirmed or identified by any one :

Held that in these circumstances the payment of the draft could not be said to have been made in good faith and without negligence. The payment therefore was not in due course within the meaning of Ss. 85-A and 10 and the bank was liable for the payment. [P 522 C 2]

D. R. Sawhney — *for Appellant.*

M. L. Puri — *for Respondents.*

Abdul Rashid J. — This appeal arises out of a suit instituted by P. C. Bhandari for recovery of Rs. 2069.11.0 against three defendants, namely Malcolm R. Halsey, the Punjab National Bank Ltd., and the Standard Bookstall, Quetta. In May 1932 Lt. Halsey, defendant 1, purporting to act for himself and one Lt. Greig took a loan of Rs. 2000 from P. C. Bhandari, Civil Engineer, Rawalpindi. The terms of the loan were that the principal and interest amounting to Rs. 3800 would be repaid by the debtors in 30 monthly instalments by means of post-dated cheques. The bond for Rs. 2000 purports to be signed both by Malcolm R. Halsey and Lt. P. Greig, who were then stationed at Quetta. On 26th May 1932, P. C. Bhandari paid Rs. 1000 to the Punjab National Bank Ltd., at Rawalpindi and the Bank issued a draft drawn on their branch at Quetta for payment of Rs. 1000 to Lt. Halsey and Lt. P. Greig or order. This draft was sent by Bhandari to Lt. Halsey, who appeared at the Quetta Branch of the Bank for the first time on 4th June and presented the draft for payment. At that time the draft purported to be endorsed in blank on reverse by both Lt. Halsey and Lt. Greig. Mr. Soni, the Manager of the Bank, refused to pay Rs. 1000 to Lt. Halsey as he did not know him. Subsequently however it was arranged that Mr. Lalwani, the proprietor of the Quetta Branch of the Standard Bookstall, who was known to the Bank and had a current account, should verify the endorsement of Lt. Halsey, that the draft should be endorsed in his favour by Lt. Halsey, and paid into the account of the Standard Bookstall. This was done and the draft was credited to the account of the Standard Bookstall. Mr. Lalwani then withdrew Rs. 2400 from the Bank

and paid a sum of Rs. 1000 out of it to Lt. Halsey. There remained Rs. 1000 to be paid to Lt. Halsey and Lt. Greig on the loan alleged to have been raised by them. Halsey asked Bhandari to deduct from this sum the first instalment of Rs. 120 and the cost of remittance and to remit the sum of Rs. 872.8.0 to him telegraphically. On Bhandari's instructions the Rawalpindi Branch of the Punjab National Bank sent telegraphic instructions to their Quetta Branch to pay to Lt. Halsey and Lt. Greig a sum of Rupees 872.8.0. On 20th June Lt. Halsey presented a receipt for this sum purporting to have been signed both by himself and Lt. Greig and received payment of the money from the Bank.

Shortly afterwards one of the post dated cheques, which were sent to Bhandari, was dishonoured, and on enquiry it was found that the signatures of Lt. Greig on the bond, the draft and the receipt were forged. The plaintiff accordingly instituted the present suit for recovery of Rs. 2069.11.0 against Lt. Halsey, the Punjab National Bank Ltd., and the Standard Bookstall. The trial Court granted the plaintiff a decree for the whole amount against Lt. Halsey and for Rs. 1983.4.0 against the Punjab National Bank Ltd. The suit was dismissed against the Standard Bookstall. The appeal preferred by the Punjab National Bank to the District Judge was dismissed with costs. Against this decision the Bank preferred a second appeal to this Court, which was heard by a learned single Judge. The learned Judge accepted the appeal in part holding that the payment of the draft for Rs. 1000 was made by the Bank in due course within the meaning of S. 85-A and S. 10, Negotiable Instruments Act and the Bank was therefore protected and could not be held liable for this amount. The decree in favour of the plaintiff was accordingly reduced to the sum of Rupees 1198.3.8. P. C. Bhandari has filed an appeal, under Cl. 10 of the Letters Patent challenging the decision of the single Judge so far as the draft of Rs. 1000 is concerned. When Lt. Halsey appeared at the Bank on 4th June 1932, the draft already bore an endorsement in blank by Lt. Halsey and Lt. Greig. The Manager however refused to cash the draft as he did not know Lt. Halsey. He did not know Lt. Greig either. Lt. Halsey appeared at the Bank twice thereafter and on each occasion he was alone. The fact that Lt. Halsey came alone to the Bank again and again and gave no

reasonable explanation of the absence of Lt. Greig should have put the Manager of the Bank on his guard. The Manager took no steps to have the signatures of Lt. Greig confirmed by any one. According to Mr. Lalwani, the Bank Manager had the following conversation with him:

The Bank Manager said as you do not know Greig personally, if Mr. Halsey guarantees his signature and you identify Halsey, the draft could be cashed. Therefore ask Halsey to guarantee the signature of Greig. * * * I asked Lt. Halsey if he would guarantee the signature of Greig as suggested by the Bank Manager and Lt. Halsey did it.

It was the Bank Manager therefore who suggested that Lt. Halsey could guarantee the signature of Lt. Greig and all that was expected of Mr. Lalwani was that he should identify Lt. Halsey. The Bank Manager took no steps to get the signatures of Lt. Greig identified. Mr. Lalwani has further stated that by writing the words "endorsements confirmed by me" on the back of the draft he meant that he confirmed the different endorsements that had been made at the back of the draft by Lt. Halsey and that he did not in any way confirm the signature of Lt. Greig. It was contended by Mr. Puri on behalf of the Bank that as the draft was endorsed in blank by Lt. Halsey and Lt. Greig the draft became payable to the bearer, that is to Lt. Halsey by virtue of the provisions of Ss. 16 and 54, Negotiable Instruments Act. This contention, in our opinion, is devoid of force. Under S. 16 if the endorser signs his name only, the endorsement is said to be in blank and such an endorsement makes the negotiable instrument payable to the bearer. The endorsement must, however, be a genuine and valid endorsement. As the draft was payable to Lt. Halsey and Lt. Greig jointly, the endorsement in blank can be regarded as a valid endorsement only if it is established that the signatures of Lt. Greig on the endorsement in blank are genuine. The Manager took no steps to verify whether the endorsement in blank on the back of the draft was made by Lt. Greig. It was further contended by Mr. Puri that under S. 85-A, Negotiable Instruments Act, where any draft drawn by one office of a Bank upon another office of the same Bank, purports to be endorsed by or on behalf of the payee, the Bank is discharged by payment in due course. The learned counsel contended that as the draft purported to be endorsed by both Lt. Halsey and Lt. Greig the Bank was discharged. The question for consideration,

however, is whether the payment by the Bank can be said to be a "payment in due course" within the purview of Section 10, Negotiable Instruments Act:

'Payment in due course' means payment in accordance with the apparent tenor of the instrument in good faith and without negligence to any person in possession thereof under circumstances which do not afford a reasonable ground for believing that he is not entitled to receive payment of the amount therein mentioned.

In the present case Lt. Halsey and Lt. Greig were jointly entitled to the payment. The Manager of the Bank asked Mr. Lalwani merely to identify Lt. Halsey, and so far as the signatures of Lt. Greig are concerned he merely wanted Lt. Halsey to guarantee his signatures; in other words, the Manager of the Bank did not want Mr. Lalwani to give any guarantee regarding the signatures of Lt. Greig. As mentioned already, the facts that Lt. Halsey came alone to the Bank and had long conversations with the Manager, who had refused to pay the amount of the draft to him, and that Lt. Halsey gave no reasonable explanation of the absence of Lt. Greig, should have raised the suspicions of the Manager so far as Lt. Greig's signatures on the draft are concerned. In order to safeguard himself he ought not to have relied merely on the endorsement made by Lt. Halsey on the back of the draft that the draft had been signed by Lt. P. Greig. Under these circumstances, the payment of the draft cannot be said to have been made in good faith and without negligence. A scrutiny of the various endorsements at the back of the draft would have convinced the Manager that the words "P. Greig" in the blank endorsement were in the handwriting of Lt. Halsey. It appears from the evidence of Mr. Lalwani, whom we see no reason to disbelieve, that it was the Manager himself who had suggested the means whereby Lt. Halsey could obtain payment of the draft. If the Manager was inclined to suggest ways and means to Mr. Lalwani whereby the draft could be cashed, it was incumbent on him to tell him that he should guarantee the signatures of both Lt. Halsey and Lt. Greig. The identification by Mr. Lalwani of Halsey alone ought to have been considered insufficient by the Manager of the Bank so far as the question of the genuineness of Lt. Greig's signatures was involved. We therefore hold that S. 85-A read with S. 10, Negotiable Instruments Act does not absolve the Bank from liability in the present case. For the reasons given above we

accept this appeal with costs, set aside the judgment and the decree of the learned single Judge, and restore that of the trial Court which was affirmed on appeal by the learned District Judge.

D.S./R.K.

Appeal accepted.

A. I. R. 1938 Lahore 523

YOUNG C. J. AND TEK CHAND J.

Emperor.

v.

Tulsi Ram — Accused — Respondent.

Criminal Revn. No. 1424 of 1937, Decided on 2nd February 1938, from order of Sess. Judge, Hoshiarpur, D/- 6.8.1937.

Criminal P. C. (1898), S. 133 — S. 133 does not apply to long-standing obstruction but only to unlawful obstruction lately built in public place—Action under S. 133 can be taken only on proof of urgency or imminent danger to public—It cannot be used as substitute for litigation in Civil Court : *A I R 1931 Lah 159, Overruled.*

Section 133 is not intended for long-standing obstruction but for an unlawful obstruction lately built in a public place. It is only on proof of urgency or imminent danger to the public that action under S. 133 can be taken and the provisions of S. 133 should not be allowed to be used as substitute for litigation in Civil Courts. Ch. 10 of the Code deals with public nuisances and provides a speedy and summary method for dealing with them, in cases of great emergency and where there is imminent danger to public interest. Where an obstruction has been allowed to stand in a public place without objection for many years, the fact indicates there is no such emergency or imminent danger to the public interest. The existence of a long-standing obstruction cannot therefore without proof of something having recently happened be considered to be a public nuisance : *A I R 1930 Lah 361 ; A I R 1935 Lah 28 and A I R 1926 All 157, Foll. ; A I R 1931 Lah 159 = 1931 Cr C 271 = 134 I C 783 = 32 Cr L J 1234, Overruled.* [P 523 C 2 ; P 524 C 1]

Muhammad Monir Assistant to the Advocate-General—for the Crown.

D. N. Aggarwal — for Respondent.

Young C. J.—This is a petition by the Crown for revision of the order of the Sessions Judge, Hoshiarpur, by which he affirmed the order of a Magistrate of the First Class dismissing an application by the Secretary of State for India in Council for removal of an obstruction on a public road. The alleged obstruction is a thara which was constructed about 14 years ago by the respondent and his brothers. The public road in question is situate within municipal limits, and it has been found that the respondent and his brothers, before constructing the thara, had taken the sanction

of the Municipal Committee. No objection to the construction of the thara, or to its continuance, was made on behalf of the Secretary of State or by any member of the public during this long period. Nor has it been alleged, or shown, that anything has happened recently to make the existence of the thara more objectionable to the public than it might have been before. Indeed, it is by no means clear that the construction of the thara in question was "unlawful." On these facts, we agree with the Courts below that no case has been made out for the exercise of the summary jurisdiction of Criminal Courts under Ch. 10, of Criminal P. C.

The trial Magistrate in rejecting the application has followed a Single Bench decision of Addison J. in *A I R 1930 Lah 361*,¹ where it was laid down that S. 133 is not intended for long-standing obstructions but for an unlawful obstruction lately built in a public place. The same learned Judge has re-affirmed this view in *A I R 1935 Lah 28*.² On revision before us, it has been pointed out by counsel for the Crown that these rulings are in conflict with a Single Bench decision of Coldstream J. in *A I R 1931 Lah 159*,³ which it is urged, lays down the law correctly. After hearing counsel we are unable to accept this contention. It has been frequently pointed out that it is only on proof of urgency or imminent danger to the public interest that action under S. 33 *et seq* can be taken, and that these provisions should not be allowed to be used as a substitute for litigation in Civil Courts : *4 P R 1897*⁴ and *37 All 26*.⁵ The view of the law taken by Addison J. is in accord with that of the Allahabad High Court in *A I R 1926 All 157*⁶ where it was held that S. 133 is not intended to be employed to avoid the necessity of filing a civil suit in regard to a

1. *Baisakhi Ram v. Emperor*, (1930) 17 *A I R Lah 361*=1930 *Cr C 965*=120 *I C 796*=31 *Cr L J 167*.
2. *Khan Din v. Wasan Singh*, (1935) 22 *A I R Lah 28*=1935 *Cr C 19*=159 *I C 374*=37 *Cr L J 70*.
3. *Barkhandi v. Emperor*, (1931) 18 *A I R Lah 159*=1931 *Cr C 271*=134 *I C 783*=32 *Cr L J 1234*.
4. *Mir Imam Abdul Aziz v. Queen-Empress*, (1897) 4 *P R 1897 Cr*.
5. *Farzand Ali v. Hakim Ali*, (1914) 1 *A I R All 491*=26 *I C 632*=16 *Cr L J 40*=37 *All 26*=12 *A L J 1241*.
6. *Ghurahu Das v. Shakal Raj Das*, (1926) 13 *A I R All 157*=91 *I C 59*=27 *Cr L J 27*=24 *A L J 112*.

construction which has been in existence for a number of years.

Coldstream J. in the case above cited, while dissenting from these rulings, thought that they appeared to import into the law on the subject conditional clauses for which there is no statutory authority. With all deference, we think that this is not so. Ch. 10 of the Code deals with "public nuisances," and as has been stated above, provides a speedy and summary method for dealing with them, in cases of great emergency and where there is imminent danger to the public interest. The fact that an obstruction has been allowed to stand, without objection, in a public place for many years itself indicates that there is no such emergency or imminent danger to the public interest. The existence of a long-standing obstruction cannot therefore without proof of something having recently happened, be considered to be a "public nuisance". We hold that the law has been correctly laid down in A I R 1930 Lah 361¹ and A I R 1935 Lah 28,² and that the Secretary of State in this case misconceived his remedy, and his application was rightly dismissed by the Magistrate and the Sessions Judge. We confirm the order of the Courts below and dismiss this petition.

R.M./R.K.

Petition dismissed.

A. I. R. 1938 Lahore 524

ABDUL RASHID J.

Pahlad Singh — Plaintiff — Appellant.
v.

Sukhdev Singh and others — Defendants
— Respondents.

Second Appeal No. 1295 of 1937, Decided on 24th January 1938, from decree of Dist. Judge, Karnal, D/- 17th June 1937.

(a) Custom (Punjab) — Rohtak District — Father has unrestricted power of alienation.

According to the Customary law of the Rohtak District, father has unrestricted power of alienation and hence no question of consideration and necessity arises. [P 524 C 2]

(b) Punjab Courts Act (6 of 1918), S. 41 — Interpretation of clause in village statement of custom involves decision as to validity of custom — Certificate is necessary to re-agitate this question in second appeal.

The interpretation of a clause in the village statement of custom involves a decision regarding the validity or existence of a custom and therefore a certificate is necessary before the question of custom can be agitated in the High Court in second appeal: A I R 1938 Lah 33, *fol.*

[P 524 C 2 ; P 525 C 1]

Faqir Chand Mittal — *for Appellant.*
Shamair Chand — *for Respondents.*

Judgment.—This appeal has arisen out of an action brought by Pahlad Singh, against Sukhdev Singh, Shib Lal and Ganga Charan. The allegations of the plaintiff were that his father Shib Lal had sold 24 bighas 19 biswas of land to Sukhdev Singh for a sum of Rs. 700, that the alienation was without consideration and necessity and that he was entitled to a declaration to the effect that the sale in dispute shall not affect his reversionary rights after the death of the alienor. In the alternative Pahlad Singh asked for the possession of the land in dispute by means of pre-emption. The trial Court framed seven issues, three of them being as follows :

(5) Is the plaintiff's suit for pre-emption within time ? (6) What is the market value of the land in suit ? (7) Cannot the suit for pre-emption lie due to reasons stated in para. 13 of the written statement ?

The trial Court held that the sale was without consideration and necessity and that, according to custom, Shib Lal was not entitled to alienate his ancestral property except for necessity. On these findings the plaintiff's suit was decreed. The trial Court however did not give any finding on Issues 5 to 7. Against this decision Sukhdev Singh, defendant, preferred an appeal in the Court of the learned District Judge. The learned Judge held that the sale was for consideration and necessity, and that under the Customary law governing the parties Shib Lal had unrestricted power of alienation. The learned District Judge also did not give any finding on the issues relating to the question of pre-emption. On these findings the plaintiff's suit was dismissed. The plaintiff has preferred a second appeal to this Court. In view of the finding given by the learned District Judge, that according to the Customary law of the Rohtak District Shib Lal had unrestricted power of alienation, no question of consideration and necessity arises. Moreover in the absence of a certificate the appellant is not entitled to re-agitate the question of custom in this Court in second appeal. It has been held by a Division Bench of this Court in I L R (1937) Lah 642¹ that the interpretation of a clause in the village statement of custom involves a decision regarding the validity or existence of a custom and therefore a cer-

1. Munshi Ram v. Mehr Das, (1938) 25 A I R Lah 33 = I L R (1937) Lah 642 = 40 P L R 295.

tificate is necessary before the question of custom can be agitated in the High Court in second appeal.

It was conceded on behalf of the respondent Sukhdev Singh that the plaintiff is entitled to an adjudication on Issues 5 to 7 which relate to the question of pre-emption. For the reasons given above I accept this appeal, set aside the judgments and decrees of both the Courts below and remand the case to the trial Court for the decision of Issues 5 to 7. The parties have been directed to appear in the Court of the Subordinate Judge at Jhajjar on 24th February 1938. The appellant will pay one-half of the costs of the respondent Sukhdev Singh incurred so far in all the Courts.

D.S./R.K.

Case remanded.

A. I. R. 1938 Lahore 525

DALIP SINGH J.

Tegu Mal — Plaintiff — Appellant.

v.

Moti Lal and another —

Defendants — Respondents.

Second Appeal No. 1190 of 1937, Decided on 20th January 1938, from decree of Senior Sub-Judge, Kangra at Dharmsala, D/- 18th May 1937.

Execution — Bar to — Person successfully maintaining that execution cannot proceed against him without separate suit being brought against him—Separate suit instituted against him—He cannot urge that separate suit does not lie and proper remedy is by way of execution.

The law does not permit a party, where the question is one of procedure, to urge that one form of procedure should be followed and when he has successfully maintained this and the procedure which he urged should be followed has been followed, to urge that the new procedure is wrong and the old procedure was right. This would be to stultify the law. [P 526 C 1]

Where a person, against whom an execution of a decree was taken out, successfully maintained in the execution proceedings that the execution could not proceed against him without a separate suit being brought against him, on the ground that he was a legatee and therefore not a party to the suit in which he only figured as a legal representative, he cannot subsequently be allowed to urge when a separate suit is brought against him, that the proper remedy was by way of execution and that separate suit is barred by S. 47, Civil P. O. : *Case law discussed.* [P 526 C 2; P 526 C 1]

D. N. Aggarwal — *for Appellant.*

M. C. Sud — *for Respondents.*

Judgment. — The question for decision in this case is whether the defendant in

the case having successfully maintained in execution proceedings that execution could not proceed without a separate suit being brought on the ground that he was a legatee and therefore not a party to the suit in which he only figured as a legal representative, can now be heard when the suit is brought, his objection having been upheld in the Court of Appeal, to contend that the proper remedy was by way of execution and no separate suit lies but is barred by S. 47, Civil P. C. The facts of the case are given in the judgments of the Courts below. Both Courts have held that S. 47 did apply to the facts of the present case, that the order of the Senior Subordinate Judge in the previous case holding that the remedy was by way of a separate suit was incorrect but that the plaintiff should have gone in appeal and had that order set aside, that he did not do so and the present suit was barred under S. 47, and therefore dismissed the suit. The trial Court left the parties to bear their own costs. The Senior Subordinate Judge dismissed the appeal with costs. The plaintiff has come in second appeal. It is argued on his behalf that when the question is as to the procedure to be followed in a certain dispute between the parties and one party has successfully asserted that the proper procedure is in one Court or is in one form, then it is not open to that party to urge when the procedure, which he contended was the right procedure, has been followed that the old procedure was the correct procedure and the present procedure is wrong. This is the real point in the case and no light is thrown on this point by the argument that there can be no estoppel against a statute or no estoppel on a point of law, which are both well-known propositions and do not need authority to support them.

The learned counsel for the appellant has cited A I R 1930 Cal 32¹ which supports him to the extent that where a person had made an application that a certain proceeding did not lie under the Bengal Tenancy Act he was not allowed subsequently to urge that the proceeding did lie under the Bengal Tenancy Act. This ruling is based on A I R 1924 Cal 600,² where however the facts were slightly different. In A I R

1. Hemanta Kumari Devi v. Prasanna Kumar Datta, (1930) 17 A I R Cal 32=120 I O 249=56 Cal 584.

2. Dwijendra Narain Roy v. Jogesh Chandra Dey, (1924) 11 A I R Cal 600=79 I O 520=39 C L J 40.

1929 Nag 79³ it was also held that a person who had urged that a separate suit lay could not urge that S. 47 barred the suit. That ruling appears directly in point. The learned counsel for the respondent has cited 9 Bom 458,⁴ 18 W R 185⁵ which has no bearing at all: A I R 1937 P C 114,⁶ A I R 1932 Pat 267,⁷ A I R 1930 Lah 1034⁸ at p. 1039, A I R 1929 Oudh 185⁹ and A I R 1930 Bom 135.¹⁰ These rulings mostly go no further than to lay down that there is no estoppel against a statute and no estoppel on a point of law. They are not directly in point. He has also cited 5 Mad 391¹¹ which appears to be in point and supports him, and 7 Mad 255¹² which however is distinguishable as in that case the rights of third parties were involved. On the whole I am of opinion that the law does not permit a party where the question is one of procedure to urge that one form of procedure should be followed and when he has successfully maintained this and the procedure which is urged should be followed has been followed, to urge that the new procedure is wrong and the old procedure was right. This would be to stultify the law. I would therefore accept the appeal and remand the case to the Appellate Court to deal with the issues found against the present defendant by the trial Court on which the learned counsel for the respondent wishes to rely before the Appellate Court. Costs will be costs in the case.

R.M./R.K.

Appeal allowed.

3. Uttamchand v. Salig Ram, (1929) 16 A I R Nag 79=117 I C 285.
4. Nimba Hari Shet v. Sitaram Paraji, (1885) 9 Bom 458.
5. Chowdhry Wahed Ali v. Mt. Jumajee, (1872) 18 W R 185=11 Beng L R 149.
6. Martine Electric Co. Ltd. v. General Dairies Ltd., (1937) 24 A I R P C 114=168 I C 616 (P C).
7. Bimalabala Sinha v. Deb Kinker, (1932) 19 A I R Pat 267=140 I C 687.
8. Mirza v. Jhanda Ram, (1930) 17 A I R Lah 1034=130 I C 419=12 Lah 367=31 P L R 842.
9. Bindeshwari Singh v. Harnarain Singh, (1929) 16 A I R Oudh 185=127 I C 20=4 Luck 622=6 O W N 233.
10. Ahmad Bhauddin v. Babu Devji, (1930) 17 A I R Bom 135=122 I C 113=53 Bom 676=31 Bom L R 778.
11. Arundadhi v. Natesha, (1882) 5 Mad 391.
12. Kuriyali v. Mayan, (1884) 7 Mad 255.

A. I. R. 1938 Lahore 526

YOUNG C. J. AND TEK CHAND J.

Emperor

v.

Nand Lal and others — Accused
Respondents.

Criminal Appeal No. 1195 of 1937, Decided on 31st January 1938, from order of Sess. Judge, Jhelum, D/- 27th April 1937.

Criminal P. C. (1898), Ss. 196-A (2) and 195 — Object of conspiracy to commit non-cognizable offence — Some of accused parties to proceedings in which offence committed — Sanction for prosecution under S. 120-B, I. P. C. is not necessary only in the case of such accused but not others.

Where a non-cognizable offence is committed and several persons are charged for conspiracy to commit the offence but some only of the accused are parties to the proceedings in which the offence was committed, sanction is not necessary in the case of such accused but is necessary in the case of the others who are not parties to the proceeding.

[P 527 C 1, 2]

Mohd. Monir for Advocate-General —
for the Crown.

Mohd. Amin and Mohd. Jamil —
for Respondents.

Judgment. — This is an appeal by the Crown from the order of the learned Sessions Judge, Jhelum, setting aside the convictions and sentences of the respondents and directing that a fresh prosecution should be started against them after due compliance with the provisions of law. Mt. Ashrafan, respondent 4, had sold certain immovable property to Haidar Khan, respondent 3. One Ghulam Ahmed who is a reversioner of the husband of Mt. Ashrafan, brought a suit in the Court of the Subordinate Judge, Chakwal, for a declaration that the sale had been effected without consideration and necessity and was ineffectual against his reversionary rights. The suit was resisted by the vendee who pleaded that the money had been raised to pay certain antecedent debts. One of these debts was alleged to be due to Nand Lal, respondent 1, who was stated to have been paid out of the consideration for the sale in question. In support of this plea a pro-note (Ex. P-B), was produced, purporting to have been executed by Mt. Ashrafan in favour of Nand Lal. A receipt (Ex. P-C) was also produced. The scribe of these documents was Sita Ram, respondent 2. He was called as a witness in the suit to support this plea, but he deposed that the pro-note and the receipt had been forged by him at the instance of Haidar

Khan, Nand Lal and certain other persons. The Subordinate Judge held that consideration and necessity for the sale had not been proved and accordingly he granted the plaintiff a decree for the declaration asked for. At the same time the Subordinate Judge made a complaint to the District Magistrate for the prosecution of the persons concerned in forging the receipt. Under orders of the District Magistrate, the matter was investigated by the police, and the four respondents, Nand Lal, Sita Ram, Haidar Khan and Mt. Ashrafan, were prosecuted under Ss. 120.B, 193 and 467, Penal Code. A charge under S. 471 also was brought against Haidar Khan.

The trial Magistrate convicted all the four respondents of the offences charged, and passed different sentences against them. The convicts appealed to the Sessions Judge before whom a preliminary objection was raised that the trial was illegal as under S. 196.A, Criminal P. C. sanction of the Local Government was necessary for prosecution under S. 120.B, and that such sanction had not been obtained in this case. The learned Judge upheld this objection, and also expressed the opinion that he was doubtful as to the legality of the joinder of the charges. He accordingly set aside the conviction and sentences, and directed that a fresh prosecution be started in the matter after due compliance with the provisions of the law.

The reason given by the learned Sessions Judge in support of his decision is that under S. 196.A, Criminal P. C. the sanction of the Local Government for prosecution under S. 120.B, I. P. C. was necessary in this case, as the object of the alleged conspiracy was to commit an offence, the maximum punishment prescribed for which is more than two years. This reasoning is erroneous and is based on a misreading of the section. The part of Cl. 2 of the section, to which the learned Judge referred, relates to cognizable offences not punishable with rigorous imprisonment for a term of two years or upwards. Obviously this is not the case here, as was conceded by both counsel before us. The case however falls under the other part of Cl. (2) of S. 196.A, which bars the prosecution of two of the respondents for another reason. The object of the conspiracy alleged against the respondents was to commit a non-cognizable offence and it is provided in S. 196.A that no Court can take cognizance

of such an offence unless the consent of the Local Government or of a District Magistrate empowered in this behalf by the Local Government by order in writing, was obtained. The proviso to S. 196.A however lays down that where the criminal conspiracy is one to which the provisions of sub-s. (4) of S. 195 apply, no such sanction is necessary. Under that sub-section, no sanction is necessary for the prosecution, under S. 120.B, of Haidar Khan and Mt. Ashrafan who were parties to the proceedings in the Court of the Subordinate Judge. But the proviso to S. 196.A does not cover the cases of Nand Lal and Sita Ram, who could not be prosecuted under S. 120.B without such sanction.

Counsel for the Crown conceded that this was the correct legal position. He stated however that in this case, the Crown did not now propose to proceed against any of the respondents under S. 120.B. He therefore prayed that the charge under that section be quashed against all the respondents including Haidar Khan and Mt. Ashrafan, and that the learned Sessions Judge be directed to hear the appeal of the four respondents against their conviction on charges other than the charge under S. 120.B. The learned counsel appearing for the respondents agreed that this was the proper course in the circumstances, as his clients too did not want a retrial.

We accept the appeal, set aside the order of the learned Sessions Judge and remand the case to him for decision of the appeal against the conviction of the four respondents for charges under Ss. 193 and 467, I. P. C., and the additional charge under S. 471 against Haidar Khan. The charge under S. 120.B against all the respondents is quashed. The respondents shall remain on bail to the satisfaction of the Sessions Judge till the hearing of the appeal by him.

K.S./R.K.

Case remanded.

A. I. R. 1938 Lahore 527

ADDISON AND DIN MOHAMMAD JJ.

Wali Dad — Plaintiff — Appellant.

v.

Mt. Imam Khatun and others —

Defendants — Respondents.

Second Appeal No. 636 of 1937, Decided on 27th January 1938, from decree of Dist. Judge, Jhelum, D/. 13th March 1937.

Custom (Punjab)—Mair Minhas of Chakwal Tahsil in Jhelum District—Will by sonless proprietor of ancestral or self-acquired property in favour of daughter's daughter is valid.

Among Mair Minhas (Rajputs) of Chakwal Tahsil in the Jhelum District a will by a sonless proprietor of ancestral or self-acquired property in favour of his daughter's daughter is valid in presence of his brother : *Case law discussed.*

[P 528 C 1; P 529 C 1]

Achhru Ram — *for Appellant.*

Ghulam Mohy-ud-Din —

for Respondents.

Addison J.—Karam, a Mair Minhas of Tahsil Chakwal in the Jhelum District, made a will on 7th July 1931 in favour of his daughter's daughter, Mt. Imam Khatun. Shortly after that he was murdered. The present suit has been brought by his brother Wali Dad for a declaration that the will was invalid by custom. The trial Court held that the ancestral property could not be bequeathed by Karam but that the self-acquired property could, and he granted the plaintiff a declaration with respect to the ancestral property. On appeal the learned District Judge has held that Karam had power in the absence of sons to bequeath his ancestral and self-acquired property to whomsoever he wished. He, therefore, accepting the defendants' appeal dismissed the suit. This second appeal has been brought by Wali Dad in this Court on the usual certificate granted under S. 41, Punjab Courts Act. The subject of the power of alienation of the Mahomedan tribes of the Jhelum District has been frequently before the Courts. Custom has always had its deepest roots in the central districts of the Punjab and it is doubtful if originally it had much hold upon the northern district of Jhelum. The *riwaj-i-am* of 1880 of the Jhelum District, which is given as App. 1 of the *riwaj-i-am* prepared by Mr. Talbot in 1901, is quite definite on this point. As regards gifts, it was said by all tribes that a proprietor could give away all or part of his property in his life-time provided he made over possession but that no one gave all his property to his daughter or a stranger in the presence of sons but no one denied his power to do so. As regards wills, all tribes except Awans said that the owner of property could dispose of it by will but in practice this was not done as the power of gift was sufficient. In 1880 therefore it is clear that there was unrestricted power of gift or will, whether the property was ancestral or non-ancestral.

According to the answer to the question

No. 78 of Mr. Talbot's Customary law of Jhelum District, Awans and all Musalman tribes of Chakwal, also Hindus except Brahmans, are reported as having said that ancestral property could not be disposed of by will, but self-acquired property could be so disposed of. Other tribes gave other replies and Mr. Talbot added a note that in spite of judicial decisions to the contrary no tribe admitted an unlimited power of bequest as regards ancestral land. He admitted the previous entry in the old *riwaj-i-am* and stated that Courts had often followed it but he added that he considered it incorrect. His opinion may be better explained by the circumstance that at the time he was writing, it was usually considered that there was a sort of general custom prevalent throughout the Punjab which was far from being the case. Although therefore in accordance with the statement in the *riwaj-i-am* of Mr. Talbot's compilation, the burden of proof may be upon the grand-daughter, that burden is practically displaced by the clear entry in the former *riwaj-i-am* and by the judicial decisions based on it. The subject is discussed at length by one of us in 132 I C 209¹ where most of the authorities are reviewed. Reference therefore need only be made to some of the earlier decisions.

In 122 P R 1884² it was found that by the custom prevailing among Jhanjuas of the Jhelum Tahsil, alienation of land in favour of a daughter by will was permitted.

In 93 P R 1885³ it was held that, among Mahomedan Rajputs of the Chakwal Tahsil, a proprietor without male issue could by custom make a will leaving his entire estate to his daughter to the prejudice of his near collaterals; and Mair Minhas are Rajputs.

There was however a decision in 50 P R 1902⁴ where it was held that it had not been established that a sonless Mair Mana (Rajput) in the Chakwal Tahsil was competent to alienate his ancestral property by will or gift in favour of his sister's sons in the presence of his first cousin without his consent. This decision however was not followed in 22 P R 1904⁵ where the sub-

1. *Mt. Nadran v. Muhammad Hussain*, (1931) 18 A I R Lah 450=132 I C 209.

2. *Sabalam v. Mt. Sarfaraz*, (1884) 122 P R 1884.

3. *Fazl v. Mt. Bhagbari*, (1885) 93 P R 1885.

4. *Haidar Khan v. Jahan Khan*, (1902) 50 P R 1902=65 P L R 1902.

5. *Sher Jang v. Ghulam Mohiudin*, (1904) 22 P R 1904=40 P L R 1904.

ject was exhaustively discussed. It was found in that case that amongst Mahomedan Mair Rajputs of the Chakwal Tahsil, a gift by a sonless proprietor of half his ancestral property in favour of his daughter's son in presence of his agnatic heirs was valid by custom, while in 71 P R 1904⁶ it was held that by custom among Moghals of the Chakwal Tahsil of the Jhelum District, a gift by a sonless proprietor of the whole or a substantial part of his ancestral immovable property to his relations in the female line was valid without the consent of his agnatic male heirs.

Again in 96 P R 1907⁷ it was held that among Mair Rajputs of the Chakwal Tahsil, a gift by a childless proprietor of his entire estate in favour of two grand-nephews in the presence of other nephews and grandnephews was valid.

In 87 P R 1918⁸ it was held that by custom among Mair Rajputs of the Chakwal Tahsil a sonless proprietor was competent to devise the whole of his ancestral estate in favour of his daughter in the presence of his brother.

10 Lah 581⁹ is a similar decision with respect to Mahomedan Gujjars of the Jhelum Tahsil. There is only one other case that need be referred to, namely 5 Lah 34,¹⁰ where it was held that sonless Awans of Talagang Tahsil of the Jhelum District were not entitled to dispose of their ancestral property by will, though the Judges, who decided the case, considered that they had power to gift their ancestral property. As pointed out however in 132 I C 209,¹ the power of testation is co-extensive with the power of gift and in fact in Mr. Talbot's Customary Law no distinction is drawn between the two powers by the various tribes. In the circumstances we hold that it has been established that Karam had power to make such a will and we dismiss this appeal with costs.

D.S./R.K.

Appeal dismissed.

6. Hasan v. Jahana, (1904) 71 P R 1904=86 P L R 1904.
7. Faiz Baksh v. Jahan Shah, (1907) 96 P R 1907=28 P L R 1908.
8. Hayat v. Mt. Gullan, (1918) 5 A I R Lah 347=47 I C 931=87 P R 1918=99 P L R 1918.
9. Pahalwan Khan v. Bagga, (1929) 16 A I R Lah 192=114 I C 705=10 Lah 581=30 P L R 605.
10. Mt. Rakhi v. Baza, (1924) 11 A I R Lah 452=79 I C 743=5 Lah 34.

A. I. R. 1938 Lahore 529

BLACKER J.

Mithu Lal—Convict—Petitioner.

v.

Emperor.

Criminal Revn. No. 1680 of 1937, Decided on 22nd January 1938, from order of Sess. Judge, Delhi, D/- 19th August 1937.

Punjab Excise Act (1 of 1914), S. 61 (2) (a) — *M* owning duly licensed shop for sale of liquor at *G*—His son *R* keeping ordinary grocer's shop at *D*, 12 miles away from *G*—*H* ordering liquor from *R* to be delivered to him at *R*'s shop at *D*—Liquor brought from *M*'s shop at *G* and delivered to *H* in *R*'s shop at *D*—*M* present at the time of delivery of liquor and payment made to him—*R* held merely acting as agent of *H* for purchase of liquor from *M* at *G*—There was no sale of liquor in *D* but at *G* and hence no offence under Section 61 was committed by *M*.

M had a shop at *G* duly licensed for the sale of liquor. His son *R* had an ordinary grocer's shop with no license to sell liquor at *D*, which was some 12 miles from *G*. The excise authorities having been informed that *R* was selling liquor without license got hold of one *H* and induced him to order from *R* some liquor to be delivered to him at *R*'s shop in *D*. Accordingly the order was taken and the liquor was brought from *M*'s shop at *G* and when *H* went to get the liquor, it was placed in his car and he paid for it. *M* was present and the money in payment of the liquor was actually given to him :

Held that *R* was merely acting as the agent of *H* for the purchase of liquor from *M* at *G*. There was no sale of liquor in *D*. The only sale that took place was at *G* where *M* being fully entitled to do so by his license, sold to *H* through *R* the liquor ordered by him and the mere fact that the delivery was made in *D* and that payment was made to *M* in *D* did not alter the case: 31 All 293 ; (1932) 48 T L R 636 and (1903) 90 L T 88, *Rel. on.* [P 530 C 1, 2]

Shamair Chand and Parkash Chand —
for Petitioner.

A. G. Maurice for Advocate-General —
for the Crown.

Order. — Lala Mithu Lal is a petitioner for the revision of his conviction under S. 61, Act 1 of 1914. The facts of the case are as follows : The petitioner Lala Mithu Lal has a shop at Ghaziabad in the United Provinces duly licensed for the sale of liquor. His son Radhe Mohan has an ordinary grocer's shop with no license to sell liquor in New Delhi, which is some 12 miles from Ghaziabad. The excise authorities of New Delhi having been informed that Messrs. Radhe Mohan were selling liquor without license got hold of a gentleman, named Mr. Hilditch, and induced him to order from them a bottle of whisky and a bottle of gin to be deliver-

ed to him at Messrs. Radhe Mohan's shop at New Delhi. Accordingly the order was taken and when Mr. Hilditch went to get the whisky and gin it was placed in his car and he paid for it. The petitioner was present and the money in payment of the liquor was actually given to him.

The Courts below on these facts have found that the sale of liquor by the petitioner to Mr. Hilditch took place in New Delhi. This finding appears to me to be bad in law and cannot be sustained. It is necessary to examine in more detail exactly what the evidence is. Mr. Hilditch has deposed that when he rang up Messrs. Radhe Mohan he asked them to obtain for him a bottle of whisky and a bottle of gin and not to sell him these articles. He also deposed that he was told by them on the telephone that the articles would have to be brought from Ghaziabad. Accordingly one of the assistants in Messrs. Radhe Mohan's shop went to Ghaziabad by motor bus, got the liquor from the Ghaziabad shop, where he signed a cash memo for it in the name of Mr. Hilditch, brought it back, paid octroi for it at Delhi and kept it in the shop of Messrs. Radhe Mohan pending the taking of delivery by Mr. Hilditch. It is clear to me on these facts that Messrs. Radhe Mohan were merely acting as the agents for Mr. Hilditch for the purchase of this liquor from the petitioner at Ghaziabad. Mr. Hilditch's statement, to which I have referred, shows clearly that he knew that Messrs. Radhe Mohan could not provide him with the whisky and the gin themselves. This is further shown by his admission when cross-examined that he had in his possession and had seen the catalogues of Messrs. Radhe Mohan and Messrs. Mithu Lal respectively. These catalogues, which are evidence in the case, show that Messrs. Radhe Mohan did not undertake to supply liquor whereas the petitioner did. I am clear, therefore, that Messrs. Radhe Mohan through their servant, who went to Ghaziabad, were merely acting as the agents of Mr. Hilditch for the purchase of this whisky and gin from the petitioner at Ghaziabad, where the petitioner was perfectly entitled in law to sell it to Mr. Hilditch.

The mere fact that the delivery by the agent to his principal took place in Delhi and that the money was paid to the vendor in Delhi does not mean that the sale took place there. Ss. 20 and 39, Sale of Goods Act, make this perfectly clear. If any

authority were needed for this proposition there is an English case (1932) 48 T L R 636¹ (two connected appeals). A similar authority is (1903) 90 L T 88.² In these cases it was held that the sale of liquor in very similar circumstances to the present took place on the licensed premises and not at the place at which the goods were subsequently delivered and at which payment was made for them. There appears to be no direct Indian authority, but the same principles are involved in 31 All 293,³ which would have been a direct authority if Messrs. Radhe Mohan had been prosecuted instead of Mithu Lal for selling this liquor in Delhi. In that case one Panna Lal was asked by the Secretary of the Jhansi Club to supply him with methylated spirits. Not having a license for the sale of methylated spirits Panna Lal obtained them from someone who had and delivered them to the Secretary of the Jhansi Club. On this it was held by the Allahabad High Court that this act could not be described as a sale by Panna Lal to the Club. The principles involved are similar to those of this case. I am therefore satisfied on the facts as found that there was no sale in Delhi. The only sale that took place was at Ghaziabad where the petitioner being fully entitled to do so by this license, sold to Mr. Hilditch through Mr. Hilditch's agents the bottle of whisky and the bottle of gin. As I have said above the fact that delivery was made in Delhi and that payment was made to the petitioner in Delhi does not alter the case. I accordingly accept this petition and acquitting the petitioner direct that the fine if paid by him be refunded.

R.M./R.K.

Petition allowed.

1. Jones v. Mighall and Nelson v. Mighall, (1932) 96 J P 395=48 T L R 636=30 L G R 412.
2. Walker v. Walker, (1903) 90 L T 88.
3. Emperor v. Panna Lal, (1909) 31 All 293 = 2 I C 192=6 A L J 238=9 Cr L J 503.

A. I. R. 1938 Lahore 530

ADDISON AND DIN MOHAMMAD JJ.

Gopi Nath Vir Bhan, Assessee —
Petitioner.

v.

Commissioner of Income-tax, Punjab,
North-West Frontier and Delhi Pro-
vinces, Lahore — Respondent.

Civil Ref. No. 23 of 1937, Decided on 6th January 1938, made by Commissioner of Income-tax, Punjab, North-West Frontier and Delhi Provinces, Lahore, D/- 11th October 1937.

(a) Income-tax Act (1922), S. 10 (2), Cls. (i) and (ix) — Certain company having lease of cotton ginning factory — Agreement between company and assessee for ginning assessee's cotton — Assessee agreeing to pay to company ginning charges and certain share in the net profits in addition — Company not responsible in case of loss — Share of net profits paid to company cannot be deducted from assessee's total income either under cl. (i) or cl. (ix).

Certain company took on lease a cotton ginning factory and the assessee entered into an agreement with the company for the ginning of his cotton. It was stipulated between them that besides the ginning charges which were fixed in the agreement, the company would be entitled to one-third of the net profits calculated after making certain deductions. In the case of loss no sum was to be paid to the company nor was the company liable to any contribution on that account. In the accounting year the assessee paid to the company certain sum towards ginning charges and in addition paid certain sum as one-third of the net profits earned by the assessee. The assessee claimed to deduct the latter sum from his total income on the ground that it came under cl. (i) or cl. (ix) of S. 10 (2) :

Held that the share in the net profits which was a fluctuating item could not be treated as rent within the meaning of cl. (i) : *A I R 1937 P C 189, Rel. on.* [P 531 C 2; P 532 C 1]

Held further that the sum claimed to be deducted was an appropriation of profits after they had been earned and not an admissible expenditure incurred for the purpose of earning those profits : *Case law discussed.* [P 533 C 1]

(b) Income-tax Act (1922), S. 10 (2) (iii) and S. 66 (5) — Question whether advance by partner is loan to partnership or increase in capital is question of fact — High Court cannot interfere with Income-tax Officer's finding on it.

It is a question of fact whether the advances made by a partner is a loan to the partnership or an increase in the capital of the firm, and when once the Income-tax authorities have held that it was by way of an increase in the capital of the firm and not a loan independent of the partnership capital the High Court has no authority to interfere. [P 533 C 1]

Kripa Ram Bajaj — *for Petitioner.*

S. M. Sikri for J. N. Aggarwal —
for Respondent.

Din Mohammad J. — This is a case stated by the Commissioner of Income-tax under sub-s. (3) of S. 66, Income-tax Act. The two questions that were formulated by this Court for the opinion of the Commissioner were couched in the following terms :

(1) Whether the sum of Rs. 22,429 paid by the assessee to Jagan Nath Syal and Company, under the agreement between the assessee and Jagan Nath Syal and Company, is a legitimate deduction under S. 10 (2), cls. (i) and (ix) of the Income-tax Act and (2) whether the assessee is entitled to deduct Rs. 2109, and Rs. 2622, paid to Fateh Chand Jai Ram Das and Shanti Sarup respectively, as interest on capital alleged to have been borrowed from them by the assessee ?

In the opinion of the Commissioner both questions should be answered in the negative and we have no hesitation in agreeing with him. The sum involved in question No. 1 was paid by the assessee to Jagan Nath Syal and Company, hereinafter called the company, in the following circumstances : The company took on lease a cotton ginning factory and the assessee entered into an agreement with the company for the ginning of his cotton. It was stipulated between them that besides the ginning charges, which were fixed in the agreement, the company would be entitled to one-third of the net profits calculated, after deducting all ginning charges at the above mentioned rates and all other expenses connected with sale and purchase of cotton and seed, insurance, interest at six per cent. per annum travelling, food of workers and employees, staff salaries, etc., bad debts and irrecoverable items.

In case of loss no sum was to be paid to the company nor was the company liable to any contribution on that account. In the accounting year the assessee paid to the company Rs. 68,000 odd towards ginning charges and in addition Rs. 22,429 were paid to it which represented one-third of the net profits earned by the assessee after making the necessary deductions specified in the agreement. It is the latter sum which the assessee claims to deduct from his total income and the income-tax authorities have refused to allow him to do so on the ground that it was covered neither by Cl. (i) nor Cl. (ix) of sub-s. (2) of S. 10, Income-tax Act. It is a well-settled principle that if any deduction is claimed, it is for the assessee to prove that that deduction is legally allowable to him. If he fails to do so, the amount so claimed is liable to be assessed. It is obvious that Clause (i) of sub-s. (2) of S. 10 does not cover the amount and it is significant that throughout the proceedings before the income-tax authorities prior to the issue of mandamus by this Court the assessee never based his claim on that clause. Had the sum in dispute been rent, it could easily have been so expressed in the agreement entered into between the assessee and the company. This however was not done nor can a fluctuating item like this be treated as rent. The following observations of their Lordships of the Privy Council in 5 I T R 270¹ are pertinent in this respect :

1. *Indian Radio and Cable Communications Co. v. Commissioner of Income-tax, Bombay Presidency & Aden*, (1937) 24 A I R P C 189=5 I T R 270=I L R (1937) Bom 591 (P C).

Circumstances of greater importance are that the sum payable may be small or great or nothing — a most unusual feature in the case of rent — and that it is impossible to presume or infer that the half share of profits is being paid only as rent, or as a similar payment, in consideration merely of the use of the plant.

We hold therefore that the sum in dispute could not be deducted as rent paid for the premises in which the assessee carried on his business. It now remains to be seen whether it is "expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains." Here too, as remarked above, we are inclined to agree with the Commissioner that the payment of the sum in dispute was an appropriation of profits after they had been earned and not an admissible expenditure incurred for the purpose of earning those profits. In a case reported in 5 I T R 270,¹ their Lordships of the Privy Council had occasion to consider a somewhat similar matter and observed as follows :

The sum is in truth made payable as part of the consideration in respect of a number of different advantages which the appellants derive from the agreement and not all of them can be shown to be of a purely temporary character. The agreement as a whole is much more like one for a joint adventure for a term of years between the appellant company and the Communications company than one for a lease for that period

Their Lordships recognize the difficulty which may often exist in deciding whether expenditure, not in the nature of capital expenditure, has been incurred solely for the purpose of making or earning 'income, profits or gains' and they agree that it may be impossible to formulate a test which will always suffice to discriminate between the expenditure which is and which is not allowable for the purpose of income-tax but in the present case they have little hesitation in coming to the conclusion that the proposed deduction is not allowable.

In that case the Communications Company and the Radio Company entered into an agreement to the effect that their businesses in India should be combined and conducted by the Radio Company for a certain number of years. The Communications Company agreed to deliver all the plant, machinery, fittings, etc., of their business in India to the Radio Company to be used by the latter during the period of the agreement and the latter agreed to pay one-half of its net profits for each of its financial years to the Communications Company. It was this half share of the net profits which was claimed by the Radio Company as a permissible deduction.

In 5 I T C 363,² again a case that went to the Privy Council, their Lordships held that in computing the assessable profits or gains of the assessee's business no allowance was deductible in respect of the half share of the net profits payable by the assessee to the French Colonial Government. Lord Macmillan, who delivered the judgment, observed as follows :

It is claimed for the Company that when it makes over to the Colonial Government their half of the net profits it is making an expenditure incurred solely for the purpose of earning its own profits. The Court below has unanimously negatived this contention and in their Lordships' opinion has rightly done so. A payment out of profits and conditional on profits being earned cannot accurately be described as a payment made to earn profits. It assumes that profits have first come into existence. But profits on their coming into existence attract tax at that point and the revenue is not concerned with the subsequent application of the profits.

In two subsequent cases, his Lordship threw further light on these observations and tried to explain as to what his real import was in using these words. In (1932) 16 Tax Cas 293³ at p. 331, his Lordship remarked :

When therefore, in the passage referred to by the Attorney-General in the *Pondicherry case*² I said that 'a payment out of profits and conditional on profits being earned cannot accurately be described as a payment made to earn profits', I was dealing with a case in which the obligation was, first of all, to ascertain the profits in a prescribed manner, after providing for all outlays incurred in earning them, and then to divide them.

In 64 I A 215,⁴ his Lordship once more adverted to the *Pondicherry case*² and observed as follows :

In the *Pondicherry case*² the assesseees were under obligation to make over a share of their profits to the French Government. Profits had first to be earned and ascertained before any sharing took place.

His Lordship further added :

Their Lordships recognize, and the decided cases show, how difficult it is to discriminate between expenditure which is, and expenditure which is not, incurred solely for the purpose of earning profits or gains. In the present case their Lordships have reached the conclusion that the payments in question were not expenditure so incurred by the appellants. They were certainly not made in the

2. *Pondicherry Railway Co. Ltd. v. Commr. of Income-Tax, Madras*, (1931) 18 A I R PC 165 = 132 I O 619 = 5 I T C 363 = 54 Mad 691 = 58 I A 289 (P C).

3. *Adamson v. Union Coldstorage Co.*, (1932) 16 Tax Cas 293 = 146 L T 172.

4. *Tata Hydro Electric Agencies Ltd., Bombay v. Commr. of Income-tax, Bombay Presidency and Aden*, (1937) 24 A I R P C 189 = 168 I O 173 = 64 I A 215 = I L R (1937) Bom 388 (P C).

process of earning their profits; they were not payments to creditors for goods supplied or services rendered to the appellants in their business; they did not arise out of any transactions in the conduct of their business. That they had to make those payments no doubt affected the ultimate yield in money to them from their business, but that is not the statutory criterion. . . . In short, the obligation to make these payments was undertaken by the appellants in consideration of their acquisition of the right and opportunity to earn profits, that is, of the right to conduct the business, and not for the purpose of producing profits in the conduct of the business.

In the present case also, the assessee had the advantage of securing a monopoly of ginning his own cotton and this was a substantial advantage that he had gained. We are even prepared to go further and say that in the present case the company and the assessee had started a quasi partnership business in which the company had to receive certain definite sums as ginning charges and had in addition to receive certain profits after making certain deductions and not to be responsible for any losses. The profits were to be paid to the company after they were earned and as such they cannot in any way be treated as an expenditure which the assessee had to incur for earning them. The second question can be disposed of on the short ground that it is a question of fact whether the advance made by a partner is a loan to the partnership or an increase in the capital of the firm, and when once the income-tax authorities have held that it was by way of an increase in the capital of the firm and not a loan independent of the partnership capital, we have no authority to interfere. We accordingly answer both questions in the negative. The assessee will be liable to pay the costs of this reference to the Commissioner.

D.S./R.K. *Answer in the negative.*

A. I. R. 1938 Lahore 533

ADDISON AND ABDUL RASHID JJ.

Sundar Das — Defendant — Appellant.

v.

*Secretary of State, Plaintiff, and others,
Defendants — Respondents.*

Second Appeal No. 1411 of 1937, Decided on 25th February 1938, from decree of Dist. Judge, Lyallpur, D/- 13th August 1937.

Civil P. C. (1908), S. 60 — Compensation money in hands of Collector awarded under Land Acquisition Act is not liable to attachment.

Compensation money awarded under the Land Acquisition Act is not liable to attachment at the

instance of the creditors of the persons whose lands have been acquired until the amount is tendered to them under S. 31 of Land Acquisition Act. The money in the hands of the Collector is money belonging to the Government until the tender is made and no relationship of creditor and debtor can be said to have been established between the Collector on the one side and the owners of the lands on the other. S. 60, Civil P. C., does not therefore apply to such a case and the amount in the hands of the Collector cannot be attached by creditors holding money decrees against the persons to whom the compensation has been awarded : *A I R 1924 Mad 521 and (1901) 2 K B 199, Rel. on.* [P 534 C 1]

Har Bhajan Das — *for Appellant.*

Mohd. Monir, Assistant to Advocate-
General — *for Respondents.*

Abdul Rashid J.—Some land belonging to Fauja Singh, defendant 3, and Vir Singh, defendant 4, was acquired by the Secretary of State for India in Council under the Land Acquisition Act. Sundar Das, defendant 1, and Mathura Das, defendant 2, had two money decrees against Fauja Singh and Vir Singh. After the award had been made by the Collector and before the money was tendered to defendants 3 and 4 under S. 31, Land Acquisition Act the decree-holders got the money attached. The Secretary of State thereupon instituted the suit out of which the present appeal has arisen for a declaration that the compensation money in his hands due to defendants 3 and 4 could not be attached in execution of the money decrees obtained by defendants 1 and 2 against defendants 3 and 4. The suit was dismissed by the trial Court. On appeal the learned District Judge decreed the claim. Against this decision Sundar Das, defendant, has preferred a second appeal to this Court.

Section 31, Land Acquisition Act lays down that on making an award under S. 11, the Collector shall tender payment of the compensation awarded by him to the persons interested, entitled thereto according to the award, and shall pay it to them unless prevented by some one or more of the contingencies mentioned in sub-s. (2) of that section. If there is no person to receive the money or if the persons entitled to the money do not consent to receive it, the Collector is bound to deposit the amount of the compensation in the Court to which a reference under S. 18 would be submitted. It is further provided that a person, who receives the money otherwise than under protest, is not entitled to have a reference made to the District Judge under S. 18 of the Act. If however he receives the money

under protest, he does not lose his right of having a reference made under S. 18. The provisions of this section make it clear that until the tender is made, the money belongs to the Government, and that the Collector has got to carry out his duty of making the tender to the persons interested, as the receipt of the money by the owner of the land without protest takes away certain rights, which would accrue to him if he receives the money under protest. The Land Acquisition Act is a complete Code in itself, and until the tender is made, the person whose land has been acquired, does not become a creditor or the Collector a debtor. Reference may be made in this connexion to a Division Bench ruling of the Madras High Court reported in 78 I C 82,¹ where it was laid down that the compensation money payable under the Land Acquisition Act is payable under that Act and that Act only. Any rights in respect of it are creatures of the statute and nothing else. It was held in (1901) 2 K B 199,² in respect of surplus assets of a company in liquidation, that when it is the duty of some officer of the Court to distribute money, which is in his hands, in a particular way, the relation of debtor and creditor is not constituted between him and the person who is entitled to all or some part of the money, which is in his hands. He is an officer of the Court and his duty is to the Court, and no debt is created which can be the subject-matter of attachment against him as garnishee.

It is clear from the authorities quoted above that the money in the hands of the Collector is money belonging to the Government until tender is made to defendants 3 and 4, and that no relationship of creditor and debtor can be said to have been established between the Collector on the one side and the owners of the land on the other. In these circumstances S. 60, Civil P. C., has no applicability. For the reasons given above, we affirm the decision of the learned District Judge and dismiss this appeal. Having regard to all the circumstances we order that the parties will bear their own costs in this Court.

R.M./R.K.

Appeal dismissed.

1. Secy. of State v. Kuppaswami, (1924) 11 A I R Mad 521=78 I C 82=46 M L J 36.

2. Spence v. Coleman, (1901) 2 K B 199=70 L J K B 632 = 84 L T 703 = 49 W R 516 = 17 T L R 469.

* * A. I. R. 1938 Lahore 534

FULL BENCH

YOUNG C. J., TEK CHAND AND
MONROE JJ.*Abdul Majid — Convict — Petitioner.*

v.

Emperor.

Criminal Revision No. 1472 of 1937,
Decided on 19th April 1938, from order of
Sess. Judge, Sialkot, D/- 14th June 1937.

(a) Criminal Trial — Witness — Poverty of
witness is no ground for discrediting him—(Per
Blacker J.).

Many a man is poor because he is honest and it
is no ground for discrediting his evidence.

[P 595 C 1]

* * (b) Penal Code (1860), S. 441—Entry at
night in complainant's house to have inter-
course with complainant's sui juris daughter by
invitation—Case does not fall under S. 441—
(Per Full Bench) : 17 P R 1908 Cr, Overruled.

It must depend on the facts of each case, as to
whether an intent to annoy the person in posses-
sion of the property entered upon can in the
circumstances, be reasonably inferred. [P 538 C 2]

Where an accused enters at night the complain-
ant's house with intent to have intercourse with
the unmarried and sui juris daughter of the com-
plainant by invitation, the accused cannot be said
to have the 'primary' or even the 'subsidiary' or
'secondary' intent to annoy the person in pos-
session, from whom he had taken all possible pre-
cautions to keep his entry secret. The mere fact
that he knew, or ought to have known, that, if
discovered, his presence in the house might cause
annoyance to the owner or other inmates of the
house, is by itself not sufficient to bring his case
within S. 441 : 17 P R 1908 Cr, Overruled ; 12
P R 1906 Cr, (F B), Expl.; Case law reviewed.

[P 538 C 2, P 539 C 1]

Dr. Muhammad Alam — *for Petitioner.*Muhammad Monir, Assistant to the
Advocate-General — *for the Crown.*

Order of Reference.

Blacker J. — The learned Judge who
admitted this petition remarked in his
admitting order that the case was obvi-
ously highly suspicious and after hearing
counsel and perusing the record I think
that this estimate has been completely
justified. It is clear to my mind that the
petitioner's story is the truer one. The
prosecution witnesses are not to be relied
upon as they have been manifestly disin-
genuous in attempting to conceal the fact
that the appellant was not only a relation
of theirs but a boy who was on friendly
terms with members of their family, not
only with the girl in question but also with
her brother. In fact the complainant who
was attempting to deny that the boy had
been in his house for the last 6 or 7 years,

was forced to admit, when a photograph was shown to him, that that photograph was of the funeral of another son of his, taken as recently as three years ago, in which the petitioner is shown as taking a prominent part. But quite apart from this, there is also the evidence of a defence witness, Wazir Ullah, who is equally related to both the parties. His evidence has been dismissed by the trial Magistrate on the ground that he is penniless. Actually he has merely stated in cross-examination that the house in which he lived is mortgaged and that his father's land has either been sold or mortgaged. This is far from meaning that he is absolutely penniless because he was not asked whether he had any other income. But even if he were penniless, this does not mean that he is an unreliable witness. Many a man is poor because he is honest and it seems to me no ground for discrediting his evidence. This witness deposes to the terms of intimacy between the petitioner and the family of the complainant.

On the other hand the story for the prosecution to my mind bears all the hallmarks of a fabricated story. The learned Magistrate was asked to visit the spot, but for some reason he refused to do so. This was an unfortunate decision because it was a type of case in which the visiting of the spot was most desirable. The prosecution witnesses have given evidence that the bars of the door leading into the apartment in which the petitioner is stated to have been found, were torn open. It seems extraordinary that if the petitioner effected his entry into the room in this way, he made no noise about it which would have awakened the inmates. It seems to me far more probable that this door was left open as is indicated by a passage in the first information report to the effect that the front door of the house was left open because one Wazir Ahmad, complainant's brother, had gone to the cinema that night and was expected to come home late. It has not been explained by the prosecution where Wazir Ahmad was sleeping that night, but the presumption appears to be that he would be sleeping in what is described as the male apartment where the other male members of the family were sleeping and in which the petitioner was alleged to have been found. And if the front door was open the presumption is that this door would also be left open for him to get into his bedroom. This would also account for the very

clumsy piece of evidence about the finding of a closed lock. It is difficult to understand why this lock was closed if the petitioner broke it open. Again it is difficult to accept the story that the petitioner was discovered because he crawled under the bed of one Nawab Din and then woke Nawab Din by bumping him from underneath. If the petitioner's object was to commit theft I cannot see how he could facilitate that object by crawling under Nawab Din's bed. A thief breaking in at night would go stealthily to the place where the property to be stolen was, which according to the evidence was in an inner room. The necessity of these fabrications is apparent. If the petitioner's story is true that he went to the house at night on the invitation of Mt. Razia and had been caught by the members of the family at her cot, they would, to save their family honour, clearly suppress that story and have to invent another story to take its place. The improbabilities to which I have referred show that they have tried to invent such story and have invented it clumsily.

The counsel for the Crown has suggested that an adverse inference must be drawn against the petitioner because he did not put either Razia Begum or Nazir Ahmad, her brother, in the witness box. But it would have been absurd to have done so, because in the circumstances of the case no reasonable person would expect them to give evidence in his favour any more than the boy Sleem Ullah has done. On the other hand there seems to be no reason to reject the evidence of D. W. 1, Abdul Aziz, who is certainly not shown to have had any motive for giving false evidence, and he deposes that a small boy, whom he does not know, actually came and told the petitioner that he was wanted by 'apa' by whom he meant Mt. Razia. It seems to me therefore that the petitioner's story is clearly the truer one and that he crept into the house late at night on the invitation of this girl who, as the evidence shows, occupied a room by herself. To reach this room he had to pass through the male apartment. He was there surprised presumably by Nawab Din and to save the family honour the story of his burglarious entry was invented.

The question however still remains whether he is guilty of any offence or not. The offence of criminal trespass has to be done with the intent either of committing

an offence or of intimidating, insulting or annoying. As Mt. Razia was not a married girl there was clearly no offence to be committed, and the only possible criminal intent which could be attributed to the petitioner was that of annoying the inmates by having an illicit connexion with their female relation. There is a considerable divergence of view in the decisions whether in such cases it is impossible to hold that there was an intent to annoy. The learned counsel for the Crown has argued that the intent to annoy would be a sort of subsidiary intent because, if discovered, the act which the petitioner committed was bound to annoy the occupants of the house. But it is clear that annoyance could only result from discovery and it must be patent that discovery was the last thing that the petitioner wanted or intended. Is it possible to hold that the last thing that a man intends to happen is his intention even if the epithet "subsidiary" is tacked on to it? It has also been argued that a man must be held to intend the natural result of his act, but in this case the consequences, which might make the act criminal, depend upon an intervening contingency which the petitioner himself is clearly anxious to avoid. Such consequences can only be described as a possible result of his act, not as a natural result.

My own view therefore is that no offence has been committed, but as in view of the divergence of opinion a similar question has recently been referred by Jai Lal J. in Criminal Revn. No. 781 of 1937¹ for the decision of a Division Bench. I would also recommend that this case be laid for decision before the same Bench.

Judgment of the Full Bench

Tek Chand J.—The facts of the case, which has given rise to this reference are as follows: On the night of 13th April 1937, Abdul Majid, petitioner, who is a lad 19 years of age, was found in the house of Abdul Raoof (P. W. 1) in Sialkot. It was alleged by the prosecution that he had come there with the intention of committing burglary. His defence was that he had a liaison with Mt. Razia Begum, the unmarried daughter of the complainant, who lived in the same house and had a separate room for herself; that on the night in question he had come to visit Mt. Razia Begum by invitation, but that while

he was passing through the room occupied by some other inmates of the house he was found out and arrested. The Courts below rejected his defence and found him guilty under S. 456, I. P. C., holding that he had entered the house with the intention of committing burglary. On revision, the case came up before Blacker J., sitting in Single Bench, who held that the case for the prosecution "bore all the hallmarks of a fabricated story". After discussing the evidence, he came to the conclusion that it had not been proved that the petitioner had entered the house with the object of committing burglary. On the other hand, his findings were that the petitioner had crept into the house late in the night on the invitation of Mt. Razia, with whom he intended to have sexual intercourse, and that to reach her room he had to pass through the male apartments and was there surprised by P. W. Nawab Din, and that to save the family honour the story of his burglarious entry was invented. On these findings, the question arose as to whether the petitioner was guilty of the offence of criminal trespass as defined in S. 441, I. P. C. That section reads as follows:

Whoever enters into, or upon, property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property, or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, is said to commit 'criminal trespass'.

It was conceded for the Crown that the girl being unmarried and *sui juris*, it was not a criminal offence to have intercourse with her with her consent and therefore the case did not fall within the first part of paragraph 1 of the section. It was however contended that the second part of the paragraph applied, as in entering the house in the possession of Abdul Raoof and Nawab Din, the petitioner had the intent to "annoy" the persons in possession of the property entered upon. It was not denied that the "primary" intent of the petitioner in entering the house was to have intercourse with the girl, but it was urged that in the circumstances, he must be held to have the "secondary or subsidiary" intent of annoying the inmates of the house, for he must have known that, if discovered, the act which the petitioner committed, i. e. his entering the house, was bound to annoy the occupants of the house. Blacker J. was not inclined to accept this argument,

1. *Mohammad Yar v. Emperor*, reported in (1938) 25 A I R Lah 514.

as it appeared clear from the facts that the alleged annoyance could only result from discovery and it was patent that discovery was the last thing that the petitioner wanted or intended and therefore in the circumstances it was not possible to hold that "the last thing that a man intends to happen is his intention even if the epithet 'subsidiary' is tacked on to it". As however the contention for the Crown was supported by some judicial decisions of the Punjab Chief Court and other Courts, the learned Judge referred the case to a Division Bench. The Division Bench, not being satisfied with the correctness of these decisions, has referred the case to a Full Bench.

Before us, the case has been argued at considerable length. Of the rulings on which counsel for the Crown relies, the one directly in point is 17 P R 1908 Cr,² the facts of which are very similar to those found in the present case. In that case, it was held that the entry in the complainant's house with the intention of having illicit intercourse with his widowed sister amounted to criminal trespass within the meaning of S. 441, Penal Code inasmuch as the particular object could not be obtained except by causing great annoyance to the brothers of the widow, who were the persons in possession of the house. The question was not discussed at any length, but the decision was based upon an earlier Full Bench ruling of the Chief Court in 12 P R 1906 Cr,³ in which it had been held that when a person, claiming a title to immovable property, whether his title is good or bad, enters without any legal justification upon property in the established possession of another, he must be inferred to have had an intent to annoy the person in possession within the meaning of S. 441, Penal Code, even though he had no primary desire to annoy, and his only object was to obtain possession for himself. In that case the learned Judges discussed S. 441 at great length and in the course of the discussion Clark C. J. who delivered the majority judgment, referred (at p. 58) to the case of a person carrying on an intrigue with an unmarried daughter of the person in possession of the property entered upon, and in that connexion he observed as follows :

A is carrying on an intrigue with B's unmarried daughter. A at night comes into B's house and

goes into his daughter's bed-room, there being a high probability that he will be discovered. I should be strongly disposed to hold that there was an intent on B's part to annoy A. B knew that he was likely to be discovered, and without any excuse did an act which was bound to annoy A. I think he should be held to have intended the natural consequences of his act.

This view was adopted in 17 P R 1908 Cr,² above referred, and the accused was convicted under S. 456, I. P. C. This case has since been followed in several other cases. In some other cases, however, the correctness of this decision has been doubted. In A I R 1925 Lah 23=81 I C 239⁴ Martineau J., sitting in Single Bench, held that to constitute criminal trespass there must be an entry into or upon property in the possession of another person, with one of the intents mentioned in S. 441, I. P. C. Mere knowledge that the entry is likely to "annoy" a person in possession of the property is not sufficient to constitute criminal trespass, and that a case in which the entry will inevitably cause annoyance to a person in possession must be distinguished from one in which there is only a possibility of annoyance being caused. It was further observed that there was no presumption that a person intends what is merely a possible result of his action, or a result which, though reasonably certain, is not known to him to be so. Applying these principles, the learned Judge held that if an accused person succeeds in showing that his presence in the house was in consequence of an invitation from, or by the connivance of an unmarried woman living in the house, with whom he was carrying on an intrigue, and that he desired that his presence there should not be known to the person in possession, he cannot be convicted of criminal trespass. The question arose again in A I R 1926 Lah 600=96 I C 871,⁵ decided by Harrison and Dalip Singh JJ. The facts found in that case were that the accused had entered into a house in order to carry on an intrigue with the owner's unmarried daughter, who was aged 19, after taking every precaution to avoid discovery. It was held by the learned Judges that it could not be said that he intended to cause annoyance to the person in possession of the house, and he was not therefore guilty of an offence under S. 448, Penal Code. Reliance was placed by coun-

2. *Jiwan Singh v King Emperor*, (1908) 17 P R 1908 Cr=32 P W R 1908 Cr=8 Cr L J 488.

3. *Ram Saran v King-Emperor*, (1906) 12 P R 1906 Cr=4 Cr L J 298=54 P L R 1907 (FB).

4. *Asa Ram v. Emperor*, (1925) 12 A I R Lah 23 = 81 I C 239 = 25 Cr L J 751.

5. *Suleman v. Emperor*, (1926) 13 A I R Lah 600 = 96 I C 871=27 Cr L J 1015=27 P L R 385.

sel for the Crown upon 17 P R 1908 Cr,² but the learned Judges expressed their dissent with it and observed that :

Where the inevitable consequence of a certain act is clear, it must be presumed that the person doing the act had a "secondary" intention of bringing about that consequence; but it was a very different thing from saying that a man must be taken to intend any consequence which may result, however remotely, from his conduct.

In reference to the facts of the case before them they observed that :

The accused having taken every precaution to avoid discovery, it could not be said by any sort of distortion of the meaning of the word 'intention' that he either intended, or expected, that his conduct would cause annoyance by being made public. On the other hand, his conduct proved, that 'the last contingency that he expected, or anticipated, or intended, was discovery, and he had taken the natural and obvious precautions to avoid such discovery'.

The same view had been taken by the Allahabad High Court in 38 All 517.⁶ In this case Sundar Lal J., held that an accused person, though he may have known that, if discovered, he is likely to cause annoyance to the owner of a house, cannot be said to have intended either actually or constructively, to cause such annoyance. Accordingly, it was held that where a person entered a house with intent to have illicit intercourse with a woman, who was a widow and of age, he was not guilty of an offence. The Punjab ruling, 17 P R 1908 Cr,² was expressly dissented from. This decision of Sundar Lal J. was considered by a Division Bench of the Allahabad Court in 40 All 221.⁷ The learned Judges (Piggott and Walsh JJ.) endorsed the view that if the accused succeeds in showing that his presence in the house was in consequence of an invitation from, or by the connivance of a female living in the house, with whom he was carrying on an intrigue, and that he desired that his presence there should not be known to the person in possession, then he cannot be convicted of criminal trespass. They held, however, that :

If it is shown that the person in possession of the house has expressly prohibited the accused from coming to the house, an intent to annoy may be legitimately inferred.

They observed that in cases in which an accused person has forcibly or clandestinely entered a house, which he knew to have been definitely closed and barred against

him by the owner thereof, it might not be a sufficient answer to a charge of criminal trespass for the accused to say that he personally hoped that the owner would remain in ignorance of the fact of his entry. The Court may find on the facts that the intention to insult or annoy, under such circumstances was so clearly inherent in the acts of the accused as to form an essential part of the purpose with which entry into the house was effected. On this point the remarks of the learned Judges of the Bombay High Court in 26 Bom 558⁸ are certainly pertinent. The Patna High Court has also reached the same conclusion in 4 Pat 459.⁹ It was held in that case that if the intent was to carry on a peaceful intrigue with an unmarried woman no offence was committed, but if the object of the entry was to force an intrigue upon a woman in the house and to have a forcible intercourse with her, the intention will necessarily be to insult or annoy and the act would fall under S. 441, I. P. C. The Madras High Court also has taken the same view in 19 Mad 240¹⁰ which has since been approved by a Full Bench of that Court in 41 Mad 156.¹¹ In that case it was pointed out that :

It is one thing to entertain a certain intention, and another to have the knowledge that one's act may possibly lead to a certain result. The section (441) defining criminal trespass is so worded as to show that the act must be done with intent and does not, as other sections do (e. g. S. 425), embrace the case of an act done with knowledge of the likelihood of a given consequence.

With great respect, I agree with the view of the law expressed in these cases and find myself unable to follow the decision in 17 P R 1908 Cr² or to accept, without reservation the dictum of Clark C. J. in 12 P R 1906 Cr³ on which it was based. It is, of course, not possible to lay down any hard and fast rule, governing all cases. It must depend on the facts of each case, as to whether an intent to annoy the person in possession of the property entered upon can, in the circumstances, be reasonably inferred. But I find it impossible to hold that on the facts as stated in 17 P R 1908 Cr,² which are almost identical with those found

8. Emperor v. Lakshman Raghunath, (1902) 26 Bom 558=4 Bom L R 280.

9. Mohammad Nazir-ud-Din v. Emperor, (1925) 12 A I R Pat 713=87 I C 106=26 Cr L J 954=4 Pat 459=6 P L T 588.

10. Queen-Empress v. Rayapadayachi, (1896) 19 Mad 240=1 Weir 537.

11. Vullappa v. Bheema Row, (1918) 5 A I R Mad 136=43 I C 578=19 Cr L J 162=41 Mad 156=33 M L J 729 (F B).

6. Emperor v. Gaya Bhar, (1916) 3 A I R All 152=35 I C 979=38 All 517=14 A L J 719.

7. Emperor v. Ohhote Lal, (1919) 6 A I R All 249=49 I C 103=20 Cr L J 119=40 All 221=16 A L J 153.

in the case before us, the accused could be said to have the 'primary' or even the 'subsidiary' or 'secondary' intent to annoy the person in possession, from whom he had taken all possible precautions to keep his entry secret. The mere fact that he knew, or ought to have known, that, if discovered, his presence in the house might cause annoyance to the owner or other inmates of the house, is by itself not sufficient to bring his case within S. 441, I. P. C. For the foregoing reasons, it must be held that on the facts as found by Blacker J., in this case, it cannot be held that on the night in question the petitioner entered Abdul Raoof's house with intent to commit an offence or to annoy any of the persons in possession of the house. He has therefore been wrongly convicted of an offence under S. 456, I. P. C. I would accordingly accept his petition for revision, set aside his conviction and sentence and acquit the petitioner.

Young C. J. — I agree.

Monroe J. — I agree.

V.B.B./R.K. Conviction set aside.

A. I. R. 1938 Lahore 539

ADDISON AND DIN MOHAMMAD JJ.

Lala Piare Lal and others—Plaintiffs
— Appellants.

v.

Lala Hem Chand — Defendant —
Respondent.

First Appeal No. 46 of 1937, Decided on 27th January 1938, from decree of Senior Sub.Judge, Delhi, D/- 30th November 1936.

Hindu Law — Adoption — Widow — Hindu dying leaving surviving him his widow and his son's widow—Adoption by son's widow during lifetime of father's widow is not valid.

Where a Hindu dies leaving behind him his own widow and the widow of his predeceased son an adoption by the widow of the son during the lifetime of the father's widow is not valid. The son, whose widow makes the adoption, having died during the lifetime of his father, the estate vests in the widow of the father and she cannot be divested of the estate by any act of the son's widow who at the time of the adoption holds no position in the family and is merely entitled to a pittance: *Case law discussed.* [P 542 C 1, 2]

Achhru Ram and Mahabir Parshad —
for Appellants.

J. N. Aggarwal and Bishan Narain —
for Respondent.

Din Mohammad J. — The suit giving rise to this appeal was instituted on 24th

January 1933, by the five plaintiffs Lala Piare Lal, Lala Mahabir Parshad, Lala Ram Chand, Rai Sahib Joti Prashad and Lala Bulaqi Das against the defendant, Lala Hem Chand, for possession of a house described as Jain Dharamsala, situate at Katra Mashru in the town of Delhi. It was alleged in the plaint that in 1907 one Janki Das, the father of Ram Chand, plaintiff 3, purchased the house in suit for Rs. 5500 with the intention of dedicating it as a Dharamsala and that he spent Rs. 4500 more in making the necessary improvements in the building and converting it into a Dharamsala, and that since then the house had been used as such. Until his death in 1909, Janki Das acted as manager of the said institution, and since then his son Ram Chand had been discharging those functions. In January 1931, the defendant took the house on temporary loan for using it on the occasion of his daughter's marriage and that he refused to vacate it subsequently. The management of the institution had been made over to the Jain Orphanage Society, Delhi, and that consequently plaintiffs 1 and 2 had joined in the suit by virtue of the resolution passed by the said Society on 14th December 1931. Plaintiffs 4 and 5 represented the Digamber Jain brotherhood to which the institution belongs. The date of the cause of action was given as 15th June 1932, when the defendant had refused to vacate the house. Almost all the allegations made in the plaint were denied by the defendant and in addition it was averred that the house in suit was owned by the defendant and that the plaintiffs had no cause of action against him. It was further added that even if the building was held to be a Dharamsala, the plaintiffs had no right to it. The alleged dedication by Janki Das was also repudiated. The plaintiffs put in their replication on 26th June 1933, traversing all the pleas raised by the defendant. A dispute having arisen as to the value of the house in suit for the purposes of court-fee a local commissioner assessed it at Rs. 14,000 and on this sum the requisite amount of court-fee was paid. On the pleadings of the parties, the following issues were framed :

(1) Did Janki Das purchase the house in dispute and dedicate it as a Dharamsala in 1907 ? (2) Has the property in dispute been used as a Jain Dharamsala from the time of its building in or about 1907 ? (3) Did defendant temporarily borrow the use of the Dharamsala in 1931 ? (4) Was plaintiff 3 the duly constituted Manager of the Dharamsala

and is he competent to sue? (5) Is the Jain Orphanage Society the duly constituted Manager of the Dharamsala and competent to sue? (6) Are plaintiffs 4 and 5 competent to bring this suit? (7) To what relief are plaintiffs entitled?

In the course of the evidence it transpired that one Lala Sri Ram, a legal practitioner of Delhi, executed a will on 23rd March 1892, by which he left a house in Katra Mashru and Rs. 5000 for charity. This house is different from the one now in suit. On 30th April 1892, Lala Sri Ram made a codicil, amending the previous will in respect of certain property left for charity. In October 1892, Lala Sri Ram died, leaving him surviving Mt. Durgi, his own widow, and Mt. Bugli, the widow of his predeceased son, Piare Lal. On 19th November 1892, Janki Das obtained a probate of both the wills made by Lala Sri Ram. In 1894 while Mt. Durgi was still alive, Mt. Bugli adopted the defendant Hem Chand. On 3rd April 1907, Janki Das purchased the house in suit from one Badri Das and it was stated in the sale deed that Janki Das had made the purchase with the money left by Lala Sri Ram vakil for the purpose of building a Dharamsala. The defendant was present at the time when the document was registered. The building operations started in February 1908 and when the house was completely renovated it was consecrated as a Dharamsala and to the defendant's knowledge an inscription was made on the house, saying, "Dharamsala B. Siri Ram Vakil Jaini, 1909." Janki Das died and the management of the Dharamsala was taken over by his son Ram Chand. The other house mentioned in Lala Sri Ram's will was also managed by him. This state of affairs continued until the defendant came into possession of the property in 1931.

On the facts mentioned above, the contentions, raised by the plaintiffs before the trial Court were that the property having been dedicated as a Dharamsala no rights of private proprietorship were left in it, that the defendant's adoption by Mt. Bugli at the time when the property actually vested in Mt. Durgi was invalid, and that on both grounds the defendant was liable to ejectment. The defendant contended that as the case disclosed in the evidence of the parties was not stated in the plaint, the plaintiffs should not be allowed to contest their claim on the grounds mentioned above. He further challenged the will on the ground of uncertainty and indefiniteness and claimed the property for himself

as the grandson of Lala Sri Ram. The Subordinate Judge however condoned the defects in the pleadings and allowing the parties to raise all those points which arose from the evidence led by them respectively decided the suit on those lines. He came to the conclusion that the defendant's adoption was valid under the Hindu law and that the defendant was entitled to succeed to all the property of his adoptive father, whether ancestral or self-acquired. (It may be mentioned here that Lala Sri Ram was claimed to be the grandfather of the defendant and not the father.) He was further of the opinion that the so-called trust was invalid and that the defendant's accepting it as a valid trust and allowing construction of the house in dispute out of the sale proceeds of Lala Sri Ram's property situate at Pahar Ganj did not debar him from contesting the present suit, especially as estoppel had not been clearly pleaded. Inasmuch as the will made by Lala Sri Ram was void and inoperative so far as the property in suit was concerned, its user as a Dharamsala was immaterial. The defendant being in possession of the house could not be ousted by any person not holding a superior title. He accordingly dismissed the suit with costs. The plaintiffs have appealed.

Counsel for the appellants has contended that (1) the defendant's adoption was invalid inasmuch as at the time of his adoption his adoptive mother, Mt. Bugli, held no position in the family and that by her adoption she could not divest Mt. Durgi of the estate that she held; (2) that, in any circumstances, the defendant who had acquiesced in the construction and dedication of the building as a Dharamsala could not after the lapse of more than 20 years be allowed to claim the property as his own. Even if the will was void for uncertainty, the amount spent on the purchase of the site and the construction of the Dharamsala could at the worst be treated as an unauthorized expenditure on the part of Janki Das and that as the defendant's remedy to recover that amount from Janki Das has expired, he cannot follow the property which now vests in the Jain community and treat it as his private property. In addition to these contentions the counsel maintained that both the plaintiff Ram Chand and his assigns, plaintiffs 1 and 2, were entitled to institute the suit, but as the defendant has not seriously challenged this position we do not propose to deal with this matter. Coming now to the legal issue

raised as to the validity of the defendant's adoption, we find that the matter is not free from difficulty. In 10 M I A 279,¹ one *G* empowered his wife to adopt a son in case he died childless. He afterwards had a son *B*. Two years after the birth of his son he re-affirmed the power conferred on his wife and permitted her to adopt a son for the purpose of performing religious rites if the son who was already in existence died. Subsequently *G* died and *B* succeeded to his estate. A few years after *G*'s death *B* also died leaving him surviving only a widow, who succeeded as heir to him. Some time after *B*'s death, his mother exercised the power given her by the instrument mentioned above and adopted a son to her husband. Their Lordships of the Privy Council held that the adoption by *G*'s widow was in the circumstances of the case void.

In 8 Cal 302,² the principles enunciated in the judgment cited above were re-affirmed by their Lordships of the Privy Council and it was decided that the son's widow having acquired a vested interest, a new heir could not be substituted for her. The facts of that case were similar to the facts of the previous case. In 10 Mad 205,³ their Lordships of the Privy Council approvingly referred to the two previous judgments mentioned above and held that the power of the father's widow to adopt a son to him is brought to an end upon the vesting of the estate in the son's widow. In 57 Bom 157⁴ which was decided on the 4th November 1932, the question that arose for decision before their Lordships of the Privy Council was, whether according to the law prevalent in the Marhatta country of the Bombay Presidency a Hindu widow, whose husband was undivided at the time of his death, and who had not the express permission of her husband, could adopt a son to him without the consent of the surviving coparceners. The parties were governed by the Mitakshara law, and on question on which the Mitakshara is silent, by the law as expounded in Nilakantha's Mayukha. After discussing almost all the

authorities available on the subject, their Lordships came to the conclusion that the correct view of the law was that expressed in 5 Bom H C R A C 181⁵ and that the adoption in question was not invalid on the ground that it was made by the widow without the express permission of her husband and without the consent of the surviving coparceners. Their Lordships then turned to the other contention raised on behalf of the respondent to the effect that the last surviving coparcener at the date of the death of *J* was *N* and that the adoption having been made after the death of *N* was invalid. Their Lordships however repelled this contention on the ground that the adoption was not made after the extinction of the coparcenary but during its subsistence.

In 12 Pat 642⁶ it was decided that in a case where a Hindu was survived by a widow as well as by an infant son who had succeeded to the impartible zamindari held by his father but had died unmarried, the son's mother could validly adopt a son to continue the line although the zamindari was not vested in her. It was alleged in that case that according to the custom of the family, females were excluded from inheritance and that an adoption made a week after the death of the last male owner by his mother was invalid. Both Courts in India had found that the custom alleged was established and that the adoption was invalid on the ground that the mother could not exercise her power to adopt so as to divest the estate vested in the plaintiff. The parties were governed by the Benares School of the Mitakshara law. It was contended before their Lordships of the Privy Council that when once the estate had vested in an heir of the last male holder other than the adopting widow, the power of adoption was at an end. It was further urged that where the husband from whom the power to adopt was derived left a son to succeed to him and that son attained full legal capacity to continue the line, the power of his mother was equally at an end, and that this would be the case whether the family was separate or joint. Their Lordships while discussing the propositions stated above, first discussed the foundation of the doctrine of adoption and

1. *Mt. Bhoobun Moyee Debia v. Ram Kishore*, (1863-66) 10 M I A 279=3 W R 15=1 Suth 574=2 Sar 111 (P O).

2. *Padma Kumari Debi v. Court of Wards*, (1882) 8 Cal 302=8 I A 229=4 Sar 285 (P O).

3. *Thayammal v. Venkatarama*, (1887) 10 Mad 205=14 I A 67=5 Sar 10 (P O).

4. *Bhimabai Jivangouda v. Gurnath Gouda*, (1938) 20 A I R P C 1=141 I O 9=57 Bom 157=60 I A 25 (P O).

5. *Rakhmabai v. Radhabai*, (1868) 5 Bom H C R A C 181.

6. *Amarendra Man Singh v. Sanatan Singh*, (1933) 20 A I R P O 155=143 I O 441=60 I A 242=12 Pat 642 (P O).

remarked that that doctrine was based upon the duty which every Hindu owes to his ancestors to provide for the continuance of the line and the solemnization of the necessary rites, and that if that duty had been passed on to a new generation, capable itself of the continuance, the father's duty had been performed and the means provided by him for its fulfilment spent. In dealing with the legal aspect of the case, their Lordships examined the older case referred to above as well as some recent cases mostly of their own Board and eventually came to the conclusion that the mother's power of adoption under her husband's authority was not exhausted at the death of her son and that the adoption was valid. In 59 Bom 360⁷ the authority mentioned above was followed and the decision given on the same lines.

Counsel for the appellants has contended that the recent Privy Council judgments are not in point inasmuch as they proceed on their own facts and do not justify a conclusion in the present case that the defendant's adoption was valid as here the son, whose widow, Mt. Bugli, made the adoption, had died during the lifetime of his father and that the estate vested in the widow of the father and that consequently Mt. Durgi could not be divested of the estate that she held by any act of Mt. Bugli. He mainly relied in this connexion on the principles deducible from the three older judgments of their Lordships of the Privy Council alluded to above. As against this, counsel for the respondent has urged that in the face of the principle enunciated in 12 Pat 642,⁶ the adoption under the Hindu law served the purpose of continuing the line and solemnizing the sacred rites. The adoption by Mt. Bugli could not therefore be challenged as invalid, especially when Mt. Durgi, in whom the estate vested, had in a way acquiesced in it.

On giving full consideration to the arguments addressed to us, we have arrived at the conclusion that the adoption of the defendant by Mt. Bugli at a time when she held no position in the family and was merely entitled to a small pittance cannot be held to be valid. Mt. Bugli's husband had died during the lifetime of his father and the only legal heir existing on the death of the father was Mt. Durgi. There could be no continuance of the line there-

fore by any act done by Mt. Bugli inasmuch as the heir who could take any effective steps to achieve that object was Mt. Durgi and none else. A case exactly on all fours with the present case has not so far arisen but our conclusion is justified by the principles we can deduce by way of analogy from the cases cited at the Bar. The matter of devolution of property may be a secondary consideration as remarked by their Lordships of the Privy Council in 12 Pat 642,⁶ but where the primary consideration does not exist, the secondary consideration in itself gains importance. Just as in 10 M I A 279,¹ 8 Cal 302² and 10 Mad 205³ which have not been dissented from in 12 Pat 642,⁶ the power of the father's widow to adopt was held to have terminated on the vesting of the estate in the son's widow, in the present case the power of the son's widow, if any, to adopt at the time when the property vested in the father's widow can safely be said to have come to an end. We accordingly hold that the adoption of the defendant was in the eye of the Hindu law invalid.

Even on the merits of the case, we are disposed to think that the respondent's claim cannot be maintained. As stated above, he was present at the time when the property in suit was purchased with the avowed object of building a Dharamsala. Besides, it was with his knowledge and implied consent that the building was consecrated as a Dharamsala. During the course of more than twenty years that this building remained in the charge of Janki Das and on his death in that of his son, Ram Chand, the defendant had never once claimed the property as his own or objected to its being treated as dedicated property. It was for the first time in 1931 that he obtained the possession of the property with the permission of the then manager and that too for a purpose for which the building was mainly intended. It was only when he had thus come into possession of the property by a clever trick played upon a simple minded manager who could not foresee the intentions which had actuated him that he set up a title in himself and took shelter under a legal defect in Lala Sri Ram's will. We consider that even if the defendant could be treated as a validly adopted son of Piare Lal the circumstances brought upon the record point to the conclusion that it was he who had made the dedication not only in consenting to the purchase of the property with the money

7. *Vijaysingji Chhatrasingji v. Shivasangji*, (1935) 22 A I R P C 95=155 I O 493=59 Bom 360=62 I A 161 (P O).

left by Sri Ram for charitable purposes but also in agreeing to the construction of the property with the sale proceeds of the property belonging to Sri Ram. From whatever aspect therefore the case is considered, the respondent has not a leg to stand on. We accordingly accept this appeal, set aside the judgment of the Subordinate Judge and decree the plaintiffs' suit with costs throughout.

R.M./R.K.

Appeal allowed.

* A. I. R. 1938 Lahore 543

BLACKER J.

Mohammad Nawaz and others
Convicts — Petitioners.

v.

Emperor.

Criminal Revision No. 1631 of 1937,
 Decided on 17th January 1938, from order
 of Sess. Judge, Sialkot, D/- 19th October
 1937.

(a) Criminal P. C. (1898), S. 342—Violation
 of S. 342 is illegality.

If S. 342 has been violated it is an illegality and
 not a mere irregularity. [P 543 C 2]

* (b) Criminal P. C. (1898), S. 342—Warrant
 case—Examination of accused after further
 cross-examination of prosecution witnesses
 under S. 256 but before defence is not illegal.

The further examination of the prosecution
 witnesses under S. 256 is not a part of the prosecution
 case: *A I R 1923 Mad 609 (F B)*,
Rel. on ; Case law referred. [P 544 C 2]

But the further cross-examination is not part of
 the defence and the defence for which the accused
 is called on within the meaning of S. 342 starts
 after the further cross-examination of the prosecution
 witnesses: *A I R 1936 All 319, Dissent.*

[P 544 C 2]

Hence in a warrant case, which should be
 regarded as comprising three-stages—prosecution,
 further cross-examination of prosecution witnesses
 and defence, the examination under S. 342 can be
 held either immediately after the close of the first
 stage or immediately before the beginning of the
 third stage or for the matter of that at any time
 between these two points. [P 545 C 1]

(c) Penal Code (1860), Ss. 149 and 34—
 Ss. 149 and 34 though not identical may in
 some cases overlap.

It is true that S. 34 and S. 149 are not identical
 in terms but there are cases in which they do
 overlap. Hence, even where S. 149 is found not to
 apply, yet if accused had the common intention of
 causing hurt to their victim and therefore if hurt
 was caused by any of them they are all liable
 under S. 34 for the hurt that was caused.

[P 545 C 2]

Abdul Karim — *for Petitioners.*

A. C. Maurice *for Advocate-General —*
for the Crown.

Order. — Four persons, Mohammad
 Nawaz, Ghulam Hussain, Khair Din and

Kharait, are petitioners for the revision of
 their conviction on appeal by the learned
 Sessions Judge of Sialkot under Ss. 324
 and 325, I. P. C. A preliminary objection
 has been taken by counsel for the peti-
 tioners that the mandatory provisions of
 S. 342, Criminal P. C., have not been
 complied with in this case. The procedure
 adopted in this case was that the learned
 Magistrate examined 14 prosecution wit-
 nesses up to 14th May. These witnesses
 were duly cross-examined as they gave
 their evidence. He then framed a charge
 and on the next date of hearing, a number
 of the prosecution witnesses were recalled
 under S. 256, Criminal P. C., and subjected
 to further cross-examination. He then ex-
 amined the petitioners and after doing so
 recorded their defence evidence. It is con-
 tended on the part of the petitioners that
 S. 342 requires that he should have exa-
 mined the accused immediately after the
 close of the prosecution case and before the
 further cross-examination under S. 256 and
 that his failure to do so has vitiated the
 trial. It is clear that if S. 342 has been
 violated it is an illegality and not a mere
 irregularity. This point has been set at rest
 by several authorities of this Court though
 it has been held that in revision it is not
 always necessary for this Court to interfere.

The question however is whether there
 has been non-compliance with S. 342 in
 this case. The point for decision is what is
 the correct stage of the trial of a warrant
 case at which the accused should be exa-
 mined. It has apparently been held by
 some Courts that the correct time is when
 the further cross-examination as well as the
 examination of the prosecution witnesses is
 over and immediately before the defence.
 But this is not the view of this Court. In
 4 Lah 61¹ it was held that an examination
 held before the further cross-examination
 was a proper compliance with the law.
*A I R 1926 Lah 154*² and *A I R 1929 Lah*
*371*³ are further authorities of this Court
 following 4 Lah 61.¹ The authorities relied
 upon in support of the contrary view are
 actually authorities for the proposition that
 even though the accused may have been
 examined after the prosecution evidence
 was closed, a further examination is obliga-

1. *Byrne v. Emperor*, (1924) 11 A I R Lah 84=81
 I C 837=4 Lah 61=25 Cr L J 801.

2. *Fazal Karim v. Emperor*, (1926) 13 A I R Lah
 154=89 I C 842=26 Cr L J 1418.

3. *Emperor v. Nadir*, (1929) 16 A I R Lah 371=
 116 I C 455=30 Cr L J 625.

tory after the close of the further cross-examination under S. 256. This was held in A I R 1928 Lah 230⁴ which followed 7 Lah 564⁵ and also 1 P R 1918.⁶ I am however unable to read into the judgment in A I R 1928 Lah 230⁴ any words which make it an authority for the proposition that the proceedings under S. 256 are a part of the examination of the prosecution witnesses. The judgment does not clearly state what procedure was followed in that case, but in 7 Lah 564⁵ and 1 P R 1918⁶ what happened was that the accused was examined after some of the prosecution witnesses only had been examined under S. 252, Criminal P. C., and was not again examined after the remaining witnesses had been examined under this section. No real authority of this Court has been cited for the proposition that if the accused is examined after all the evidence has been taken under S. 252 it is obligatory to examine him again after the proceedings had been taken under S. 256. One judgment quoted is A I R 1934 Lah 648,⁷ but with due deference this does not appear to me a real authority for the proposition. The order of the Hon'ble Judge in that case is a very brief one merely accepting the reference. Only the petitioner was represented.

The learned Sessions Judge in his order of reference appears to have misunderstood 4 Lah 61¹ which consists of two parts first, the proposition that the proper place for the examination of the accused is after the examination of the prosecution witnesses under S. 252 and therefore there is no necessity to examine him again after the further cross-examination under S. 256 and secondly, the further proposition largely by way of an obiter dictum that even if the proper stage was after S. 256 had been complied with there was only a curable irregularity. It was the latter proposition, namely that there was only a curable irregularity which has been disapproved. The view therefore of this Court appears to be firmly established that the proper time for the examination of the accused under S. 342 is

after the witnesses have been examined under S. 252. But there appears to be no authority for going further and holding that they must necessarily be examined before the further cross-examination under S. 256. In fact to hold this would be impossible for very often the proceedings under S. 256 overlap the proceedings under S. 252 as in cases where the Magistrate acting under S. 254 charges after having heard only some of the prosecution witnesses. Then the further cross-examination of those witnesses under S. 256 follows and after it is over the examination of the rest of the prosecution witnesses under S. 252 is resumed and concluded. In such a case it would be impossible to comply with S. 342 after complying with S. 252 but before complying with S. 256.

It is clear from the authorities which I have quoted that this High Court does not consider the further examination of the prosecution witnesses under S. 256 to be a part of the prosecution case and this view, which has also been held by a Full Bench of the Madras High Court in 46 Mad 449⁸ appears, if I may say so with due deference, to be obviously correct. But to uphold the contention of counsel for the petitioners in the present case, it will be necessary to hold that the proceedings under S. 256 are a part of the defence. If they are part of the defence, then S. 342 requires that the examination of the accused should be held before the case is called on for his defence. In one judgment, A I R 1936 All 319,⁹ it appears to have been held that the further cross-examination is part of the defence but for reasons which I shall presently give I venture to dissent from this view. In the Madras Full Bench case to which I have referred above, there are some words which might suggest that the Hon'ble Judges were regarding this further cross-examination as part of the defence but it is nowhere clearly stated that it is so. That judgment, like the three Lahore judgments to which I have referred above, is really an authority for the proposition that if the accused has been examined after the conclusion of the prosecution case under S. 252 he need not be again examined after the further cross-examination

4. Emperor v. Gian Singh, (1928) 15 A I R Lah 230=111 I C 665=29 Cr L J 905.

5. Lachhman Singh v. Emperor, (1926) 13 A I R Lah 551=96 I C 863=27 Cr L J 1007=7 Lah 564=27 P L R 427.

6. Girja Nandan Singh v. National Insurance and Banking Co. Ltd., (1918) 5 A I R Lah 302=44 I C 139=1 P R 1918.

7. Kundan Lal v. Emperor, (1934) 21 A I R Lah 648=1934 Cr O 972=158 I C 1034=36 Cr L J 468=35 P L R 173.

8. Varisal Rowther v. Emperor, (1923) 10 A I R Mad 609=78 I C 163=46 Mad 449=44 M L J 567 (F B).

9. Hafiz Mahommed Rafiq Ahmed v. Emperor, (1936) 23 A I R All 319=1936 Cr O 476=162 I C 758=37 Cr L J 710=1936 A L J 274.

under S. 256. But the question whether the proceedings under S. 256 can be regarded as part of the defence can, I think, be determined by reference to that section itself read with S. 342. The important and relevant words in S. 342 are, "after the witnesses for the prosecution have been examined and before he is called on for his defence". S. 256 lays down first, that the accused is to be asked whether he wishes further to cross-examine any of the prosecution witnesses and if so that those witnesses are to be re-called and cross-examined. After that the evidence of any remaining prosecution witnesses is to be taken and then occurs the sentence, "the accused shall then be called upon to enter upon his defence and produce his evidence". These words clearly imply that the defence for which the accused is called on within the meaning of S. 342 starts after the further cross-examination of the prosecution witnesses and that all that S. 342 requires is that the examination of the accused shall take place before the defence witnesses are actually heard, or if no defence evidence is produced, before the defence arguments.

The trial of a warrant case should according to this view be regarded as comprising not merely two stages, prosecution and defence, but three stages, prosecution, further cross-examination of prosecution witnesses and defence. If this is so, then it is clear that S. 342 does not lay down any particular moment of time but a period of time within which the examination can be held. If the trial of a warrant case were regarded as having only two stages—prosecution and defence—then S. 342 would have to be interpreted as indicating a particular moment of time, namely that intervening between the close of the first stage and the beginning of the second. If however, as appears to me to be the correct view, there are three stages, then the examination under S. 342 can be held either immediately after the close of the first stage or immediately before the beginning of the third stage or for the matter of that at any time between these two points. It would however be inconvenient in most cases to interrupt the further cross-examination of the witnesses to examine the accused. That being my view, I hold that there has been no illegality in this trial as the provisions of S. 342 have been complied with. The examination of the accused was after the prosecution witnesses had been examined

under S. 252 and before the accused had been called upon his defence within the meaning of the last words of S. 256.

Coming now to the merits, there appear to me no grounds for differing from the finding of the learned Sessions Judge. One point has been raised by counsel for the petitioners and that is that having found that Ss. 148 and 149 did not apply, the learned Sessions Judge should have acquitted two of the petitioners because there was no offence left. The learned counsel, however, has forgotten the existence of S. 34, I. P. C. It is true that S. 34 and S. 149 are not identical in terms but there are cases in which they do overlap and the present is one of them. It is clear that the finding of the learned Sessions Judge, with which I am unable to disagree is that the petitioners had the common intention of causing hurt to their victim and therefore if hurt was caused by any of them they are all liable under S. 34 for the hurt that was caused. The learned Sessions Judge on consideration of the evidence and after giving due weight to all the circumstances in favour of the accused i. e. the delay in making the first information report has found it established that the four petitioners were present and took part in the beating of Miran Bakhsh and they had the common intention of causing hurt to him. In my opinion they have been rightly convicted and the sentences not being excessive I dismiss the petition.

D.S./R.K.

Petition dismissed.

*** A. I. R. 1938 Lahore 545**

ADDISON AND DIN MOHAMMAD JJ.

Messrs. Som Chand-Maluk Chand —

Assessee.

v.

Commissioner of Income-tax —

Respondent.

Civil Ref. No. 24 of 1937, Decided on 19th January 1938, referred by Commissioner of Income-tax, Punjab, North West Frontier and Delhi Provinces, D/- 22nd October 1937.

(a) Income-tax Act (1922), S. 66 (3) — High Court, under S. 66 (3), has no jurisdiction to entertain question not raised in application to Commissioner under S. 66 (2).

The jurisdiction of the High Court, under S. 66 (3) is confined only to those matters which are contained in the application made to the Commissioner under sub-s. (2) of S. 66 and it is only in relation to such matters that the refusal of the

Commissioner to state the case can be investigated by the High Court. Consequently if a point is not raised before the Commissioner, his refusal to state the case cannot be declared to be unjustified or, in other words, his decision cannot be pronounced to be incorrect. Hence, where the question whether the assessment made under S. 23 (4) was arbitrary was not raised in the application under S. 66 (2) the High Court has no jurisdiction to entertain that question. Apart from this if the assessee were permitted to raise questions touching the merits of the assessment before the High Court for the first time under sub-s. (3) of S. 66, it would amount to allowing him to appeal against an assessment, an appeal against which is expressly forbidden. [P 546 C 2 ; P 547 C 1]

* (b) Income-tax Act (1922), Ss. 23 (4) and 66 (3) — Assessment under S. 23 (4) — High Court cannot interfere merely by virtue of its general inherent jurisdiction.

The jurisdiction exercised by the High Court under the Income-tax Act is a special jurisdiction and is consequently circumscribed within the limits specified in the Statute. The power of revising, reviewing or interfering in any other manner with an assessment made under S. 23 (4) being nowhere conferred upon the High Court expressly or impliedly by the Income-tax Act, no such power can be exercised merely by virtue of the general inherent jurisdiction of the High Court, if any : *A I R 1931 Lah 87 (F B) ; A I R 1931 Rang 194 (F B) and A I R 1937 P C 133, Explained. A I R 1936 P C 269, Rel. on.* [P 548 C 1]

Lala Kirpa Ram Bajaj — *for Assessee.*

J. N. Aggarwal and S. M. Sikri —

for Respondent.

Din Mohammad J. — This is a case stated under sub-s. (3) of S. 66, Income-tax Act. The question formulated by this Court was couched in the following terms :

Whether in the circumstances of this case the assessment of the petitioner was not made arbitrarily, recklessly or capriciously, without the Income-tax Officer exercising his 'judgment' in the matter, and is it not liable to be set aside.

The Commissioner has questioned the jurisdiction of this Court in entertaining a question which was not raised in the application submitted by the assessee to the Commissioner under sub-s. (2) of S. 66. It may be necessary to state the facts shortly in order to appreciate the force of this objection. The assessee did not make a return under sub-s. (2) of S. 22, nor did he comply with the terms of the notice issued under sub-s. 4 of the same section. Thereupon the Income-tax Officer made the assessment to the best of his judgment under sub-s. (4) of S. 23. The assessee applied under S. 27 for the cancellation of this assessment, but his application was disallowed. He then presented an appeal under S. 30, but the appeal, too, was dismissed. He subsequently moved the Commissioner under sub-s. (2) of S. 66, but the

Commissioner refused to interfere with the assessment, on which the assessee put in an application in this Court with the result that the question referred to above was formulated and the Commissioner was required to state the case thereon. The question whether the assessment was arbitrary, reckless or capricious was never raised at any stage of the proceedings before the income-tax authorities and it is on this ground that the Commissioner has questioned the jurisdiction of this Court and has relied in this connexion on the wording of sub-s. (3) of S. 66. The material portion of this subsection reads as follows :

(3). If on any application being made under sub-s. (2), the Commissioner refuses to state the case on the ground that no question of law arises, the assessee may apply . . . to the High Court, and the High Court if it is not satisfied of the correctness of the Commissioner's decision, may require the Commissioner to state the case and to refer it. . . .

The Commissioner contends that the jurisdiction of the High Court is confined only to those matters which are contained in the application made to the Commissioner under sub-s. (2) of S. 66 and it is only in relation to such matters that the refusal of the Commissioner to state the case can be investigated by the High Court. Consequently if a point is not raised before the Commissioner, his refusal to state the case cannot be declared to be unjustified, or, in other words, his decision cannot be pronounced to be incorrect. We consider that there is much force in this contention and we have arrived at this conclusion not only on the wording of sub-s. (3) of S. 66, but on consideration of the whole scheme of the Act. It is clear that no appeal is allowed from an assessment made under sub-s. (4) of S. 23. The only course open to an assessee, who is assessed under that sub-section, is to approach the Income-tax Officer in the first instance under S. 27 and to ask for the cancellation of the assessment made against him. In case of refusal of the Income-tax Officer to accede to his request, he can move the Assistant Commissioner under sub-s. (1) of S. 30. All that he can contest before these authorities is the matter arising under S. 27 and no other matter can be raised either before the Income-tax Officer or before the Assistant Commissioner. Similarly, all that can be mooted before the Commissioner is the matter arising out of the appellate order of the Assistant Commissioner and no more. If the assessee were permitted to raise

questions touching the merits of the assessment before the High Court for the first time under sub-s. (3) of S. 66, it would amount to allowing him to appeal against an assessment, an appeal against which is expressly forbidden. We accordingly hold that no mandamus could issue to the Commissioner on the point at issue.

Counsel for the assessee concedes the legal position as explained above, but he contends that there is an inherent power vested in this Court to interfere in cases of gross injustice or capricious assessments. In support of his contention he relies on 12 Lah 129,¹ 9 Rang 281² and I L R (1937) Nag 191.³ But in our opinion, none of these judgments lends any support to him. Read carefully these judgments rather go against his contention. In 12 Lah 129,¹ a case decided by five Judges of this Court, the main judgment was delivered by Sir Shadi Lal C. J. While discussing a similar question raised before him, he observed at page 144 of the report :

It is true that a finding of fact recorded by him (Income-tax Officer) cannot be impeached even when it is not based upon any material, nor is it open to the High Court to say with respect to a particular case that the assessment has been made contrary to the rules of justice and good conscience.

No doubt he added :

The High Court is however entitled to make a pronouncement upon the meaning of S. 23, sub-s. (4), and to lay down that the Income-tax Officer cannot be said to make an assessment to the best of his judgment, if he is not guided by the dictates of justice and fair play. As assessment resting upon the whim and caprice of the Income-tax Officer cannot be elevated to the dignity of an assessment made to the best of his judgment.

But it is obvious that these remarks were merely intended to impress upon the minds of the Income-tax Officers that while making assessments to the best of their judgment they should not be whimsical or capricious and not that the learned Judge had jurisdiction in the matter; nor did he interfere with the assessment. The conclusion at which he arrived is really contained in the earlier passage quoted above. In 9 Rang 281,² Page C. J. had observed at page 294 of the report :

If the word (arbitrary) is taken to mean that the Income-tax Officer, regardless of information in his possession, deliberately, recklessly or fraudulently has made an assessment under S. 23 (4) which he knows that he was not justified in making, in such circumstances and assuming that the assessee has failed to obtain redress as provided in the Act, I should not be prepared to hold, as at present advised, apart altogether from the provisions of the Income-tax Act, that this Court does not possess jurisdiction in virtue of its inherent prerogative powers to order the Income-tax Officer to do his duty.

The conclusion at which he arrived however is stated at page 302 of the report in the following words :

Under S. 66 (2) the assessee as therein provided may require the Commissioner of Income-tax inter alia to refer to the High Court any question of law arising out of an order of the Assistant Commissioner under S. 31, and if the Commissioner refuses to state a case on the ground that no question of law arises under S. 66 (3) on the assessee's application the High Court may require the Commissioner to state the case and to refer it. Inasmuch as the question whether an assessment made by the Income-tax Officer under S. 23 (4) is valid or not is not a question of law that arises or can arise out of an order of the Assistant Commissioner passed under S. 31, it follows that such a question cannot be made the ground for an order by the High Court under S. 66 (3) requiring the Commissioner to state a case.

His conclusions were concurred in by the other four colleagues of his who heard the case with him. Three of them merely said that they agreed, while Dunkley J. appended a separate note to the main judgment, throwing further light on these conclusions. In I L R (1937) Nag 191³ (corresponding to 5 I T R 170) their Lordships of the Privy Council observed :

Their Lordships find themselves in agreement with the views expressed by the High Court at Rangoon in 9 Rang 281.²

It is on this passage that counsel for the assessee has laid much stress and has argued that inasmuch as their Lordships of the Privy Council had agreed with the views expressed by the High Court at Rangoon, they impliedly accepted the views of Page C. J. as stated above in respect of the inherent jurisdiction vested in the High Court to interfere in such matters. We are not however disposed to interpret this passage in the manner suggested by the assessee's counsel. All that this passage conveys is that their Lordships were in agreement with the conclusions at which the High Court had arrived and those conclusions made no reference to the inherent jurisdiction of the High Court. The interpretation that we place upon the passage quoted from the judgment of their Lordships of the Privy Council finds support

1. Mahomed Hayat Haji Mahomed v. Commr. of Income-tax, (1931) 18 A I R Lah 87=131 I O 81=12 Lah 129=32 P L R 563 (F B).

2. Abdul Bari v. Commr. of Income-tax, (1931) 18 A I R Rang 194 = 133 I O 81 = 9 Rang 281 (F B).

3. Commr. of Income-tax U P & C P v. Badridas Ramrai Shop, (1937) 24 A I R P O 133 = 167 I O 793=I L R (1937) Nag 191 = 64 I A 102 = 5 I T R 170 (P O).

from the fact that their Lordships stated in an earlier part of the judgment that if the assessee was given no relief under S. 27, the assessment stood as it was. Reference in this connexion may be made to 7 I T C 173⁴ In that case it was held that the High Court had no power under S. 66 (3) to require the Commissioner of Income-tax to state the case on the question whether the assessment, being purely arbitrary and based on no materials whatever, was justified in point of law. The jurisdiction exercised by the High Court under the Income-tax Act is a special jurisdiction as remarked by their Lordships of the Privy Council in 4 I T R 323⁵ at page 339 and is consequently circumscribed within the limits specified in the Statute. The power of revising, reviewing or interfering in any other manner with an assessment made under S. 23 (4) being nowhere conferred upon the High Court expressly or impliedly by the Income-tax Act, no such power can be exercised merely by virtue of the general inherent jurisdiction of the High Court, if any. In view of our decision on the preliminary objection raised by the Commissioner, the question need not be answered; but even if it were permissible to us to consider the merits of the case we would have had no hesitation in holding that the order was neither arbitrary nor reckless nor capricious, and would thus have answered the question formulated by this Court in the affirmative. The assessee will pay the costs of this reference to the Commissioner of Income-tax.

D.S./R.K.

Answer accordingly.

4. Jot Ram Sher Singh v. Commr. of Income-tax, C. P. & U.P., (1931) 21 A I R All 559=150 IC 197=16 All 933=1934 ALJ 274=7 I T C 173.
5. Commr. of Income-tax, Bombay Presidency & Aden v. Bombay Trust Corporation Ltd., (1936) 23 A I R P C 269=164 I O 18=63 I A 403=4 I T R 323=60 Bom 900 (P C).

A. I. R. 1938 Lahore 548

ADDISON AND ABDUL RASHID JJ.

*Lala Manohar Lal, Proprietor of Firm Manak Chand Gulzari Mal—**Defendant — Petitioner.*

v.

*Karobar Khandan Mushtarka Ahle Hanud Mausuma Nanhe Mal Sanwal Das, Plaintiffs and others—**Defendants — Respondents.*

Civil Revn. No. 151 of 1937, Decided on 2nd December 1937.

Civil P. C. (1908), S. 115, O. 37, R. 3— Order under O. 37, R. 3 giving leave to defend conditionally is interlocutory order and does not amount to 'case decided' — No revision lies against it — High Court cannot interfere even though it is assumed that it is not interlocutory order—Trial Court has full discretion in matter of granting leave—Wrong exercise of discretion does not amount to material irregularity in exercise of jurisdiction.

An order passed by a Court under O. 37, R. 3 giving leave to defendant conditionally is an interlocutory order and does not amount to a 'case decided' within the purview of S. 115 so as to be open to revision. [P 549 C 2]

It is not open to the High Court to interfere in revision with such order, although it is assumed that it is not an interlocutory order. Under R. 3, O. 37, the trial Court is entitled to refuse leave to defend or to give leave to defend unconditionally, or to give leave to defend conditionally and in giving such leave the trial Court cannot be said to have acted illegally or with material irregularity in the exercise of its discretion. A wrong exercise of discretion cannot amount to a material irregularity in the exercise of jurisdiction: *A I R 1924 Lah 425 and A I R 1936 Mad 246, Rel. on; A I R 1930 All 758; A I R 1929 Mad 841; A I R 1935 Mad 302; (1900) 85 L T 262 and A I R 1935 Mad 43, Disting.* [P 550 C 1]

*J. N. Aggarwal — for Petitioner.**Mehr Chand Mahajan and Bishan Narain — for Respondents.*

Abdul Rashid J. — The suit, which has given rise to this petition for revision, was instituted by Nanhe Mal Sanwal Das, bankers, on 13th January 1937, under O. 37, Civil P. C. for recovery of Rs. 2521-5-0 on the basis of a hundi. Defendant 1 applied for leave to appear and defend the suit. After going into the affidavit filed by the defendant, the trial Court came to the conclusion that triable issues arose in the case. The Court was however of the opinion that there was grave suspicion as to the bona fides of the defence raised. The defendant was given leave to defend if he deposited the amount in suit and costs in Court by 1st March 1937. Against this decision defendant 1 has preferred a petition for revision to this Court, on the ground that the trial Court ought to have given him leave to defend unconditionally. This petition for revision came up for hearing before Dalip Singh J. on 2nd July 1937. He has referred the case to a Division Bench for decision. The first question for consideration is whether the order of the trial Court is an interlocutory order in the suit, or whether the proceedings regarding leave to defend should be considered as ancillary to the suit. If the order of the trial Court is to be regarded as an interlocutory order no revision lies

to this Court as held by a Full Bench in 5 Lah 288.¹ It was contended by Mr. Jagan Nath Aggarwal, on behalf of the petitioner, that an application for leave to defend the suit is not an application in the suit and that such an application is a step in the ancillary proceedings pending before the Court with reference to the suit on the basis of a hundi. The learned counsel relied on a Division Bench ruling of the Allahabad High Court reported in 52 All 927² where it was held that

the dismissal of an application for leave to sue as a pauper amounts to a 'case decided' within the meaning of S. 115, Civil P. C., and a revision lies therefrom if there are proper grounds for a revision.

In my opinion this authority does not support the contention of the learned counsel in any way. When an application for leave to sue as a pauper is dismissed by the Court, the matter is altogether brought to an end and the plaintiff is entirely out of Court. The application to sue as a pauper ripens into a suit only when it is granted. If the application is dismissed no suit can be said to have been instituted at all. Reference was also made by the learned counsel to A I R 1929 Mad 841.³ In this case it was held that where on a summary suit the Court grants only conditional permission to defend, despite its finding that there is a defence which has to be considered, the case is revisable. This is a very short judgment of a single Judge of the Madras High Court. It does not consider the question whether the order of the Court giving conditional permission to the petitioner to defend the case on giving security is an interlocutory order. In A I R 1935 Mad 302⁴ it was held that if there is a triable issue in the case, the Court ought to grant leave to defend without requiring the defendant either to pay the amount claimed or to furnish security therefor. This decision was also given by a single Judge. The question whether the order of the trial Court was an interlocutory order was not considered in any detail. The only observations made by the learned Judge on this question were as follows :

The Subordinate Judge seems to assume that in every case he ought to demand security. Anyhow his order does not show that he applied his mind to the matter and considered the question whether in the particular case there is a triable issue. In these circumstances as the amount involved in the suit is a very heavy amount and as the result of the lower Court's order may be substantial injustice, I am of opinion that a material irregularity has been committed by the trial Court.

The above-mentioned rulings of the Madras High Court cannot be taken to lay down that the order giving permission to defend conditionally is not an interlocutory order and comes within the meaning of the words "case decided" as used in S. 115, Civil P. C. In A I R 1936 Mad 246⁵ Varadachariar J. observed as follows :

It will certainly not be a reasonable interpretation of Cl. 2, R. 3, O. 37 of the Code to say that it contemplates only two courses, either a grant of leave unconditionally or a refusal of leave. At the time when the question of granting leave comes up, the Court has not before it the full materials on which it can come to a satisfactory conclusion on the merits of the proposed defence, and if it thinks that there is something to be said in defence, what in the present case the lower Court describes as a 'plausible defence,' it may be inclined to grant leave but only on condition of giving security.

The language of R. 2, O. 37, Civil P. C., makes it clear that orders passed by the Courts under R. 3, are interlocutory orders. R. 2 lays down that all suits upon bills of exchange, hundis or promissory notes may, in case the plaintiff desires to proceed hereunder, be instituted by presenting a plaint in the form prescribed. Cl. 2 of the same Rule lays down that in any case in which the plaint and summons are in such forms respectively, the defendant shall not appear or defend the suit unless he obtains leave from a Judge as hereinafter provided so to appear and defend. The suit having been instituted in the prescribed form the application by the defendant for leave to defend is an application in the suit which was instituted by presenting a plaint in the prescribed form and which must be regarded as a pending suit until the passing of the decree or the dismissal of the suit. I am therefore of the opinion that the order of the trial Court giving leave to defend conditionally is an interlocutory order and does not amount to a "case decided" within the purview of S. 115, Civil P. C.

The next question for consideration is whether this Court is entitled to interfere in revision with an order of the trial Court which gives leave to the defendant to

1. Lal Chand Mangal Sen v. Behari Lal Mehr Chand, (1924) 11 A I R Lah 425=84 I C 259=5 Lah 288 (FB).

2. Mt. Sumatra Devi v. Hazari Lal, (1930) 17 A I R All 758=126 I C 1=52 All 927=1930 A L J 901.

3. Olayatt Kunhu v. Ussan Kasim Sait, (1929) 16 A I R Mad 841=119 I C 64.

4. Venkata Kistnayya v. Ramaswami, (1935) 22 A I R Mad 302=157 I C 591=68 M L J 407.

5. Gopala Rao v. Subba Rao, (1936) 23 A I R Mad 246=161 I C 182=70 M L J 241.

defend conditionally, assuming the order not to be an interlocutory order. The learned counsel for the petitioner relies on a ruling of their Lordships of the House of Lords reported in 85 L T 262.⁶ He contends that the provisions of Rr. 1 to 6 of O. 14 of the Rules of the Supreme Court were identical with the provisions of O. 37, Civil P. C., and that if triable issues arise in a case, leave to defend is given unconditionally in England. The facts of the reported case were that the defendant had signed a memorandum of charge and two promissory notes with a co-defendant who did not contest his liability to secure an advance and further moneys. He received an indemnity from his co-defendant and stated that he had been told that he incurred no liability by signing and that he had signed the memorandum and two promissory notes relying on that representation. The respondents brought their action for £3295, the amount due from the defendant and his co-defendant. On an application under O. 14, the Master ordered the amount to be paid into Court within seven days, with judgment if the sum was not so paid. This order was affirmed on appeal by the Judge at Chambers and by the Court of Appeal. The defendant appealed to the House of Lords and it was held that the defendant ought to have been given leave to defend unconditionally. The reported case is distinguishable from the present case in so far as in the reported case their Lordships were dealing with an appeal. It was open to them to substitute their own discretion for the discretion exercised by the first Court. In a petition for revision under S. 115, Civil P. C., this Court can interfere only if the trial Court has exercised jurisdiction not vested in it by law, or has failed to exercise jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity. Under R. 3 of O. 37 the trial Court was entitled to refuse leave to defend or to give leave to defend unconditionally or to give leave to defend conditionally. In giving leave to defend conditionally the trial Court cannot be said to have acted illegally or with material irregularity in the exercise of its jurisdiction. A wrong exercise of discretion cannot amount to a material irregularity in the exercise of jurisdiction.

Reference was also made by Mr. Jagan-

nath Aggarwal to 58 Mad 116.⁷ That was a case in which an appeal was preferred to a Division Bench from a judgment delivered by a single Judge on the Original Side. It was held therein that if a defendant sets up a defence in his affidavit in support of his application for leave to defend which, if he should succeed in proving, would entitle him to succeed in the suit, then the Master or the Court before whom the application comes has no discretion whatever in the matter and that unconditional leave to defend should be granted because a triable issue has been raised by the defendant and it is not open to the Master or anybody else other than the trial Judge to go into the merits and discover whether the defence set up is true or false. The question whether the order of the trial Court granting leave conditionally is subject to revision by the High Court was not and could not be considered in that case. I am accordingly of the opinion that in the present case no question of the illegal or irregular exercise of jurisdiction by the trial Court arises, and that the order of the trial Court is therefore not open to revision under S. 115, Civil P. C. For the reasons given above I would dismiss this petition for revision with costs.

Addison J. — I agree.

R.M./R.K.

Petition dismissed.

7. Sundaram Chettiar v. Valli Ammal, (1935) 22 A I R Mad 43=152 I C 687=58 Mad 116=68 M L J 16.

A. I. R. 1938 Lahore 550

ADDISON AND DIN MOHAMMAD JJ.

Umra and others — Plaintiffs —

Appellants.

v.

Fateh-ud-Din and others — Defendants — Respondents.

Second Appeal No. 741 of 1937, Decided on 31st January 1938, from decree of Dist. Judge, Jullundur, D/- 2nd April 1937.

Custom (Punjab)—Arains of Jullundur Tahsil—Gift by sonless proprietor of ancestral land to sister's son is valid.

Among Arains of Jullundur Tahsil, a gift by a sonless proprietor of ancestral land in favour of sister's son is valid : 24 P R 1905, *Expl.*; 127 P R 1907 and A I R 1920 Lah 79, *Rel. on.* [P 550 C 2; P 551 C 1, 2]

L. M. Datta — *for Appellants.*

Achhru Ram — *for Respondents.*

Addison J. — The collaterals of Imam Din instituted two suits for a declaration

6. Jacobs v. Booths Distillery Co., (1900) 85 L T 262=50 W R 49.

that two gifts of land made by Imam Din in favour of his sister's son and a collateral respectively would not affect their reversionary rights upon his death. The trial Judge dismissed the suits and the District Judge dismissed the appeals. He has however granted a certificate under S. 41, Punjab Courts Act for second appeals to this Court on the question of custom involved. This judgment will dispose of both appeals which are Nos. 741 and 785 of 1937. The answer to question 84 (A) of the Customary law of the Jullundur District compiled in 1914 is to the effect that the Arains and Awans of the Jullundur Tehsil say that in the absence of a male issue they can alienate by gift the whole or part of their property in favour of their relations without the consent of their legal heirs. This is definite enough but the answer to question 90 (A) throws some doubt upon the question. That question was as to whether a father could make a gift of his property to his daughter, his daughter's son, his sister or her sons or his son-in-law and the answer given is that all tribes in the Jullundur Tehsil admitted that a father could gift his self-acquired property to his daughter, to his daughter's sons, to his sister or her sons, or to his son-in-law even in the presence of sons or near kindred but could not make a gift of his ancestral property without the consent of sons or near kindred. The Awans and Arains of Jullundur Tehsil are not specially noted as objecting to this reply, though the answer given to question 90 (A) seems to be in part contradiction of the answer given to question 84 (A) so far as they are concerned. It may be noted here that the parties are Arains of Jullundur Tehsil.

In 24 P R 1905¹ it was held that the defendants had failed to prove that by custom among Arains of the Jullundur Tehsil a sonless proprietor was competent to gift his ancestral property to his sister's son in the presence of his male agnates. That decision appears to be in favour of the appellants but was given before the present Customary law was compiled. In 127 P R 1907² it was held that by custom among Awans of the Jullundur District a childless proprietor was not competent to make a free and absolute gift of his ancestral land to strangers and non-relations in the pre-

sence of his male agnates. In 57 I C 248,³ however another Division Bench held on the Customary law that among Awans of the Jullundur Tehsil a gift by a sonless proprietor of ancestral land partly to his sister's son and partly to his mother's sister's son was valid. They relied upon 127 P R 1907² as stating that though Awan proprietors had by custom undoubtedly large powers of disposition, these powers did not extend to gifts to complete strangers. The learned Judges, who decided that case, had apparently in view the terms of the Customary law. The Judges, who decided 57 I C 248,³ therefore, held that as given in the answer to question 84 (A), Awans of the Jullundur Tehsil in the absence of male issue could transfer the whole or part of their property in favour of their relations without the consent of their legal heirs. The case before us is similar as the Arains of the Jullundur Tehsil gave the same answer as the Awans.

It would seem that the compiler of the Jullundur Customary law put down too many questions with regard to gifts so that the questions overlap. Question 90 (A) and its answer as to gifts to daughters, etc. overlap question 84 (A). It is most probable that the Arains and Awans of Jullundur Tehsil thought that they had given a full answer to question 84 (A) and for that reason they are not again specifically mentioned in the answer to question 90 (A). We hold, therefore, that the *riwaj-i-am* allows such gifts of ancestral land made by sonless proprietors to relations. Instances of such gifts have also been relied upon by the Courts below. On the evidence, therefore, the suits were properly decided and we dismiss these appeals with costs.

D.S./R.K.

Appeals dismissed.

3. *Abdulla v. Khair Din*, (1920) 7 A I R Lah 79 = 57 I C 248.

* A. I. R. 1938 Lahore 551

ADDISON AND DIN MOHAMMAD JJ.
Messrs. Tulsi Das-Nagin Chand —
Assessee — Petitioners.

v.

Commissioner of Income-tax, Punjab,
North-West Frontier and Delhi Pro-
vinces, Lahore — Respondent.

Civil Misc. No. 654 of 1937, Decided on 1st March 1938.

* (a) Income-tax Act (1922), Ss. 22 (4) and 23 (4)—To determine what evidence is rele-

1. *Ilahia v. Qasim*, (1905) 24 P R 1905 = 42 P L R 1905.

2. *Barkat Ali v. Jhandu*, (1907) 127 P R 1907 = 81 P W R 1907 = 59 P L R 1908.

vant for purpose of inquiry, Income-tax Officer is final arbiter and not assessee—Income-tax Officer calling for production of all account books—Assessee producing some but withholding others—This amounts to non-compliance with S. 22 (4) even if Income-tax Officer utilizes account books actually produced.

It is the requirement of the Income-tax Officer which is to be satisfied by the assessee under sub-s. (4) of S. 22 and not what the assessee thinks the Income-tax Officer should, in the circumstances of the case, have required. In other words the final arbiter of what is required is the Income-tax Officer and not the assessee. It would therefore be entirely for the income-tax authorities to determine what evidence they consider relevant for the purposes of their enquiry and to contend that a certain piece of evidence which they considered to be relevant was not relevant at all to the matter at issue would be in a way to encroach upon their domain. Similarly, if an Income-tax Officer calls for all the previous accounts relating to the various businesses conducted by the assessee, but the assessee withholds some of them and the Income-tax Officer utilizes the accounts produced by the assessee in making his estimate, it cannot be argued that those accounts which were not produced by the assessee were not required for the purpose of the assessment. The withholding of some of the account books which the assessee had been called upon to produce amounts therefore to a non-compliance with the terms of the notice issued under sub-s. (4) of S. 22 and entails all the penalties laid down in sub-s. (4) of S. 23: *A I R 1931 All 417, Disting.; A I R 1929 Mad 60, Rel. on.* [P 553 C 1, 2]

(b) Income-tax Act (1922), S. 23 (4)—Income-tax Officer calling upon assessee to produce all account books—Assessee withholding some—Income-tax Officer can make assessment under S. 23 (4) even if he bases assessment of next year on same account books produced by assessee in previous year.

What happens in a subsequent year cannot be taken to be a criterion for what should have happened in the previous year, and if an order made by the Income-tax Officer is not open to objection on any legal ground, it cannot be set aside merely on the ground that in any subsequent year he himself, or his successor, did what he refuses to do previously. [P 552 C 2; P 554 C 1]

Where therefore an Income-tax Officer calls upon the assessee to produce all the account books but the assessee withholds some, the Income-tax Officer is entitled to make assessment under S. 23 (4) even if he bases the assessment of the next year on the same material in the account books produced by the assessee in the previous year. [P 554 C 1]

Kirpa Ram Bajaj — *for Petitioners.*

J. N. Aggarwal and S. M. Sikri —
for Respondent.

Din Mohammad J.—This is a petition under sub-s. (3) of S. 66, Income-tax Act praying for the issue of a mandamus to the Commissioner to state the case of the petitioner and to refer it to this Court. Originally 11 questions were formulated in the petition but the petitioner's counsel has

now confined himself to the two questions stated below: (1) Whether there has been any non-compliance with the terms of the notice issued to the petitioner under sub-s. (4) of S. 22; and (2) whether in view of the fact that the assessment for the next year was based on the same material in the account books which were produced before the Income-tax Officer, the Income-tax Officer and the Assistant Commissioner were legally competent to assess the petitioner under sub-s. (4) of S. 23.

The facts giving rise to the two questions propounded above are as follows. The assessee is a Hindu undivided family trading in hardware at Ludhiana and in the neighbouring States. He submitted the usual return for 1932-33 on which he was duly assessed on 2nd November 1932. In the course of assessment proceedings for the year 1933-34 it transpired that the assessee's income for 1932-33 had escaped assessment and that it had further been assessed at a low rate. The Income-tax Officer, who was then dealing with the case, thereupon issued a notice under S. 34 and called upon the assessee to submit a fresh return in relation to the assessable income. The assessee submitted a return but it was found to be incomplete. Thereupon, a notice under sub-s. (4) of S. 22 was served on the assessee requiring him to produce all the account books relating to the various concerns in which the assessee was interested. With this notice only a partial compliance was made inasmuch as a large number of books dealing with the old accounts of certain concerns belonging to the assessee were withheld. Consequently the Income-tax Officer made an assessment to the best of his judgment under sub-s. (4) of S. 23, but in order to arrive at the figure on which the assessment should be made, he referred to the account books which had been produced by the assessee and utilized certain materials appearing in those account books in arriving at his conclusion. The assessee made an application under S. 27 but the application was rejected by the Income-tax Officer on 14th February 1936, and an appeal against that order also failed. On a petition being made under sub-s. (2) of S. 66, the Commissioner came to the conclusion that no issue of law arose and consequently dismissed the petition.

The main contention of the assessee is that most of the books which were not produced were irrelevant to the inquiry and

that even their absence had not been felt by the Income-tax Officer inasmuch as he was in a position to make the assessment on information furnished by the account books which were actually produced and that consequently it could not be said that there was any non-compliance with the terms of the notice issued under sub-s. (4) of S. 22. In support of his contention he has relied on 5 I T C 142;¹ but neither does the contention raised by the assessee appear to us to be sound nor does the authority relied on by him advance his case any further. Sub-section (4) of S. 22 empowers the Income-tax Officer to serve on any person contemplated by the sub-section a notice requiring him to produce such accounts or documents as the Income-tax Officer may require. Sub-s. (4) of S. 23 enacts that if any person fails to comply with all the terms of a notice issued under sub-s. (4) of S. 22, the Income-tax Officer shall make the assessment to the best of his judgment. Reading these two provisions of law together, the only conclusion that can reasonably be deduced is that it is the requirement of the Income-tax Officer which is to be satisfied by the assessee under sub-s. (4), S. 22 and not what the assessee thinks the Income-tax Officer should in the circumstances of the case have required. In other words, the final arbiter of what is required is the Income-tax Officer and not the assessee. If therefore there is any non-compliance with any of the terms of the notice issued under sub-s. (4) of S. 22, the assessee makes himself liable to be assessed under sub-s. (4) of S. 23. To put any other construction on the clear wording of the statute as contained in sub-s. (4), S. 22 or sub-s. (4) of S. 23 would amount to substituting the assessee for the income-tax authorities to determine what materials are necessary to be produced in order to enable the Income-tax Officer to arrive at a just estimate of an assessee's income. This could never have been the intention of the Legislature while enacting these provisions.

In 5 I T C 142¹ the Income-tax Officer had based his assessment on the actual entries in the books produced by the assessee and had come to the conclusion that there was no extra income on which the assessee should have been assessed or that such income could have been discovered by the production of those books which had

not been produced. Here however, the circumstances are quite different, and the Income-tax Officer has repeatedly observed that the profits have been concealed and that the non-production of some of the books required by him is deliberate. That case therefore is distinguishable on the grounds stated above. It may be that as remarked by the learned Judges in that case, "the word 'require' really means require as a piece of relevant evidence" and that it does not mean "that the Income-tax Officer should ask for documents or account books which he does not think to be relevant at all"; but, as observed in the same judgment, an Income-tax Officer is entitled to call for documents which in his opinion would furnish him with relevant material for assessment of tax. It is a well-established rule of law that the income-tax authorities are the sole arbiters of facts and that the conclusions reached by them on questions of facts are not liable to be disturbed by any outside authority. It would therefore be entirely for the income-tax authorities to determine what evidence they consider relevant for the purposes of their enquiry and to contend that a certain piece of evidence which they considered to be relevant was not relevant at all to the matter at issue would be in a way to encroach upon their domain.

Similarly, if an Income-tax Officer, after calling for the previous accounts relating to the various businesses conducted by the assessee, utilizes the accounts produced by the assessee in making his estimate, it cannot be argued that those accounts which were not produced by the assessee were not required for the purpose of the assessment. An Income-tax Officer may refer to the accounts produced in order to arrive at an estimate of the assessable income or he may look into the accounts in order to justify his conclusion as to the falsity of the accounts submitted by the assessee; but, in our view, it is going too far to say that if an Income-tax Officer utilizes any account books in arriving at his estimate, those were the only relevant accounts which were necessary for his purpose and that he was not justified in asking for any other account books. The withholding of some of the account books which the assessee in this case had been called upon to produce amounted therefore to a non-compliance with the terms of the notice issued under sub-s. (4) of S. 22 and entailed all the penalties laid down in sub-s. (4) of S. 23. In

1. *Gangasagar v. Commr. of Income-tax U. P.*, (1931) 18 A I R All 417=132 I C 329=53 All 451=1931 A L J 345=5 I T C 142.

support of this conclusion reference may be made to 3 I T C 290² at page 297.

The second question can be disposed of on the short ground that what happens in a subsequent year cannot be taken to be a criterion for what should have happened in the previous year, and that if an order made by the Income-tax Officer is not open to objection on any legal ground, it cannot be set aside merely on the ground that in any subsequent year he himself, or his successor, did what he refused to do previously. We accordingly answer both questions suggested by the assessee in the affirmative and dismiss this petition. The Commissioner will however get his counsel's fee from the assessee which we estimate at Rs. 50.

D.S./R.K. *Answer in the affirmative.*

2. Ramaswami Ohettiyar v. Commr. of Income-tax, Madras, (1929) 16 A I R Mad 60=116 I O 566=52 Mad 194=56 M L J 141=3 I T C 290 (F B).

A. I. R. 1938 Lahore 554

ADDISON AND DIN MOHAMMAD JJ.

Jagat Singh and others—Defendants—Appellants.

v.

Mt. Raj Devi and others—Plaintiffs—Respondents.

Second Appeal No. 341 of 1937, Decided on 23rd November 1937, from decree of Dist. Judge, Lyallpur, D/- 18th February 1937.

(a) Custom (Punjab) — Widow — Widow on succeeding to husband's tenancy acquiring proprietary rights—She acquires them as absolute owner.

Where a widow, on succeeding to the tenancy held by her deceased husband on peasant terms, purchases the proprietary rights from the Government, she does not acquire them as a life estate for the benefit of her reversioners; she does so in her own capacity and is absolute owner: *A I R 1914 Lah 509 and A I R 1916 Lah 100, Rel. on; Case law referred.* [P 556 O 1]

(b) Custom (Punjab)—Widow — Widow has full power over income of estate held by her as widow — Property acquired out of such income is her own separate property.

Under Customary law in the Punjab, a widow has full power over the income of the estate which she holds as a widow and can do with it what she likes. If she acquires any property out of that income, it is not an accretion to her husband's estate but her own separate property. [P 556 O 1]

Achhru Ram — for Appellants.

M. L. Puri — for Respondents.

Addison J. — A square of land in Chak No. 99 R. B. in Tahsil Jaranwala of the Lyallpur District was granted to Mian Singh, Jat, the husband of Mt. Raj Devi, plaintiff 1, as a tenant on abadkari or peasant terms. Mian Singh died as a tenant. Subsequent to his death his widow, Mt. Raj Devi, who succeeded to the tenancy, purchased the proprietary rights in August 1933 from the Government. Thereafter she gifted the land in favour of plaintiffs 2 to 4 by means of a registered deed, dated 24th August 1933. The defendants are reversioners of Mian Singh and resisted possession. Accordingly the plaintiffs have brought the present suit for possession of the land. The pleas of the defendants were to the effect that Mt. Raj Devi acquired proprietary rights only as a representative of her deceased husband and not as an absolute owner and that therefore she had only a widow's estate in those rights. It was further contended that the money paid for the acquisition of the proprietary rights was money derived from the income of the property in suit which she held as a widow under Customary law and that, therefore, the property in the land was an accretion to the estate of her deceased husband. Following numerous decisions of this Court, the pleas of the defendants were rejected by the trial Judge and the lower Appellate Court and a decree for possession given. Against this decision the defendants have preferred this second appeal.

There is a mass of authority in favour of the view that under Customary law a widow thus acquiring proprietary rights acquires them as an absolute owner whether the grant is a peasant or yeoman grant. In the peasant grants, as a matter of fact, no provision was made for more than acquisition of occupancy rights though in the yeoman grants provision was made both for occupancy rights and proprietary rights on payment of certain sums and on fulfilment of certain conditions. This however does not affect the merits of the appeal. The first case which we need refer to is 8 P R 1915.¹ That was a case somewhat similar to the present and it was held that the widows when they paid the necessary sums to the Government became ipso facto owners of the land in their own right and could not be dispossessed there-

1. Mt. Malap Kuar v. Hakim Singh, (1914) 1 A I R Lah 509=28 I O 441=8 P R 1915=195 P L R 1915.

from. An absolutely similar case is 129 P R 1916² while 5 P R 1918³ was decided on the same reasoning though the facts were slightly different. In it the sons acquired the proprietary rights on payment though their father was the original Government tenant and had acquired occupancy rights. It was held that as the sons acquired the proprietary rights, the land was self-acquired in their hands, though their father was the original grantee and had acquired occupancy rights therein.

Similarly in A I R 1921 Lah 315,⁴ a decision by Sir Shadi Lal C. J. and Wilberforce J., it was held that the land in the widow's hands was her self-acquired property as she had acquired the proprietary rights and the reversioners had therefore no power to control her acts. 2 Lah 195⁵ is a case where the father was the grantee and the sons acquired proprietary rights from Government. It was held that the land was not ancestral in the hands of the sons. In 6 Lah 134⁶ it was held that the widow acquired the occupancy rights for herself and not as representative of her deceased husband and that her right to dispose of such self-acquired property was unlimited. This was a case where the husband was the original tenant but had not acquired occupancy rights before he died. The reasoning is the same as in the other cases. A I R 1931 Lah 417⁷ is an extreme case. The grantee died before acquiring proprietary rights and mutation was effected in the names of his three sons and the widow of his predeceased son in equal shares, it being noted that the widow would hold the tenancy till death or re-marriage. Subsequently the Deputy Commissioner passed an order conferring proprietary rights in the tenancy on the deceased and directed the land to be mutated in the names of the three sons and the widow as full owners in equal shares. It was held that, as regards the one-fourth share, the widow must be considered to be an absolute owner, having

full right to devise her share as she liked. This was a decision by Harrison and Tek Chand JJ.

The last case which we need refer to is A I R 1934 Lah 485.⁸ That was a case where the widow under Customary law was in possession of her husband's estate and acquired certain property by the exercise of the right of pre-emption which she had in her capacity as holding the land as a widow. It was not proved that the pre-emptive price was paid from the husband's estate and it was held that the property so acquired did not form part of the husband's estate. In the judgment of Monroe J. occur the following remarks :

Mr. Badri Das has admitted to us that there is no direct authority in his favour and it seems to me that unless the principle of *Keech v. Sandford*⁹ is part of the Customary law of the Punjab the conclusion contended for by Mr. Badri Das would not follow. If that principle were part of the Customary law there would long ago have been some statement in the authorities to that effect.

There is much force in the remarks quoted, for, custom depends on what has been done in the past and there is no authority except possibly one case which helps the appellants in a way. It is true that under Hindu law (see A I R 1925 Lah 2)¹⁰ an accretion made by an heiress partakes of the estate to which it is added, but the question whether any property is an accretion to the estate of the deceased husband is one of intention on the part of the heiress to augment that estate by treating it as a part thereof, though in the absence of anything appearing to the contrary any purchase made out of the income of an estate may be presumed to be an accretion thereto under Hindu law. Similarly 65 I C 305¹¹ was a decision of their Lordships of the Privy Council in somewhat similar terms. That also was a case under Hindu law.

It was contended however that the decision in A I R 1932 Lah 144¹² was in favour of the appellants. That was a case standing by itself where the first instalment of the purchase money was paid by the son of the grantee before he died. On the son's death his widows were entered as having in-

2. *Seva Singh v. Mt. Bholi*, (1916) 3 A I R Lah 100=36 I C 382=129 P R 1916=83 P L R 1917.

3. *Lal v. Gauhar*, (1918) 5 A I R Lah 103=44 I C 129=5 P R 1918.

4. *Bisakha Singh v. Ishar Singh*, (1921) 8 A I R Lah 315.

5. *Hurji v. Chanan Mal*, (1921) 8 A I R Lah 63=63 I C 908=2 Lah 195=84 P L R 1921.

6. *Narain Singh v. Mt. Sada Kaur*, (1925) 12 A I R Lah 305=88 I C 64=6 Lah 134=26 P L R 169.

7. *Mt. Budhan v. Karman*, (1931) 18 A I R Lah 417=191 I C 214.

8. *Mansabdar Khan v. Mt. Allah Dei*, (1934) 21 A I R Lah 485=152 I C 910=35 P L R 475.

9. *Select Cas Ch* 61=2 Eq Cas Abr 741.

10. *Tehl Kaur v. Amar Nath*, (1925) 12 A I R Lah 2=79 I C 670.

11. *Nabakishore v. Upendrakishore*, (1922) 9 A I R P C 39=65 I C 305 (P C).

12. *Jivan Singh v. Ajmer Kaur*, (1932) 19 A I R Lah 144=134 I C 1117.

herited his rights in equal shares as a life estate and they paid the remaining instalments. It was held in the peculiar circumstances of that case that the widows had only a life estate in the land when purchased outright. That case however stands by itself and is not an authority in a straightforward case like the present, which is undoubtedly governed by the other authorities referred to. The course of decision on this question in the Punjab has been uniform and it cannot be held that under Customary law a widow acquires under the Colonization of Government Lands (Punjab) Act 5 of 1912 the proprietary rights in the land from Government as a life estate for the benefit of the reversioners. She does so in her own capacity and is absolute owner. This was the only ground of appeal argued and there is obviously no force in the first ground of appeal to the effect that the District Judge was wrong in law in holding that the doctrine of graft and the principle of S. 90, Trusts Act were inapplicable to the present case. A Full Bench of the Allahabad High Court held in 43 All 374¹³ that a Hindu widow in possession of her husband's estate, who acquired certain property through the exercise of her right of pre-emption which she had in that capacity, but did not pay the pre-emptive price from her husband's estate, held the property so acquired as her own separate property and that S. 90, Trusts Act had no application. Under Customary law, a widow has full power over the income of the estate which she holds as a widow and can do with it as she likes and we know of no case where it has been held that if she acquired property out of that income it was an accretion to her husband's estate and not her own separate property. Under Customary law it is necessary to prove that such a custom exists, and it is now too late in the day to put forward any such plea which, moreover, is not supported by any evidence. For the reasons given, we dismiss this appeal with costs.

V.B.B./R.K.

Appeal dismissed.

13. Sri Ram Jankiji v. Jagdamba Prasad, (1921) 8 A I R All 11=61 I O 3=43 All 374=19 A L J 129 (F B).

A. I. R. 1938 Lahore 556

YOUNG C. J. AND TEK CHAND J.

Kartar Singh—Convict — Appellant.

v.

Emperor.

Criminal Appeal No. 1282 of 1937, Decided on 4th January 1938, from order of Addl. Sessions Judge, Amritsar, D/- 12th November 1937.

(a) Criminal P. C. (1898), S. 164 — Accused volunteering to make confession — Magistrate recording confession but not appending certificate — Magistrate deposing as to having gone through formalities — Confession held admissible.

The accused on being produced before a Magistrate for an order of remand stated that he wanted to make a confession and the Magistrate had his handcuffs removed and gave him ten minutes' time to reflect and then recorded the confession. The certificate required by S. 164 was not appended to the confession but the Magistrate was examined as a witness and had deposed that he had satisfied himself that the confession was being made voluntarily and that he had told the accused that he need not make any confession to him and that if he made one it would be used against him :

Held that the confession was admissible in evidence. [P 557 O 2]

(b) Penal Code (1860), S. 302 — Sentence — Accused's wife of loose character giving birth to child begotten through another man—Accused, feeling insulted on his being congratulated by fellow villagers, killing his wife—Lesser penalty held sufficient.

The deceased, who was the wife of the accused was of a loose character and was turned out by the accused; while living with her parents, she conceived from a stranger and came back to the house of the accused in a state of pregnancy and gave birth to an illegitimate child in his house; and the accused being chafed by his fellow villagers who "congratulated" him on the birth of a son, murdered the deceased :

Held that it was not a case in which the extreme penalty of law should be imposed and that the ends of justice would be met by a sentence for transportation for life. [P 558 O 1]

A. R. Kapur — *for Appellant.*R. C. Soni for Advocate-General —
for the Crown.

Tek Chand J. — Kartar Singh, Jat of mauza Sarai Amanat Khan Tehsil Tarn Taran, Amritsar District, has been convicted of the murder of his wife Mt. Amar Kaur and has been sentenced to death. At the same trial, he has also been convicted under S. 326, I. P. C., for having caused grievous hurt with a dangerous weapon to an illegitimate son who had been born to Mt. Amar Kaur fifteen days before the occurrence. For this latter offence, Kartar Singh has been sentenced to rigorous im-

prisonment for seven years. Mt. Amar Kaur was married to the appellant seven or eight years ago. Subsequently she became of loose character and was discarded by the appellant and was sent back to her parent's village. He himself appears to have given up worldly affairs and began to reside in the local Gurdwara, and is stated to have led the life of a devout Sikh. Mt. Amar Kaur's parents tried once or twice to bring about a reconciliation but as the appellant continued to hear stories about her loose character he declined to receive her back. About nine months before the occurrence, Mt. Amar Kaur conceived from some other person while living in her parents' village. Shortly afterwards her parents brought her back to Sarai Amanat Khan and left her in the appellant's house. There she gave birth to a son about 15 days before she was killed. The appellant felt insulted at the birth of an illegitimate child in his own house, and resented people congratulating him on the birth of a "son".

It is alleged that on the night between 9th and 10th August 1937, the appellant came to his chaubara and invited Mt. Amar Kaur to come there to help him in lifting a bundle of wheat. Accordingly she came into the chaubara, and the appellant stabbed her in the abdomen with a kirpan. She fell down wounded and began to groan. The appellant then stabbed the child and went back to the Gurdwara. The cries of the wounded persons attracted some neighbours, who brought the village physician Nabi Bakhsh (P. W. 7). In the meantime, some relations of the appellant had also come, and brought him back from the Gurdwara to his own house. Hakim Nabi Bakhsh dressed the wounds of Mt. Amar Kaur and the child. On his arrival, Nabi Bakhsh asked Mt. Amar Kaur as to what had happened and she replied that the appellant, who was sitting nearby, had thrust a kirpan into her abdomen. Nabi Bakhsh then addressed the appellant and asked him: "Bhai, what have you done"? The appellant replied: "She has suffered the consequences of her acts and I will suffer the consequences of my acts." Mt. Amar Kaur died shortly after sunrise. The child was removed to the hospital, where it remained till the 22nd when it died, the cause of death, according to the Civil Surgeon, who performed the post mortem examination, being "weakness and malnutrition." There is no direct evidence of the crime. The prosecution however rely upon the extra-

judicial confession made by the appellant before Hakim Nabi Bakhsh and two of the village lambardars, Wassan Singh (P. W. 4) and Kartar Singh (P. W. 13). In addition to this, there is the confession made by the appellant before Khan Fazal Qadar Khan, Magistrate, Second Class, on 11th August 1937. The learned Additional Sessions Judge has accepted these confessions as true.

Before us, the learned counsel for the appellant has argued that the recorded confession before the Magistrate is inadmissible in evidence as it was not made voluntarily and the requirements of S. 164, Criminal P. C., were not complied with. We see no force in these contentions. It appears from the statement of the Sub-Inspector that the appellant was produced before the Magistrate in order to get a remand. When he was brought before the Magistrate the appellant stated that he wanted to make a confession. On this the Magistrate had the handcuffs removed, gave him ten minutes' time to reflect, and then recorded the confession, (Ex. P. W.), and after recording it remanded him to the judicial lock-up. The certificates required by S. 164 are not appended to the confession (Ex. P. W.), but the Magistrate has been examined as a witness and has deposed that he had satisfied himself that the confession was being made voluntarily, that he had told the appellant that he need not make any confession to him and that if he made one, it might be used against him. There is no reason to disbelieve the sworn testimony of the Magistrate. We hold therefore that this confession is admissible in evidence. But even if the recorded confession be left out of consideration there is no reason to doubt the genuineness of the extra-judicial confession made by the appellant before Hakim Nabi Bakhsh and the two lambardars, Wassan Singh and Kartar Singh. All these witnesses have given clear, consistent and convincing evidence, and no reason has been suggested to doubt the veracity of any one of them. We accordingly hold that the appellant killed Mt. Amar Kaur with a kirpan and that he also stabbed the child. He has therefore been rightly convicted under S. 302 of the murder of Mt. Amar Kaur and under S. 326 for causing grievous hurt with a dangerous weapon to the child.

There remains the question of sentence. There is no doubt that Mt. Amar Kaur was a person of loose character and that

while living in her parents' village she conceived from a stranger and came to the appellant's house in a state of pregnancy. This was naturally resented by the appellant. She then gave birth to an illegitimate child in his house, and he was chafed by his fellow villagers who "congratulated" him on the birth of a son. In these circumstances, we think that this is not a case in which the extreme penalty of the law should be imposed on him. We think that the ends of justice will be met by imposing a sentence of transportation for life. We accordingly maintain the conviction but commute the sentence of death to one of transportation for life. To this extent the appeal is accepted. The sentence of seven years' rigorous imprisonment under S. 326 for causing grievous hurt to the child is confirmed. The two sentences will run concurrently.

K.S./R.K.

Sentence commuted.

A. I. R. 1938 Lahore 558

BHIDE J.

Abdullah Shah—Plaintiff — Appellant.
v.

Mohammad Yaqub and another —
Defendants — Respondents.

Second Appeal No. 513 of 1937, Decided on 18th October 1937, from preliminary decree of Addl. District Judge, Ludhiana, D/- 1st March 1937.

(a) Estoppel — Second appeal — Estoppel raised on facts on record and based on decision of lower Appellate Court—Estoppel held could be raised in second appeal.

Where a person raises a question of estoppel for the first time in second appeal basing it on the facts on record and urging it on the footing of the findings of the lower Appellate Court, such point can be entertained in second appeal : *A I R 1930 Rang 265, Ref.* [P 559 O 1]

(b) Evidence Act (1872), S. 115—Fraud or deception need not be pleaded.

It is not necessary for the purpose of S. 115 that any fraud or deception should be pleaded. If it is found that any representation was intentionally made by one party and it was acted upon by the other party, the rule of estoppel will apply. [P 559 O 1]

(c) Practice—Judicial notice—Corresponding dates of Indian and Gregorian calendars not correct—Court can take judicial notice.

Where corresponding dates according to Indian and Gregorian calendars are not correctly given in pleadings or documents, the Court can take judicial notice of it although such point was not raised by parties. [P 559 O 1]

Mohammad Munir — for Appellant.

Dr. Nand Lal — for Respondents.

Judgment.—Plaintiff Abdullah Shah sued in this case for possession of one-half share in a house, which had been given to his daughter Mt. Rabia Begam in lieu of dower at the time of her marriage with Mohammad Yakub. The house was actually gifted in lieu of dower in favour of Mt. Rabia Begam by Mt. Latifan, mother of Mohammad Yakub. Mt. Latifan in her turn had obtained the house from her husband Mohammad Wain and Mahammad Wain had purchased it from Mt. Zainab on 14th August 1900. On the death of Mt. Rabia Begam, the plaintiff Abdullah Shah claimed that he was entitled to one-half of the house according to Mahomedan law. The trial Court decreed the suit. On appeal, it was urged on behalf of the defendants that Mt. Latifan had never acquired any valid title to the house. One of the points raised in this connexion was that Mt. Latifan's husband, Mohammad Wain, had purchased the house after the date on which he was married to Mt. Latifan, when it is alleged to have been gifted by him to her. The date of the marriage of Mohammad Wain with Mt. Latifan, as given in the kabinnama and in the deed of gift in favour of Mt. Rabia Begam, is 25th Zilhaj Hijri 1318 and the corresponding date is given as 17th May 1900. The learned District Judge therefore held that as Mohammad Wain purchased the house on 14th August 1900, he could not have been in a position to make a gift of it on 17th May 1900. On this ground he accepted the appeal and granted the plaintiff only a decree for possession of 1/16th share of the house, as he considered that the gift could be upheld to this extent on other grounds. From this decision Abdullah Shah has preferred a second appeal.

The main ground which was urged before me was that even if the findings of the learned District Judge were accepted as correct, the defendants were estopped from pleading that Mt. Latifan had not acquired a valid title to the house; because even if Mohammad Wain was not an owner of the house at the time of the gift in favour of Mt. Latifan, he did become an owner subsequently and in the circumstances he and his representatives were clearly estopped from pleading that Mt. Latifan did not acquire a valid title to the house. In support of his contention, S. 115, Evidence Act, and the illustration thereto were relied on. The learned counsel for the res-

pondents on the other hand contended that the plea of estoppel was never raised in the Courts below and therefore the appellant was not entitled to take it in second appeal. But the facts on which the plea is based are on the record and the learned counsel for the appellant has urged it on the footing of the findings of the learned District Judge himself. In the circumstances I see no reason why it should not be entertained in second appeal: *cf.* 8 Rang 223¹ at page 228.

It is not disputed that the parties are the representatives of Mohammad Wain and Mt. Latifan respectively. It was urged by the learned counsel for the respondents that it was not distinctly pleaded that any deception was practised on Mt. Latifan in this respect. But it is not necessary for the purpose of S. 115 that any fraud or deception should be pleaded. If it is found that any representation was intentionally made by one party and it was acted upon by the other party, the rule of estoppel will apply. In the present instance it seems clear that Mt. Latifan would not have accepted the house in lieu of her dower if Mohammad Wain had not represented that the house was his property. I therefore hold that the defendants are estopped from contending that Mt. Latifan was not the owner of the house when she gifted it to Mt. Rabia. On this finding the plaintiff must succeed.

I may note further that it appears from the calendar that as a matter of fact the actual date corresponding to 25th Zilhaj 1318 Hijri is 15th April 1901 and not 17th May 1900 as given in the deed of gift and deed of dower, (Exs. D-1 and D-2). The learned District Judge's finding was thus based on an erroneous statements as to the corresponding dates in these documents. The correct corresponding date has been verified from the authorized calendar of the Chief Court for the year 1901 and there appears to be a mistake in giving the date in the deed of gift as well as in the kabin-nama. The learned counsel for the respondents contended that this point also was not taken in the Courts below; but I think that the Court is entitled to take judicial notice of this fact. In view of the above findings it is unnecessary to consider the other issues. I accept the appeal and setting aside the decree of the learned District

Judge restore that of the trial Court with half the costs throughout. I am not awarding full costs to the appellant as he did not take up the main pleas on which he has succeeded in second appeal at the very outset.

B.D./R.K.

Appeal allowed.

A. I. R. 1938 Lahore 559

ADDISON AND DIN MOHAMMAD JJ.
Modern Chemical Works Ltd. Baroda —
Plaintiff — Appellant.

v.

Pandit Man Mohan Nath Dar —
Defendant — Respondent.

Letters Patent Appeal No. 135 of 1937,
Decided on 17th January 1938, from decree
of Bhide J., in S. A. No. 291 of 1937, D/-
24th June 1937.

Company—Winding up — Defendant holding share in company registered in Indian State and residing in British India not appearing before State Liquidation Court and not submitting to its jurisdiction—Call order made against him by Liquidation Court is without jurisdiction and cannot be enforced as such in British India.

In a personal action, a decree pronounced by a Court of a foreign state *in absentem*, the defendant not having submitted to its authority, is by international law a nullity: 22 Cal 222 (PC) and 158 I C 24, Rel. on. [P 560 C 1]

Where the defendant, who is a share-holder in a company registered in an Indian State and is a resident of British India, does not appear before the State Liquidation Court, before which the liquidation proceedings in respect of the company are started, and does not submit to the jurisdiction of the Liquidation Court, a call order made against him by the Liquidation Court, in absence of an express agreement in the Articles of Association that the disputes with the share-holders should be settled by the State Court, is without jurisdiction and cannot be enforced as such in British India. It is necessary that the liquidator suing the defendant in British India should prove all necessary facts to establish his liability. It is also necessary, in order to allow the plaintiff to succeed, that the call order for the particular amount was necessary and just. The mere fact that the call order was made does not amount to such proof: (1908) 1 K B 302 and A I R 1933 Mad 112, Rel. on; (1874) 9 Ex 345, Expl. [P 560 C 2]

Bhagwat Dayal — *for Appellant.*

Vishnu Datta — *for Respondent.*

Addison J.—Most of the facts of this case are given in A I R 1935 Lah 975,¹ the suit being remanded for trial on the merits. The suit has now been dismissed on the ground that the company in liqui-

1. Co-operative Town Bank of Padigon v. Shanmugam Pillai, (1930) 17 A I R Rang 265=125 I O 865=8 Rang 223.

1. Modern Chemical works, Ltd. Baroda v. Manmohan Nath Dar, (1935) 22 A I R Lah 975=160 I C 346=17 Lah 341=38 P L R 662.

dation had not proved that notice was given to the defendant when the call order was made, 11 Bom 241² being followed in this respect. The lower Appellate Court dismissed the appeal from this decision, and a single Judge of this Court dismissed the second appeal. The reason given by the single Judge however was not that of want of notice but because there was no evidence to show on what grounds the balance due on the shares was being called. Against this decision this appeal under the Letters Patent has been preferred. The general law is not in doubt. In a personal action a decree pronounced by a Court of a foreign state *in absentem*, the defendant not having submitted himself to its authority is by international law a nullity : see 22 Cal 222³ and 158 I C 24.⁴ In the present case, the defendant did not submit himself to the jurisdiction of the Liquidation Court of Baroda.

It was contended however on behalf of the appellant that the fact that the defendant was a share-holder in a company, registered in Baroda, which was thus subject to the Baroda Court, rendered him subject to the jurisdiction of the Baroda Court and (1874) 9 Ex. 345⁵ was cited as establishing this proposition. This authority however as now held, does not go further than to lay down that where in the Articles of Association it was agreed that the share-holders would be subject to the jurisdiction of the French Courts, only in these circumstances the French Courts had jurisdiction over him in his absence and the judgment passed by them could be enforced by the English Courts. This is clear from (1908) 1 K B 302.⁶ That is a case where there was a partnership between the defendant and others in Australia. A certain decree was passed against the defendant in his absence after he had returned to England. It was held that the defendant, not being domiciled in Western Australia, nor resident there at the date of the action in the Supreme Court of that Colony, and not having appeared

to the process or expressly agreed to submit to the jurisdiction of that Court, was not bound by its finding or decree; and that the action in England which was based on that finding and decree could not be maintained. The exact effect of the Exchequer case was there defined. These decisions were followed by a Division Bench in A I R 1933 Mad 112,⁷ where it was said that by the fact of entering into a partnership in a foreign country a person does not bind himself to submit to the jurisdiction of the Courts of that country, in regard to matters arising in connexion with that partnership and the judgment was held to be without jurisdiction as the defendant had not appeared or submitted to the jurisdiction of the foreign Court. It was not contended in the appeal before us that the articles of association contained an express agreement that disputes with shareholders should be settled by the Baroda Court.

The defendant did not submit to the jurisdiction of the Baroda Liquidation Court nor did he appear there and there is no question that he is a resident of British India and has all along been so. On the authorities, therefore, it must be held that the call order against the defendant made by the Baroda Liquidation Court was made without jurisdiction and cannot be enforced as such in British India. It is therefore necessary that the Liquidator should prove all the facts necessary to establish the liability of the defendant. This was practically said when the case was first before this Bench where it was pointed out that the suit was in the form of an ordinary action. It is stated in the call order that the defendant was served to appear before the Liquidation Court in Baroda, but there is no evidence on the record to establish that a call of Rs. 20 per share was necessary and just. In order to allow the plaintiff to succeed in this action, as pointed out by the learned single Judge, this should have been established. The mere fact that a call order was made does not amount to such proof. In the circumstances therefore, we dismiss this appeal but make no order as to costs.

R.M./R.K.

Appeal dismissed.

7. Guruswami v. Mahomed Khan, (1933) 20 A I R Mad 112=140 I O 588=63 M L J 761.

2. *Edulji Burjorji v. Manekji Sorabji*, (1887) 11 Bom 241.

3. *Gurdyal Singh v. Raja of Faridkote*, (1895) 22 Cal 222=21 I A 171=6 Sar 503=112 P R 1894 (P C).

4. *Ganesh Das v. Ajudhia Saran*, (1935) 158 I O 24.

5. *Copin v. Adamson*, (1874) 9 Ex 345 = 43 L J Ex 161=81 L T 242=22 W R 658.

6. *Emanuel v. Symon*, (1908) 1 K B 302 = 77 L J K B 180=98 L T 304=24 T L R 85.

* A. I. R. 1938 Lahore 561

ADDISON AND ABDUL RASHID JJ.

Northern India Insurance Co. Ltd. —
Defendant — Appellant.
v.

Kanhaya Lal — Plaintiff —
Respondent.

First Appeal No. 282 of 1937, Decided on 24th February 1938, from decree of Addl. Sub-Judge, First Class, Lahore, D/- 9th July 1937.

* Insurance — Life insurance — Policy of insurance laying down that policy would become void if person assured commits suicide within one year from date of policy — Assured committing suicide after 18 months—Assignee of policy is entitled to recover amount due under policy.

Where one of the conditions in a policy of insurance is that the policy is to become void if the person assured causes his own death before the policy has been in existence for one year and the assured commits suicide after a period of about 18 months, a person to whom the policy has been assigned by the assured is entitled to recover from the Insurance Company the amount due under the policy. In India the committing of suicide in itself is not a crime, which would disentitle the assignee from making a claim under the policy as would be the case in England: (1937) 2 All E L R 243, *Disting.* [P 562 C 2]

D. R. Sawhney — for Appellant.

Mohd. Amin and Harnam Singh —
for Respondent.

Abdul Rashid J.—The material facts of the case for the purposes of this appeal may be shortly stated. Mool Chand, the father of Kanhaya Lal plaintiff, took out a policy of life insurance from the Northern India Insurance Company on 1st June 1932. The terms of the policy were that Rs. 5000 were payable on the death of Mool Chand if the death occurred before 1st June 1937. A further sum of Rs. 5000 was payable if the death occurred before the 47th birthday of the assured. In the event of the person whose life was assured dying by his own hand before the policy had been in existence for one year, the policy was to be void and all premiums were to be forfeited. On 22nd November 1932 Mool Chand assigned the policy in favour of his son Kanhaya Lal. On 9th August 1933 the assured committed suicide in a hotel at Lahore. Kanhaya Lal being the assignee of the policy taken out by his father demanded Rs. 5000 from the Insurance Company. On their failure to pay the amount, he instituted the present suit for recovery of Rs. 5357 on the basis of the policy. The defendant company pleaded

inter alia that Mool Chand had committed suicide with the deliberate object of securing payment from the defendant and other Insurance Companies with which he had insured his life during the years 1931 and 1932 for a sum of Rs. 25,000, that the act of the deceased was a speculative and wagering one, and that the contract with the defendant was therefore void. The trial Court held that Mool Chand had sufficient means to pay the premiums due on the different policies taken out by him, that he committed suicide on discovering his wife Mt. Jassa Bai committing adultery with Bhai Piara Lal, timber merchant, and that as Mool Chand killed himself after the lapse of one year from the date of the issue of the policy the plaintiff was entitled to maintain the action. On these findings a decree for Rs. 4905-11-0 was granted to the plaintiff against the defendant. Against this decision the Northern India Insurance Company has preferred an appeal to this Court while cross-objections relating to the disallowance of the costs and interest by the trial Court have been preferred by Kanhaya Lal plaintiff.

It appears that Mool Chand deceased had insured himself with the Bombay Life Assurance Company for Rs. 4000 in the year 1933. He had taken out a policy for Rs. 16,000 in the year 1931 from the Jupiter General Insurance Company. In 1932 as mentioned already, he had insured himself with the defendant company for a sum of Rs. 5000. The annual premium payable on the policy in dispute was only Rupees 125. The trial Court after going into the entire evidence came to the conclusion that up to the time of his death Mool Chand was in a position to pay the premiums on the different policies taken out by him. On 22nd January 1932 Mool Chand separated the plaintiff from himself as the plaintiff's step mother Mt. Jassa Bai did not get on with the plaintiff and his wife. From the allotment of shares at the time of partition it appears that property worth Rs. 3400 fell to the share of Mool Chand and his second son Chuni Lal, and property worth Rs. 1300 was given to the plaintiff. This fact clearly shows that the plaintiff was in a position to pay the premiums on the policy in dispute at the time when he took out the policy. The three letters found on the person of the deceased at the time of his death (Exs. P-1 to P-3) addressed to the Superintendent of Police, the District Magistrate, Lahore, and the plaintiff Kan-

haya Lal respectively show that the plaintiff became disgusted with life on 8th August 1933 when he found his wife, Mt. Jassa Bai, in a compromising position with Bhai Piara Lal, timber merchant at Multan. He returned to Lahore immediately without attending the marriage ceremony of the son of Ram Chand, station master. The shock of the unfaithfulness of his wife was too great for him and he decided to end his life by poisoning himself by taking potassium cyanide.

The principal argument addressed by the learned counsel for the appellant was that the plaintiff was not entitled to any relief as the descendants of Mool Chand could not be allowed to benefit as a result of the crime committed by their father. Reliance was placed by the learned counsel on the case in (1937) 2 All E L R 243.¹ In that case the assured person committed suicide and it was held that as suicide was a felony under the English law, the descendants of the assured were not entitled to recover the sum assured. In our opinion the authority referred to above is inapplicable to the present case. In their judgment the learned Judges were careful in pointing out that under the English Common law the committing of suicide was a felony, and that it was clear that the assured had deliberately killed himself in order to enable his estate to collect the insurance money. Had the assured not killed himself the policies would have automatically expired in two or three minutes as the assured had no means of raising the premiums. The learned Judges examined a number of American cases also and observed as follows :

Whatever the position may be in the United States, where each state, by legislative or judicial action of its own, can, it seems, determine the legality of a policy which, expressly or by implication, provides for payment of the policy moneys in whole or in part in the case of suicide, sane or insane, we cannot, we think, consistently with the law of England as we understand it, hold that the respondent can successfully maintain her claim.

It was further observed that :

It may be that both ecclesiastical and civil penalties have been mitigated or abolished, but the criminal law still remains. Only the Legislature in this country can change the law in this matter, if it should so will. While the law remains unchanged, the Court must, we think, apply the general principle that it will not allow a criminal or his representative to reap, by the judgment of the Court, the fruits of his crime.

In India the committing of suicide is not a crime. Attempted suicide is punishable under S. 309, I. P. C., while abetment of suicide is punishable under S. 306. The committing of suicide in itself is not and cannot be regarded as a crime in India. In this respect the English Common law is inapplicable to India as the criminal law of India is the creation of Statute. The Judges in the English case took care to point out that there may seem a hardship in holding that the appellant company is in law not compellable to pay the amount due on the policy but that it was impossible to hold otherwise, consistently with the Common law as prevailing in England. The contract between the parties was embodied in the policy of insurance. Owing to condition No. 8 the policy was to become void if the person assured caused his own death before the policy had been in existence for one year. In the present case the assured killed himself after a period of about 18 months. In these circumstances there is no reason why the contract entered into by the Insurance Company should not be enforced in favour of the plaintiff. For the reasons given above we dismiss this appeal with costs. We also dismiss the cross-objections preferred on behalf of the plaintiff. Parties will bear their own costs so far as the cross-objections are concerned.

R.M./R.K.

Order accordingly.

A. I. R. 1938 Lahore 562

JAI LAL AND DALIP SINGH JJ.

Mt. Jawahran and another —

Defendants — Appellants.

v.

Hazari and others — Plaintiffs —

Respondents.

Second Appeal No. 983 of 1936, Decided on 29th September 1937, from decree of Addl. Dist. Judge, Hissar, D/- 19th June 1936.

Custom (Punjab) — Rohtak District — Daughters excluded from inheriting property either ancestral or self-acquired — Widow has no power of alienation—Riwaj-i-am challenged — Onus of proof.

According to the entry in the riwaj-i-am of the Rohtak District a daughter has no right to succeed to her father's landed property, whether ancestral or self-acquired, and a widow has no right to alienate her husband's property whether ancestral or self-acquired. When such entry is challenged the burden is heavy on the party to prove that the entry in the Riwaj-i-am is wrong. [P 563 C 1]

1. *Beresford v. Royal Insurance Co.*, (1937) 2 All E L R 243.

Charanjiva Lal Aggarwal —

for Appellants.

Shamair Chand — *for Respondents.*

Judgment. — This second appeal arises out of a suit instituted by the respondents, the reversioners of Hamira, for a declaration that a gift of land made by Mt. Jawahran, widow of Hamira, in favour of her daughter Mt. Gulab Bai would not affect their reversionary rights. The suit has been decreed by the trial Judge and the appeal of the daughter and the widow has been dismissed by the learned Additional District Judge. The District Judge, however has granted a certificate under S. 41 Punjab Courts Act for a second appeal. The question of custom which according to the certificate is involved in the case is whether a daughter has a right to succeed to her father's self-acquired landed property in preference to collaterals within the fifth degree. The property in suit has been found to be self-acquired of Hamira and it appears that the entry in the *riwaj-i-am* of the Rohtak District to which the parties originally belonged is that a daughter has no right to succeed to her father's landed property whether it be ancestral or self-acquired and also that a widow has no right to alienate her husband's landed property whether ancestral or self-acquired. The burden was therefore heavy on the defendants, Mt. Jawahran and Mt. Gulab Bai, to prove that the entry in the *riwaj-i-am* is wrong. No evidence has been produced to establish this. Some evidence was led at the trial that among the Rajputs, to which caste the parties belong, a resident son-in-law is entitled to succeed to the property of his father-in-law. It does not, however, appear that it was proved that Ranjit, the husband of Mt. Gulab Bai, was a resident son-in-law as that term is understood in the Customary law. But it is not necessary to give a definite finding on this question because I find from the grounds of appeal to the District Judge that the appellants did not raise this question.

It is contended before us that the trial Court did not give sufficient opportunity to the appellants to produce their evidence and refused to receive some documentary evidence which was tendered to it and also that proper issues have not been framed. It is not however shown that any issue which arose on the pleadings of the parties has not been framed, nor is there any affi-

davit before us to show at what stage and what evidence, documentary or otherwise, was tendered in the trial Court which was not accepted. In my opinion, there is no force in this appeal and on the evidence it is impossible to hold that the presumption which arises on account of the entry in the *riwaj-i-am* has been rebutted. I would dismiss this appeal with costs.

Dalip Singh J.—I agree.

B.D./R.K.

Appeal dismissed.

A. I. R. 1938 Lahore 563

TEK CHAND J.

Debi Sahai and another—Plaintiffs —
Petitioners.

v.

Gillu Mall and others — Defendants—
Respondents.

Civil Revn. No. 528 of 1937, Decided on 10th November 1937, from decree of Judge, Small Cause Court, Delhi, D/- 8th April 1937.

(a) Civil P. C. (1908), O. 30 — Joint Hindu family business must sue and be sued in name of its members.

There is no rule of law which lays down that a suit brought in the name of a joint Hindu family business should be brought in the name of the firm. Order 30 does not apply to a joint Hindu family firm as the rights and liabilities of such a firm are not exclusively regulated by the Contract Act. Such firm must sue and be sued in the name of its members: *A I R 1933 Bom 304; A I R 1925 Bom 527 and A I R 1934 Cal 810, Rel. on.*

[P 564 C 1]

(b) Hindu Law — Family business can be started at any time even after death of father — Such business is excluded from registration.

There is no provision of law which prohibits the members of a Hindu coparcenary to start family business out of joint funds at any time, after the death of their father or other ancestor. Such a business is excluded from provisions as regards registration of partnerships.

[P 564 C 1]

Shamair Chand — *for Petitioners.*

D. N. Aggarwal — *for Respondents.*

Order.—The order of the lower Court dismissing the suit on the preliminary point that the suit is not maintainable as the firm had not been registered is manifestly wrong and must be set aside. The plaintiffs are two brothers, Debi Sahai and Pirbhu Lal, sons of Seri Niwas. They instituted a suit for recovery of Rs. 500 alleged to be due from the defendants on foot of a *bahi* account. The suit was originally brought in the name of Debi Sahai and Pirbhu Lal, described as proprietors of the firm Debi Sahai Pirbhu Lal. Subse-

quently the plaint was amended and the suit was by "Debi Sahai and Pirbhu Lal, members of a joint Hindu family, proprietors of the firm Debi Sahai Pirbhu Lal". In the body of the amended plaint it was clearly stated that the business of the plaintiffs is the joint Hindu family concern and that the plaintiffs are its owners as members of the family. In support of his order dismissing the suit in limine the learned Judge has given two reasons: (i) that "if a joint Hindu family firm is suing, the plaint ought to have been in the name of that joint family firm", and (ii) that as the firm was started recently after the death of the father of Debi Sahai and Pirbhu Lal, the firm could not be treated as a joint Hindu family firm.

There is no rule of law which lays down that a suit brought in the name of a joint Hindu family business should be brought in the name of the firm. O. 30, Civil P. C., does not apply to a joint Hindu family firm as the rights and liabilities of such a firm are not exclusively regulated by the Contract Act. It has been held that such a firm must sue and be sued in the name of its members: see A I R 1933 Bom 304,¹ A I R 1925 Bom 527² and 61 Cal 975.³ The first ground therefore is wholly untenable. As regards the second ground, the learned Judge seems to think that a joint Hindu family firm can come into existence only if the business has descended from father to son. This assumption is obviously wrong. There is no provision of law which prohibits the members of a Hindu coparcenary to start family business out of joint funds at any time, after the death of their father or other ancestor. In this case the evidence clearly shows that the present business had been going on since Sambat 1889 as a joint family concern. S. 5, Partnership Act specifically excludes a Hindu undivided family concern from the provisions of the Act relating to registration of partnerships. The suit as brought was not defective for want of the certificate of registration and has been erroneously dismissed. I accept the petition for revision, set aside the judgment and decree of the

Court below and remand the case to it for decision on the merits. Court fee on this petition will be refunded. Other costs will be costs in the cause.

D.S./R.K.

Case remanded.

A. I. R. 1938 Lahore 564

DALIP SINGH AND BHIDE JJ.

Tej Bhan — Plaintiff — Appellant.

v.

*Chandi Shah and others — Defendants
— Respondents.*

First Appeal No. 392 of 1936, Decided on 15th December 1937, from decree of Senior Sub-Judge, Mianwali, D/- 15th July 1936.

Transfer of Property Act (1882), S. 53 — Fraudulent transfer — On considering facts transfer held made with intent to defeat creditors and not with intention to prefer one creditor to another.

It is not correct perhaps to say that there is any distinction between consideration which should be valid for the purposes of the Contract Act but not valid for the purpose of S. 53 of the Transfer of Property Act. [P 565 C 2]

A decree-holder in execution of his decree attached land belonging to the judgment-debtor. One T objected to the attachment on the ground that the land in dispute had been leased to him before the attachment. According to him the terms of the lease were that the period of the lease was for 20 years and certain sum was reserved as annual rent which was not to be paid to the lessor but to his creditors in discharge of debts due to them by the lessor. These creditors had not obtained any decree, in other words, there was not any genuine pressure being put upon the judgment-debtor to prefer these creditors. Besides this there was no evidence showing that the judgment-debtor had given possession to the lessee and moreover there was no proof whether the annual rent which was to be paid to the creditors had actually been so paid:

Held that in these circumstances the transfer was with intent to defeat and delay the creditors and it was not a case of preferring or favouring one creditor at the expense of another. The transfer was therefore void as against the decree-holder within the meaning of S. 53. [P 565 C 2; P 566 C 1]

J. G. Sethi, M. L. Sethi and Dr. Nand Lal — *for Appellant.*

J. L. Kapur and Roop Chand — *for Respondents.* •

Dalip Singh J. — On 29th June 1934, one Chandi Shah obtained a decree against Maliks Surkhru and Shahadat. In execution of this decree he attached part of the land belonging to the said Maliks on 25th March 1935. One Tej Bhan objected to the attachment, alleging that the land in

1. Amulakchand Mewaram v. Babulal Kanlal, (1933) 20 A I R Bom 304=147 I O 786 = 35 Bom L R 569.

2. Ramprasad Shivalal v. Shrinivas Balmukund, (1925) 12 A I R Bom 527 = 90 I O 685 = 27 Bom L R 1122.

3. Lalchand Amonmal v. M. C. Boid & Co., (1934) 21 A I R Cal 810 = 152 I O 991 = 61 Cal 975=88 O W N 914.

dispute had been leased to him on 21st March 1935. According to Tej Bhan the terms of the lease were that the period of the lease was for 20 years and a thousand rupees was reserved as annual rent. This annual rent was not to be paid to the lessors, the Maliks, but was to be used to discharge the debts due to three alleged creditors of the Maliks, namely Daulat Ram, Asa Ram and Khilla Ram. The debt of Daulat Ram amounting to something over ten thousand rupees was to be discharged in full first, then the debt of Asa Ram was to be discharged and lastly the debt of Khilla Ram was to be discharged. This lease had been registered subsequent to its execution and is printed at page 127 of the paper book. Tej Bhan further claimed that on 10th May 1935 mutation had been ordered of the said land in his favour. The mutation order is printed at page 131. The objections of Tej Bhan were dismissed by the executing Court and he has now brought a declaratory suit under O. 21, R. 63, Civil P. C., on the same grounds, namely that there was a valid transfer in his favour prior to the attachment. The contesting defendant, Chandi Shah, has contended that the said transfer was a fraudulent and fictitious one made with intent to defeat creditors and therefore was void as against him under S. 53, T. P. Act. The trial Court held that the debts alleged to be due to Daulat Ram, Asa Ram and Khilla Ram were genuine debts but it held that as Tej Bhan was a stranger therefore though there might be consideration 'good' within the meaning of the Contract Act as between the lessors and Tej Bhan, there was no good consideration for the lease within the meaning of S. 53, T. P. Act. Further it held that the said lease was made with intent to defeat and delay creditors and a variety of reasons was given in the judgment for the Court holding this opinion. The trial Court accordingly dismissed the suit with costs and the plaintiff has come in appeal.

In appeal the learned counsel for the appellant contends that the lease was for consideration which was not inadequate and as the debts were genuinely due to the alleged creditors therefore the lease should be treated as if it were a transfer favouring one creditor possibly at the expense of another but that it could not be said that the lease was with intent to defraud the general body of creditors. It is unnecessary to enter into the somewhat difficult

question as to whether the authorities which have held that a transfer to a genuine creditor, which reserves no right to the judgment-debtor, cannot be held to be in fraud of creditors, should or should not be extended to the case where the transfer is not in favour of a creditor but to a third party. The circumstances of this case leave no doubt in my mind that the transfer in this particular case was with intent to defeat and delay creditors and it was not a case of favouring or preferring one creditor at the expense of another. It is no doubt not correct perhaps to say that there was no good consideration for the transfer or that there is any distinction between consideration which should be valid for the purposes of the Contract Act, but not valid for the purpose of S. 53, T. P. Act. The fact however remains that the position of Malik Surkhru and Malik Shahadat was as follows : They were owing a decretal amount to Chandi Shah and various other creditors. The particular creditors named in this lease deed had not obtained any decrees. It appears that on 21st March 1935 Chandi Shah went to the patwari and obtained a fard of the land in dispute. It is alleged that Abdur Rehman, son of Malik Surkhru, was present at the time but whether he was present or not, it seems clear on the record that the patwari himself was siding with the Maliks. On that very date the lease in favour of Tej Bhan was executed. The coincidence of the date is, to say the least of it, curious. Again it is not clear why the Maliks should have preferred to pay off these creditors, who had not obtained decrees, instead of the creditors who had obtained decrees ; in other words, there was not any genuine pressure being put upon the Maliks to prefer these creditors, which might lead one to believe that the transfer was bona fide.

Again it is strange, as remarked by the trial Court, that these creditors, who were vitally concerned in this transaction if it was a bona fide one, were no parties to the lease, nor was any document taken from them agreeing that they should look henceforward for payment of their debts to Tej Bhan and not to the Maliks at all. As pointed out again by the trial Court, if this arrangement with Tej Bhan was to be construed literally, the debts of Asa Ram and Khilla Ram would be long barred by limitation before the time came to pay off their debts at all, and if Tej Bhan refused to pay their

debts at that time, there would be no way of enforcing the debts under the lease. It therefore seems to me clear that as regards two of these creditors the transaction by no means secured payment of their debts. Further it is not at all clear why, if there was any desire to pay off these creditors, one of them was not selected to be the lessee rather than a person like Tej Bhan. It appears again from the record that Tej Bhan has friendly relations with the Maliks. The defendant Chandi Shah alleges that he is their karinda. He himself admits that he does their writing work for them whenever called upon to do so. But I agree with the trial Court in holding that there is considerably more connexion between Tej Bhan and the Maliks than has been admitted by Tej Bhan.

Again, the evidence to show that Tej Bhan was given possession of this property under the lease is as pointed out by the trial Court by no means satisfactory. It consists of nothing more than the evidence of the patwari supported by Khasra girdawaris, and as pointed out by the trial Court, the patwari has throughout behaved as a partisan and the khasra girdawaris and his oral statement are insufficient to prove that possession really passed to Tej Bhan under the lease. Again there is no real proof of the payment of Rs. 1000 to Daulat Ram under the terms of the lease. It is no doubt correct that a receipt executed by Daulat Ram has been produced and Daulat Ram states that he received Rupees 1000. No written record of the payment has been kept nor has Tej Bhan produced any accounts to show that this money was paid to Daulat Ram by him. It is therefore at any rate plausible as urged by the defendant Chandi Shah that Tej Bhan is a mere screen for the Maliks and that actually the Maliks are still in possession and getting the benefit of the produce. In these circumstances it does not seem possible to hold that this transaction was with the intent of benefiting any creditor at all, assuming that the finding of the trial Court that the debts of Daulat Ram, Asa Ram and Khilla Ram were genuine debts is correct. I am therefore of opinion that the transaction was in fraud of the creditors with intent to defeat and delay them and was void as against the creditor Chandi Shah within S. 53, T. P. Act. I would therefore dismiss the appeal with costs.

Bhide J. — I agree.

D.S./R.K. — Appeal dismissed.

A. I. R. 1938 Lahore 566

ABDUL RASHID J.

Haji Ghulam Mohammad — Plaintiff
— Appellant.

v.

Feroz and others — Defendants —
Respondents.

Second Appeal No. 88 of 1938, Decided on 31st March 1938, from decree of Dist. Judge, Rawalpindi, D/- 15th October 1937.

Court-fees Act (1870), S. 17—Sale by mortgagee of his rights under mortgage—Balance of mortgage money not being paid, suit by vendee against mortgagor and his surety and in alternative against vendor—Causes of action against original mortgagor and that against vendor are not distinct so as to attract S. 17—Mortgage found void—Vendor must refund money received by him under sale of mortgagee rights.

A mortgage was executed by a person who was minor at the time of executing it. The mortgagee assigned his rights under the mortgage to another person for certain consideration. On failure to pay the balance the assignee brought a suit against the mortgagor and his surety and in the alternative claimed a decree against the assignor if the amount was not recovered from the mortgagor and his surety. The suit against the original mortgagor was dismissed as the mortgage was void, he being minor at the time of its execution :

Held that the cause of action against the assignor was not distinct but a part and parcel of the cause of action against the original mortgagor. Section 17, was therefore inapplicable: *A I R 1924 Nag 169, Disting.; 40 P L R 33, Rel. on.*

[P 567 C 2]

Held further that as the mortgage in favour of the assignor was found a nullity, the consideration for the sale by him in favour of the assignee failed. The assignor must therefore refund the money received by him for the sale of the mortgagee rights.

[P 567 C 2]

Shamair Chand — for Appellant.

Harbans Singh and Bhagat Singh Chawla — for Respondents 1 & 2 and 3 & 4 respectively.

Judgment.— On 16th August 1930, Feroz, defendant 1, executed a mortgage deed in favour of Shiv Ram, defendant 3, for a sum of Rs. 125 with respect to a house. Fazal Din, defendant 2, who is the elder brother of Feroz, signed this mortgage deed as a surety. The mortgagor and the surety undertook to pay interest at the rate of Re. 1-8-0 per cent. per mensem. Shiv Ram assigned his rights under this mortgage in favour of Ghulam Mohammad by means of a registered deed on 10th November 1934 for Rs. 150. Defendants 1 and 2 paid Rs. 22 and Rs. 70 to Shiv Ram on account of interest. On their failure to pay the balance the present suit was instituted by Ghulam Mohammad, assignee, for reco-

very of Rs. 161 from Feroz and Fazal Din. In the alternative the plaintiff claimed a decree against Shiv Ram in case his case against Feroz and Fazal Din was not decreed. The trial Court held that Feroz was a minor at the time of the execution of the mortgage deed and that the mortgage transaction was therefore absolutely void. On that finding the plaintiff's suit was dismissed. Against this decision the plaintiff preferred an appeal in the Court of the learned District Judge. The learned District Judge agreed with the trial Court that no decree could be passed against Feroz, defendant 1, who was a minor at the time of the execution of the mortgage deed. The learned District Judge however decreed the plaintiff's claim against Fazal Din who had stood surety for his brother. The alternative claim put forward by the plaintiff against Shiv Ram was also dismissed. Against this decision the plaintiff has preferred a second appeal to this Court, his sole prayer being that he should be awarded a decree against Shiv Ram, defendant 3, the only condition attached to the decree being that it shall be executed only if the decretal amount cannot be recovered from Fazal Din.

A preliminary objection was taken on behalf of Shiv Ram, respondent, to the effect that the plaintiff had not paid full court-fee in the trial Court and the lower Appellate Court. It was urged that the cause of action against Feroz and Fazal Din was distinct from the cause of action against Shiv Ram and that under S. 17, Court-fees Act separate court-fee was payable in respect of each cause of action. Reliance was placed in this connexion on A I R 1924 Nag 169.¹ In my opinion, this ruling is distinguishable from the present case. In the reported case the relief claimed against the tenant was the return of the consideration that he had received for surrendering the tenancy. The relief claimed against the person in possession was possession of land on the ground that he was a trespasser. The suit therefore embraced two distinct subjects. The first relief claimed was based on a contract while the second cause of action came into existence because the land in dispute had been wrongfully taken possession of by a trespasser. Cause of action comprises every fact which a plaintiff is bound to prove in order to succeed in a

suit. In the present suit the mortgage by Feroz in favour of Shiv Ram and the sale of mortgagee rights by Shiv Ram in favour of the plaintiff constitute the cause of action against Feroz and Fazal Din. The cause of action against Shiv Ram is the sale of the mortgagee rights in favour of the plaintiff. The cause of action against Shiv Ram is therefore a part and parcel of the cause of action against the original mortgagor. I am therefore of opinion that S. 17, Court-fees Act is inapplicable to the facts of the present case. Reference may be made in this connexion to a ruling of this Court reported in 40 P L R 33.² The preliminary objection, in my opinion, is not well founded.

On the merits the appeal must succeed. S. 65, Contract Act lays down that when an agreement is discovered to be void or when a contract becomes void any person who has received any advantage under such agreement or contract is bound to restore it or to make compensation for it, to the person from whom he received it. The mortgage has been declared void ab initio. Therefore Shiv Ram had no rights under the mortgage, but he purported to sell the rights that he had under the mortgage in favour of the plaintiff. If the mortgage in favour of Shiv Ram was a nullity it must be held that the consideration for the sale by Shiv Ram in favour of Ghulam Mohammad, plaintiff, has failed. If the consideration has failed the vendor must refund the money received by him to the vendee for the sale of the mortgagee rights. For the reasons given above, I accept this appeal and grant the plaintiff a decree for Rs. 150 against the estate of Shiv Ram in the hands of Jog Raj and Parma Nand alias Nand Lal, respondents 3 and 4. This decree will be executed against the estate of Shiv Ram. Any amount that may be realised by the decree-holder from Fazal Din will be deducted from the decretal amount so far as the estate of Shiv Ram is concerned. Having regard to all the circumstances I order that the plaintiff and the representatives of Shiv Ram will bear their own costs throughout.

D.S./R.K.

Appeal accepted.

2. Abdul Rahman Khan v. Mahomed Amir, (1937) 40 P L R 33.

1. Hirderam v. Ramcharan, (1924) 11 A I R Nag 169=78 I C 703.

* A. I. R. 1938 Lahore 568

ADDISON AND DIN MOHAMMAD JJ.

Sant Lal and others — Plaintiffs — Appellants.

v.

Firm Udho Ram Walait Ram, Decree-holder and another, Judgment-debtor and others, Defendants and others, Plaintiffs — Respondents.

First Appeal No. 372 of 1937, Decided on 4th April 1938, from decree of Senior Sub-Judge, Ludhiana, D/- 23rd August 1937.

* (a) Civil P. C. (1908), O. 21, R. 58—Claim under, cannot be entertained after sale.

After the sale has taken place the attachment is ipso facto determined and the Court has no longer any jurisdiction to try the claim case under O. 21, R. 58: 15 I C 53; A I R 1926 Cal 468; A I R 1924 Pat 76 and A I R 1928 Rang 80, Rel. on.; A I R 1931 Mad 782; 1 N L R 167 and A I R 1933 Sind 198, Dissent. [P 568 C 2; P 569 C 1]

(b) Civil P. C. (1908), O. 21, R. 58—Mortgagee in possession cannot object to attachment—His proper remedy is under Rr. 100 and 103 of O. 21.

A person in possession of property under a usufructuary mortgage is not entitled to object under O. 21, R. 58, to the attachment of the property at the instance of a person who holds a decree against the mortgagor. He can take the necessary steps under Rr. 100 and 103 of O. 21 at the proper stage, and of course the mortgagee is always at liberty to bring the usual suit for the sale of the property under mortgage: A I R 1922 Pat 408 and A I R 1937 Pat 63, Rel. on. [P 569 C 1]

Shamair Chand and Parkash Chandra —
for Appellants.

Achhru Ram — for Respondents
(Defendants).

Addison J. — This was a suit by the Jain Kanya Pathshala under O. 21, R. 63, Civil P. C. for a declaration that the property attached and sold in execution of the decree of defendant 1 against defendant 2 was liable to a previous mortgage in its favour. The mortgage deed is dated 21st July 1927 and was executed by defendant 2 in favour of defendant 6, who gifted the mortgage rights to the plaintiff Pathshala. Defendants 3 to 5 were the purchasers of the property at the court auction. The suit was dismissed on the ground that the Court had no jurisdiction to entertain a claim or objection under O. 21, R. 58, after the sale in execution had taken place, and thus no declaratory suit under O. 21, R. 63, Civil P. C. lay. The suit for a declaration therefore could only fall under S. 42, Specific Relief Act and as further relief was possible, the suit being in reality one

to enforce a mortgage deed, the trial Court called upon the plaintiff to amend the plaint. This was not done and it was accordingly rejected under O. 7, R. 11, Civil P. C. Against this decision this appeal has been preferred.

The objection was put in by the Pathshala under O. 21, R. 58, after the sale in execution had taken place but before confirmation of the sale. This however makes no difference as the sale was confirmed later and title therefore passed to the auction-purchasers from the date of the sale. In favour of the appellant there is a Single Bench judgment of the Madras High Court (55 Mad 251¹) to the effect that a Court has jurisdiction to consider a claim even when it is made after the sale. The same view has been taken in 1 N L R 167² by the Additional Judicial Commissioner, while a Division Bench of the Sind Judicial Commissioner's Court came to the same conclusion in A I R 1933 Sind 198.³ On the other hand, a Division Bench of the Calcutta High Court in 15 I C 53⁴ held that it was not competent for an executing Court to proceed with a claim application under R. 58 of O. 21, Civil P. C. after the execution sale had actually taken place, and a single Judge of that Court came to the same conclusion in A I R 1926 Cal 468.⁵ Similarly, a Division Bench of the Patna High Court in A I R 1924 Pat 76⁶ held that after the sale had taken place the attachment was ipso facto determined and the Court had no longer any jurisdiction to try the claim case under O. 21, R. 58. A single Judge of the Rangoon High Court followed the Calcutta decisions in 5 Rang 751.⁷ Further the arrangement of the Civil Procedure Code shows that a claim under O. 21, R. 58, should precede the sale. It is true that by sub-r. (2) of that Rule a Court is not bound to postpone the sale pending the investigation of the

1. Jagannadham v. Pydayya, (1931) 18 A I R. Mad 782=134 I C 809=55 Mad 251=61 M L J 884.

2. Bhag Chand v. Mt. Jhunia, (1905) 1 N L R 167.

3. Mukhi Narumal Tilokchand v. Allahbux Bahadur, (1933) 20 A I R Sind 198=145 I C 142=27 S L R 256.

4. Gopal Chandra v. Natobar Kundu, (1912) 16 C W N 1029=15 I C 53.

5. Kali Charan Ghose v. Surajini Debi, (1926) 13 A I R Cal 468=87 I C 168.

6. Puhup Dei Kuer v. Ram Charitar Barhi, (1924) 11 A I R Pat 76=74 I C 87=4 P L T 544.

7. Mg. Po Pe v. Mg. Kwa, (1928) 15 A I R Rang 80=107 I C 161=5 Rang 751.

claim but usually it should do so except where it is of opinion that the claim is frivolous or vexatious or meant to delay the execution proceedings. After the sale has taken place the only objection that can be taken to it is provided in O. 21, R. 90 on the ground of a material irregularity or fraud in publishing or conducting the sale. In these circumstances, we are of opinion that the view of the Calcutta, Patna and Rangoon High Courts is to be preferred.

A case decided by a Division Bench of the Patna High Court in 1 Pat 159⁸ is particularly relevant. It was held there that a person in possession of property under a usufructuary mortgage is not entitled to object under O. 21, R. 58, Civil P. C., to the attachment of the property at the instance of a person who holds a decree against the mortgagor, and therefore when such an objection has been made and disallowed, R. 63 does not debar the objector from making an application under R. 100. It was said there that his position as a mortgagee did not entitle him to come to Court and argue that the property was not liable to attachment. This case was followed by a Full Bench in 16 Pat 54.⁹ It was there laid down that an attachment of the mortgaged property could mean only an attachment of the equity of redemption, being the right, title and interest of the judgment-debtor and that the mortgagee therefore had no right to object to such an attachment, his interest being paramount and unaffected by the auction sale. The case before us is that of a mortgagee in possession and it is clear therefore that he can take the necessary steps under Rr. 100 and 103 of O. 21 at the proper stage, and of course the mortgagee is always at liberty to bring the usual suit for the sale of the property under mortgage. The decision of the trial Court was therefore correct whether we merely take the view that the objection was incompetent, having been lodged after the sale which was subsequently confirmed or whether we hold that the plaintiff being mortgagee in possession, his proper remedy is to wait and take action under Rr. 100 and 103 of O. 21 at the proper time, provided always that he does not in the meantime bring a suit to

have the property sold. For the reasons given above we dismiss this appeal but make no order as to costs.

D.S./R.K.

Appeal dismissed.

A. I. R. 1938 Lahore 569

ABDUL RASHID J.

Emperor

v.

Dhana and others

Accused — Respondents.

Criminal Misc. No. 76 of 1938, Decided on 22nd March 1938, for transfer from Magistrate, First Class, Rohtak.

Criminal P. C. (1898), S. 526—Complainant in cognizable case applying for transfer of case—Application opposed by Crown—Application cannot be granted—That Magistrate lives in house of accused held no ground for transfer.

Although the complainant in a cognizable case is entitled to apply for transfer under S. 526, his rights are subordinate to those of the Crown and in the case of conflict between the two, the right of the Crown must prevail. An application for transfer by a complainant will not therefore be granted when it is opposed by the Crown : *A I R 1926 Lah 156, Rel. on.* [P 570 C 1]

The fact that the Magistrate lives in the house of the accused which he has rented before the case was instituted is no ground for transfer at the instance of the complainant, especially where the Crown opposes the transfer petition. [P 570 C 1]

Qabul Chand — for Petitioner.

Mohammad Amin Khan for Advocate-General — for the Crown.

Mohammad Amin — for Respondents.

Order.—A riot took place at Rohtak in October 1937, wherein one man was killed and ten others were seriously injured. As a result of this riot a case under S. 307 and some other sections of the Penal Code was lodged against 14 persons. This case is pending in the Court of Mr. Zafar-ul-Haq Khan, Magistrate, First Class, Rohtak. In February 1938, an application was presented by one Sita Ram in the Court of the District Magistrate, Rohtak, praying that the case referred to above may be transferred from the Court of Khan Zafar-ul-Haq Khan to some other Court of competent jurisdiction. Sita Ram is one of the injured persons. During the investigation his statement was taken by the police and his injuries were also got examined by the doctor. The District Magistrate rejected the application of Sita Ram. Sita Ram has accordingly preferred an application to this Court praying that the case mentioned above may be taken away from the Court

8. *Biswa Nath Patra v. Lingraj Patra*, (1922) 9 A I R Pat 408=70 I C 306=1 Pat 159.

9. *Sunder Prasad Singh v. Deodhan Singh*, (1937) 24 A I R Pat 63=166 I C 463=16 Pat 54=17 P L T 812 (F B).

of Mr. Zafar-ul-Haq Khan and entrusted to another Court.

This application is opposed by the Crown. Sita Ram being one of the injured persons, may perhaps be regarded as a complainant though the case is a cognizable one. It has however been held by this Court in 6 Lah 541,¹ that though the complainant in a cognizable case is entitled to apply for transfer under S. 526 of the Code, but his rights must be subordinate to those of the Crown, and in the case of conflict between the two, the right of the Crown must prevail. I am in respectful agreement with the view adopted in this ruling. Ten persons were injured in this riot. If the wishes of each one of these persons are to be taken into account in preference to the attitude taken up by the Crown, utter confusion is likely to result. If the prosecuting agency is of the opinion that it will not get fair and impartial justice in the Court of some Magistrate it is always open to the Crown to present an application for the transfer of the case. If the Crown is opposing the transfer it is evident that the prosecution have no reasonable apprehension that justice will not be done. On the merits the only ground of any importance is that the Magistrate lives in a bungalow which is owned by the father of one of the accused persons. In a town a landlord has no financial hold on the tenant. The landlord lives in Calcutta and the Magistrate took the house on rent long before the present case was instituted in his Court. The rent was fixed before the riot took place. In the circumstances of this case and in view of the fact that the Crown is opposing this petition for transfer I hold that no adequate grounds for transfer have been made out. I therefore dismiss this application.

R.M./R.K. *Application dismissed.*

1. Bagh Ali v. Muhammad Din, (1926) 13 A I R Lah 156=93 I O 75=27 Cr L J 411=6 Lah 541=27 P L R 80.

A. I. R. 1938 Lahore 570

DIN MOHAMMAD J.

Bhagat Ram and another—Defendants
— Appellants.

v.

Ralla Ram — Plaintiff — Respondent.

Second Appeal No. 147 of 1938, Decided on 19th April 1938, from decree of Dist. Judge, Hoshiarpur, D/. 6th November 1937.

Limitation—Mortgage — Default of interest for three years giving right to sue for entire amount — Interest paid only after eleven years — Mortgage suit brought more than twelve years after payment of interest—Payment held gave fresh start but could not revive three years default clause.

A mortgage bond provided that interest thereon would be paid every year and in default of payment of three years' interest the mortgagee would be entitled to sue for entire amount. Eleven years after the execution of the bond some interest was paid and a separate bond was executed for remaining interest. A suit on mortgage bond was brought more than twelve years after this payment and execution of bond and it was sought to avail of the three years default clause in the mortgage bond to bring the suit in time :

Held the payment of interest only gave another starting point of limitation and the three years' clause could not be revived, so as to bring the suit within limitation : *A I R 1921 All 192 and A I R 1922 All 524, Ref.; 27 Bom 1 (FB), Disting.*

[P 571 C 2]

Parkash Chandar and Shamair Chand—
for Appellants.

Achhru Ram — *for Respondent.*

Judgment. — This appeal has arisen in the following circumstances. A mortgage bond for Rs. 430 was executed by Bhagat Ram and Anant Ram in favour of Ralla Ram on 14th April 1910 and it was stipulated therein that the mortgagee would be entitled to realise Rs. 12.14.6 by way of interest every year and in case three years' interest was not so paid, the mortgagee would be entitled to recover the whole amount by sale of the mortgaged property. It is common ground that no interest was paid as agreed upon and that the payment of interest was for the first time made on 28th December 1921, when a bond for Rs. 141.13.0 was executed by the mortgagors in favour of the mortgagee for interest due up to 14th April 1921. No interest was paid subsequent to this period and on 15th April 1936, the mortgagee instituted the present suit for recovery of Rs. 500 by sale of the property mortgaged. Several defences were raised to this suit but we are mainly concerned with the question of limitation. The trial Court held that although Art. 132, Limitation Act applied, the clause relating to default revived on 28th December 1921 when a bond for the payment of interest was executed and consequently the money became due not on the date when the bond was executed but on the expiry of three years from that date. The suit was accordingly decreed. On appeal the District Judge also took the same view and dismissed the appeal. The mortgagors have presented the

present appeal from that decision of the District Judge.

Counsel for the parties agree that the question is bare of authority and that the case is one of first impression. Counsel for the appellants however has relied upon A I R 1921 All 192¹ and A I R 1922 All 524² by way of analogy. In A I R 1921 All 192,¹ it was held by a Division Bench that limitation must run from the date of the first default in the case of a bond which provides that if the borrower made default in the payment of any instalment of interest, the lender could sue for the whole amount, although a period was fixed for re-payment if the borrower repaid regularly according to the terms of the bond. In A I R 1922 All 524,² the mortgagor had covenanted to pay interest year by year and the principal within three years of the date of execution and in case of default of the payment of the annual interest he had empowered the mortgagee, without waiting for the expiration of the period fixed for payment of the principal, to realize the amount due for the principal and interest from the hypothecated property. It was held in these circumstances that the privilege of deferring payment of the principal was conditional on the punctual payment of the annual interest and that the whole amount, principal and interest, became due on default of payment of the interest for the first year.

Counsel for the respondent refers to 27 Bom 1,³ but I do not consider that it helps him in any manner. In that case a decree directed that the decretal amount should be paid by yearly instalments and further provided that in case of default being made in the payment of any two consecutive instalments the mortgagee should recover possession of the mortgaged property. Default was made in the first two years but the instalments were paid later by the mortgagor and accepted by the mortgagee. The mortgagor further paid subsequent instalments but again failed to pay two consecutive instalments. On these facts it was held by a Full Bench of the Bombay High Court that having regard to the payment and acceptance of instalments the parties had been remitted to the same

position as they would have been in if no default had occurred. Jenkins C. J. however added that it is a fundamental proposition of law that payment and acceptance of overdue instalments cannot by themselves prove a waiver; the point is one to be determined on the circumstances of each case. Moreover, in 31 Cal 83⁴ it was held that where an instalment bond gives the creditor the right to sue for the whole amount due under the bond on default of payment of a single instalment, there is no waiver of that right by acceptance of part of an overdue instalment, or by receipt of interest. It may also be remarked that the case in both the Courts below was fought on the ground of S. 20, Lim. Act only and no question of waiver was specifically pleaded or put in issue. S. 20, Lim. Act is clear on the point that a fresh period of limitation is to be computed from the time when the payment was made and this being so, no question of further extension of time by a period of three years, as provided in the case of original default, arises in this case. Default did take place during the first three years and the cause of action arose on 14th April 1913. Subsequent payment of interest merely gave the mortgagee a fresh start but the terminus a quo could not be altered from what it was provided in the section itself. The mortgagee therefore had only 12 years from the date of the bond dated 28th December 1921 within which to sue and as he did not sue within that period his suit was clearly time-barred. I accordingly accept the appeal, set aside the decree of the District Judge and dismiss the suit with costs throughout.

B.D./R.K.

Appeal allowed.

4. Mohesh Chandra v. Prosanna Lal Singh, (1904) 31 Cal 83=8 C W N 66.

A. I. R. 1938 Lahore 571

ADDISON AG. C. J. AND

DIN MOHAMMAD J.

Ram Bhaj — Plaintiff — Appellant.

v.

*Ahmad Said Akhtar Khan and others
— Defendants — Respondents.*

Second Appeal No. 170 of 1938, Decided on 4th May 1938, from decree of Dist. Judge, Ambala, D/- 14th December 1937.

(a) *Res judicata* — Suit by reversioner binds entire body of reversioners.

A suit brought by a reversioner is for the benefit of all the reversioners entitled to sue and just as

1. Nathi v. Tursi, (1921) 8 A I R All 192=63 I O 886=19 A L J 712=48 All 671.

2. Ram Das v. Mahomed Said Khan, (1922) 9 A I R All 524=67 I O 160=20 A L J 346.

3. Kashi Ram v. Pandu, (1908) 27 Bom 1=4 Bom L R 688 (F B).

any finding given in favour of a reversioner benefits all members of the reversionary body, a finding arrived at against him injures every body concerned : *Case law referred.* [P 573 C 2]

(b) *Res judicata*—Rule of — Application not to be influenced by technical considerations — Reason for this rule explained — *Res judicata* between co-plaintiffs — Decision arrived at by united efforts of all plaintiffs — Full contest by defendant — Decision binds all co-plaintiffs for ever.

The application of the rule of *res judicata* by the Courts in India should be influenced by no technical considerations of form but by matter of substance within the limits allowed by law. The *raison d'être* of the rule is to confer finality on decisions arrived at by competent Courts between interested parties after genuine contest; and to allow persons who had deliberately chosen a position to reprobate it, and to blow hot now when they were blowing cold before would be completely to ignore the whole foundation of the rule. It cannot be denied that an issue may be *res judicata* between co-plaintiffs as well as co-defendants, and although for an issue to be *res judicata* between co-plaintiffs, there must be a real contest between them, when the interests of various plaintiffs are common, and no question of adopting two conflicting positions as between themselves arises, the decision arrived at by the united efforts of all will bind them for ever, especially when the only person concerned in holding the opposite position has had a full fight : *A I R 1916 P C 78 and 21 Mad 8, Rel. on.* [P 574 C 1]

Shamair Chand — *for Appellant.*

Asa Ram Aggarwal — *for Respondents.*

Din Mohammad J. — The facts bearing upon the question of law involved in this case are these. Nanak and Wazira were descended from the same common ancestor, Rup Chand. Nanak's son Ram Bhaj is alive and has two sons, Matu and Indar. Wazira had two sons, Gobinda and Jangu. Gobinda's only son Rulya predeceased his father, leaving a widow, Mt. Ganeshi and one Shiv Ram claimed to be an adopted son of Gobinda. Jangu had a son, Ruldu, who died leaving a widow, Mt. Shankri. In 1923 Matu and Indar instituted a suit for a declaration that a will made by Gobinda of a one-half share of his property to Shiv Ram should not bind them after the death of Gobinda's widow and that of his widowed daughter-in-law, Mt. Ganeshi. A question arose as to whether Shiv Ram was or was not an adopted son of Gobinda and a finding was given against him. In 1932 Mt. Shankri alienated a part of her estate to one Jamil Dad Khan and this alienation was contested by both Shiv Ram and Mt. Ganeshi. Again a question arose as to whether Shiv Ram was an adopted son of Gobinda and thus entitled to sue. It was found that the adoption had taken place

but it was held that this adoption could not be successfully urged in view of the finding in the previous case that Shiv Ram was not an adopted son of Gobinda.

In 1934 the same Mt. Shankri sold another piece of land to one Ahmad Said Akhtar, a brother of the previous alienee, Jamil Dad Khan. Thereupon Ram Bhaj, father of Matu and Indar, instituted the suit out of which the present appeal has arisen challenging both the alienations made by Mt. Shankri. The question of Shiv Ram's adoption again came in issue along with the usual pleas of consideration and necessity. The Subordinate Judge held that the adoption of Shiv Ram no longer existed and consequently the presence of Shiv Ram did not debar the plaintiff from maintaining the suit ; that the alienation in favour of Jamil Dad Khan was not for consideration and that in favour of his brother Ahmad Said Akhtar was not for necessity. He consequently made a decree in favour of the plaintiff in terms of the relief prayed for. Both the vendees appealed to the District Judge who in a judgment, which is not very clear, held that the judgment in the case of Matu and Indar did not operate as *res judicata* and that the adoption of Shiv Ram was in existence. He accordingly allowed the appeal and dismissed the suit without going into the question of consideration or necessity. Ram Bhaj has appealed. The only question that falls for determination in this case therefore is whether the finding in the case of Matu and Indar operated as *res judicata* on the question of Shiv Ram's adoption. Counsel for the appellant has referred to a large number of authorities which lay down that the suit by a reversioner is always in a representative capacity and that a finding arrived at in that suit binds all members of the reversionary body and all those who derive their title from them. In 38 Mad 406,¹ their Lordships of the Privy Council observed :

A suit to set aside an adoption is brought by the presumptive reversioner in a representative capacity and on behalf of all the reversioners. The act complained of is to their common detriment, just as the relief sought for is for their common benefit.

In 39 Mad 634,² their Lordships followed the judgment referred to above. In

1. Venkata Narayana v. Subbammal, (1915) 2 A I R P O 124=29 I O 298=38 Mad 406=42 I A 125 (P O).

2. Janaki Ammal v. Narayanaswami Iyer, (1916) 3 A I R P O 117=37 I O 161=39 Mad 634=43 I A 207 (P O).

47 All 883,³ again a case of the Privy Council, the head-note reads as follows :

When in a suit by the nearest reversioner against a Hindu widow relative to her deceased husband's estate, an issue is finally determined, the issue is *res judicata* under the Code of Civil Procedure 1908, S. 11, and Explan. 6, in any subsequent suit by another reversioner. The above rule applies where the plaintiff in the first suit was the nearest reversioner save for one who from poverty was not in a position to sue for the protection of the estate. It is not material that the plaintiff in the second suit does not claim through the plaintiff in the first.

In 103 I C 454,⁴ a Division Bench of this Court held that a decree dismissing a suit by the next reversioner is, unless *mala fides* can be established, binding upon all other reversioners. In 59 Cal 636,⁵ one of the principles enunciated in connexion with Explan. 6 to S. 11 reads as follows :

Where the plaintiff or the defendant sues or is sued in a representative capacity, which attaches to him under the general law, the decision binds the entire body whom he represents.

In 44 All 19,⁶ a Full Bench composed of Sir Pramada Charan Banerji, Tudball and Sulaiman JJ. held that a suit by a reversioner for setting aside an alienation made by a Hindu widow in possession is brought by him in a representative capacity, that is, as representing the whole body of reversioners, for the protection of the estate. A decree in such a suit is therefore binding not only between the reversioner who brought the suit and the transferee but also as between the whole body of reversioners on the one hand and the transferee or his representative in title on the other. In 41 Mad 659,⁷ a Full Bench of the Madras High Court composed of five Judges held that a suit by a reversioner to set aside an alienation by a Hindu widow is a representative suit on behalf of all her reversioners then existing or thereafter to be born. In 10 Lah 613,⁸ Harrison and Tek Chand JJ. held that it is well settled

that a suit for a declaration by a reversioner to contest an alienation made by a widow in possession is a representative suit on behalf of all the reversioners and a decree fairly and properly obtained against the reversioner in such a suit binds not only him but the whole body of reversioners on the one hand and the alienee or his representative on the other. The principle deducible from the authorities cited above admits of no doubt. A suit brought by a reversioner is for the benefit of all the reversioners entitled to sue and just as any finding given in favour of a reversioner benefits all members of the reversionary body, a finding arrived at against him injures everybody concerned.

We have now to determine to what extent does this principle affect the present case. In the first suit the plaintiffs were two reversioners, Matu and Indar, and the chief contesting defendant was Shiv Ram, whose adoption was in dispute. On the basis of the principles enunciated above, the finding arrived at in that case against Shiv Ram's adoption benefited as well as bound not only the plaintiffs in that suit but the entire reversionary body including Ruldu. It was on this ground that in the second suit brought by Shiv Ram against an assignee of a part of Ruldu's estate, the assignee was held competent to take advantage of the previous finding which his assignor despite his not being a party to the suit could have utilized. In the present suit, one of the reversioners is the plaintiff, and the representatives of another reversioner are the defendants, and the question is, whether as between the reversioners *inter se*, the finding against Shiv Ram's adoption will hold good. The District Judge is of opinion that it does not, inasmuch as the previous judgment was not a judgment *in rem*. This no doubt is so, but he has ignored the fact that S. 41, Evidence Act is not the only section which lays down a bar by judgment. S. 40 comes first and gives effect to every such bar as has been introduced by the law of procedure. One such bar is the rule of *res judicata* and if this principle, whether based on S. 11, Civil P. C., or otherwise, applies, the present suit will be maintainable regardless of the fact that S. 41, Evidence Act does not govern the defence. The suit is, as stated above, between persons on whose behalf the previous plaintiffs in a contest with Shiv Ram obtained a finding against his adoption. Further, one of the assignees in

3. Mata Prasad v. Nageshar Sahai, (1925) 12 A I R P C 272=91 I C 370=28 O O 352=52 I A 398=47 All 883 (P C).

4. Mai Dhan v. Mansa Ram, (1927) 14 A I R Lah 835=103 I C 454=28 P L R 369.

5. Lal Mohan Dhupi v. Ram Lakhmi Dassya, (1932) 19 A I R Cal 271=137 I C 46=59 Cal 636=35 O W N 1203.

6. Kesho Prasad Singh v. Sheopargash Ojha, (1922) 9 A I R All 301=64 I C 248=44 All 19=19 A L J 749 (F B).

7. Varamma v. Gopaladasayya, (1919) 6 A I R Mad 911=46 I C 202=41 Mad 659=35 M L J 57 (F B).

8. Thakar Singh v. Uttam Kaur, (1929) 16 A I R Lah 295=118 I C 449=10 Lah 613=30 P L R 828.

the present case as representing the estate of Ruldu successfully resisted Shiv Ram on the basis of that finding. Should Ruldu's estate be allowed to repudiate now what it fought for and achieved before? The answer is clearly in the negative. It may be that the bar does not exactly fall within the terms of S. 11, Civil P. C., but that is immaterial. It is well settled that that section is not exhaustive and that the bar operates as much on general principles as on the wording of the section. As remarked by their Lordships of the Privy Council in 43 Cal 694⁹ at p. 706:

The application of the rule (of *res judicata*) by the Courts in India should be influenced by no technical considerations of form but by matter of substance within the limits allowed by law.

The *raison d'être* of the rule is to confer finality on decisions arrived at by competent Courts between interested parties after genuine contest; and to allow persons who had deliberately chosen a position to reprobate it and to blow hot now when they were blowing cold before would be completely to ignore the whole foundation of the rule. It cannot be denied that an issue may be *res judicata* between co-plaintiffs as well as co-defendants, and although it is laid down in certain judgments that for an issue to be *res judicata* between co-plaintiffs, there must be a real contest between them, with all respect we are disposed to consider that when the interests of various plaintiffs are common, and no question of adopting two conflicting positions as between themselves arises, the decision arrived at by the united efforts of all will bind them for ever, especially when the only person concerned in holding the opposite position has had a full fight. Reference may in this connexion be made to 21 Mad 8¹⁰ decided by Benson and Boddam JJ. In that case *A* sold land to *B* of which he was not in possession. Afterwards both *A* and *B* sued to recover possession but failed on the ground that *A* had no title. *B* then sued *A* to recover the purchase money with interest. It was held that *A* was not entitled to give evidence of his alleged title in view of the decision in the previous case. We are conscious of the fact that Ruldu was no party to the previous case, but in our view the same principle applies to a representative suit.

9. Sheoparsan Singh v. Ram Nandan Prasad, (1916) 8 A I R P C 78=88 I O 914=48 Cal 694=48 I A 91 (P C).

10. Krishnam Namblar v. Kannan, (1898) 21 Mad 8.

We have no hesitation in holding therefore that on general principles the issue relating to Shiv Ram's adoption could not be re-agitated at the instance of Ruldu's representatives, and that Ram Bhaj had consequently a *locus standi* to sue. We accordingly accept the appeal, reverse the decision of the District Judge, and remand the case to him under O. 41, R. 23, Civil P. C., for disposal of the remaining questions raised before him. Court-fee on the appeal will be refunded, and other costs will be costs in the cause. Parties have been directed to appear before the lower Appellate Court on 27th May 1938.

B.D./R.K.

Case remanded.

A. I. R. 1938 Lahore 574

TEK CHAND J.

Nand Lal — Defendant — Appellant.

v.

Firm Kharaiti Lal Chaman Lal, Plaintiff and another, Defendant — Respondents.

Second Appeal No. 1617 of 1937, Decided on 16th February 1938, from decree of Dist. Judge, Gujranwala, D/- 6th October 1937.

Specific Relief Act (1877), S. 42 — *Declaratory suit—A in execution against B trying to attach C's property—A's attempts failing twice—Suit by C against A for declaration of his rights to his property held maintainable.*

A in execution of his decree against *B* tried to attach property of *C* alleging that *B* and *C* were joint. The attachment failed twice because *C* alleged that he was independent of *B*. Ultimately *C* finding that as he was entitled to his rights in his property and that not only that *A* was interested to deny it but denied it on two occasions, he filed a declaratory suit against *A* for declaration of his rights:

Held C's suit was maintainable and he was not bound to wait until A attached his property and until C's objection to attachment was dismissed by Court when he could file a suit under O. 21, R. 63, Civil P. C. [P 575 C 2].

Mohammad Amin — *for Appellant.*

J. L. Kapur — *for Respondents.*

Judgment. — The appellant Nand Lal obtained a money decree against Hans Raj, defendant 2. In execution of this decree he got a warrant issued for attachment of moveable property of the judgment-debtor which he undertook to point out in the judgment-debtor's shop at Gujranwala (*hasab nishan dehi digridar*). He took the bailiff to a shop in a bazar in Gujranwala, which was being carried on by Kharaiti

Lal and Chaman Lal, brothers of Hans Raj. These persons told the bailiff that the shop belonged to them, and that the judgment-debtor Hans Raj was separate from them and was not a partner in it, nor were any goods belonging to him kept in the premises. The bailiff made enquiries from the neighbours who supported the allegation of Kharaiti Lal and Chaman Lal. He then returned without attaching any goods. The decree-holder made another attempt to have the warrant executed by attachment of goods in the shop, but the plaintiffs stood their ground again, and the bailiff seeing a signboard bearing the plaintiffs' names, did not proceed to attach the property. There was however a scuffle on this occasion followed by a criminal prosecution. A few days later Kharaiti Lal and Chaman Lal instituted a suit for a declaration that they were the exclusive owners of the firm Kharaiti Lal Chaman Lal, that the judgment-debtor, Hans Raj, had no concern with it, nor had he any goods of his own lying in the shop, and that none of the assets of the firm was liable to attachment and sale in execution of the decree of Nand Lal against Hans Raj. The suit was resisted by Nand Lal who pleaded that Hans Raj was in fact joint with the plaintiffs and in any case they had no cause of action to get the declaration prayed for.

The trial Judge held that the repeated attempts of the defendant to get the goods in the shop attached afforded a good cause of action to the plaintiffs for a declaratory suit. On the merits, he found, after a detailed examination of the evidence, that it had not been proved that Hans Raj was joint with the plaintiffs or that he had any interest in the goods in the shop. On these findings, he decreed the suit. The defendant appealed to the District Judge, who has affirmed the findings of the trial Court on both points and has affirmed the decree.

On second appeal, it is urged that the suit is premature; and that the futile attempts made by defendant 1 to have the moveables in the shop of the plaintiffs attached do not afford them a good ground for maintaining a suit for a declaration under S. 42, Specific Relief Act. It is argued that the plaintiffs should have waited till some of the goods in their shop had been actually attached, and then they should have filed objections under O. 21, R. 58, Civil P. C. and if the executing Court had dismissed the objections, then, and not

until then, would they be entitled to sue for a declaration of their title. In my opinion this contention is without force. A suit for declaration under S. 42 can be maintained *inter alia* if the plaintiff is "entitled to any right as to any property"; and the defendant "has denied or is interested to deny" the plaintiffs' right. In the present case both these conditions are fulfilled. The plaintiffs claim to be the sole owners of the firm Kharaiti Lal Chaman Lal and of the goods in the shop of the firm. The defendant Nand Lal has been denying their exclusive right to such property, and alleging that Hans Raj was a partner in the firm and that the goods in the shop, or some of them, belonged to Hans Raj, he has attempted to attach such goods. The attempt failed once, but was repeated again. There was thus not merely an assertion of a hostile title, but an attempt to seriously infringe the plaintiffs' rights. On these facts the plaintiffs clearly had a cause of action to sue for declaration under S. 42. It was not necessary for them to wait till their goods had actually been attached, their business stopped or, at any rate, partially impaired, and then to sue under O. 21, R. 63, Civil P. C. I agree with the Courts below in holding that the suit was maintainable in the form in which it was brought. The learned counsel for the appellant attempted to challenge the finding of fact that the plaintiffs were the exclusive owners of the shop, but this finding is supported by legal evidence on the record, and cannot be impugned in second appeal. No other point was argued. The appeal fails and is dismissed; but in the circumstances, the parties are left to bear their own costs throughout.

B.D./R.K.

Appeal dismissed.

A. I. R. 1938 Lahore 575

ABDUL RASHID J.

*Sarwan and another — Plaintiffs —
Appellants.*

v.

*Shib Singh and others — Defendants —
Respondents.*

Second Appeal No. 40 of 1938, Decided on 7th March 1938, from decree of Dist. Judge, Hissar at Gurgaon, D/- 8th October 1937.

Punjab Tenancy Act (16 of 1887), S. 5 (1) (a)—Daughter or sister of last male holder cannot acquire occupancy rights.

A daughter or a sister of the last male holder of land can under no circumstances be said to have fulfilled the conditions of S. 5 (1) (a), even if she has been continuously in possession of land for 30 years without paying any rent therefor. Under the Punjab Tenancy Act a daughter or a sister can never acquire any occupancy rights. It is only a widow who can acquire occupancy rights under Cl. (b) of S. 59 (1). [P 576 C 1]

Bishen Narain — *for Appellants.*

Shamair Chand — *for Respondents.*

Judgment.—Section 5, sub-s. (2), Punjab Tenancy Act lays down that if a tenant proves that he has continuously occupied land for 30 years and paid no rent therefor beyond the amount of the land revenue thereof and the rates and cesses for the time being chargeable thereon, it may be presumed that he has fulfilled the conditions of Cl. (a) of sub-s. (1). Mr. Sri Ram Sud, Assistant Collector, First Grade, held on 27th March 1923, that Mt. Devalia had continuously occupied the land for 30 years before 10th January 1922, and that she had not paid anything to the landlord beyond the amount of land revenue and the rates and cesses, and that therefore it must be presumed that she had fulfilled the conditions of Clause (a) of sub-s. (1) of Sec. 5. Under Cl. (a) of sub-s. (1) of S. 5 a person can be declared to be an occupancy tenant only if on 1st November 1887 he had held land for more than two generations in the male line of descent through a grandfather or granduncle, and for a period of not less than 20 years. It is clear that a daughter or a sister of the last male holder of land can under no circumstances be said to have fulfilled the conditions of S. 5 (1) (a), Punjab Tenancy Act, even if she has been continuously in possession of land for 30 years without paying any rent therefor. Under the Punjab Tenancy Act a daughter or a sister can never acquire any occupancy rights. It is only a widow who can acquire occupancy rights under Cl. (b) of S. 59 (1). The acquisition by Mt. Devalia of occupancy rights was therefore clearly an acquisition as a widow.

The learned counsel for the appellants contended that there were observations in the judgment of Mr. Sri Ram Sud, which showed that Mt. Devalia had been given occupancy rights not as a widow but in her personal capacity. He further contended that even if the Revenue Court had made a blunder in conferring occupancy rights on Mt. Devalia in her own right, that judgment was binding on both the parties and the question was *res judicata*. The obvious

reply to this argument is that the appellants have chosen to come into Court as plaintiffs under S. 59, Punjab Tenancy Act, and they must prove their right to succeed to Mt. Devalia under S. 59. Cl. (a) of S. 59 (1) is of no assistance to the plaintiffs-appellants as they are not the male lineal descendants of Mt. Devalia in the male line of descent. They are her male lineal descendants, but Mt. Devalia being a woman, they cannot be said to have descended from the last tenant in the male line of descent. If the Assistant Collector in granting occupancy rights to Mt. Devalia made a blunder that blunder could not be rectified, nor could Mt. Devalia be prevented from deriving any benefit that may accrue to her from that blunder, but the present plaintiffs, after the death of Mt. Devalia, cannot prejudice the rights of the landlord in the present suit, because no rights accrued to them by the judgment of the Assistant Collector, dated 27th March 1923. For the reasons given above, I dismiss this appeal. Having regard to all the circumstances however I order that the parties shall bear their own costs throughout.

B.D./R.K.

Appeal dismissed.

A. I. R. 1938 Lahore 576

BLACKER J.

Lal Singh and others

Accused — Petitioners.

v.

Emperor.

Criminal Misc. Petn. No. 79 of 1938, Decided on 14th April 1938, for transfer from Magistrate, First Class, Gujrat.

Criminal Trial—Transfer of case—Application for transfer based on communal motive is not maintainable — But Magistrate trying case committing errors of procedure and his action likely to raise apprehension of partiality—Case should be transferred.

A Magistrate is not barred by reason of belonging to one community or the other from trying cases between members of two communities. But where he commits errors of procedure during the trial and his action is very likely to raise an apprehension in the mind of petitioners that they are not going to get an impartial trial, the case should be transferred. [P 577 C 1]

Indar Dev for Amolak Ram Kapur —
for Petitioners.

Basant Krishna for Advocate-General —
for Respondent.

Order. — This is an application for the transfer of a case, *Crown v. Lal Singh and*

Others from the Court of Syed Ghulam Mohy-ud-din Shah, Magistrate, First Class, Gujrat, to some other Court. The main grounds that are urged in support of this application are two: (1) that in a cross case in which the present petitioners were complainants and some of the present prosecution party were the accused under S. 302, Penal Code, the learned Magistrate, as soon as he became seised of this case, admitted the accused to bail without recording any reasons as he was in law bound to do; (2) that the learned Magistrate framed charges against the accused in the case, which is the subject-matter of this application, for having caused hurt to one Piran Ditta although at that stage of the case Piran Ditta had given no evidence and none of the witnesses had stated that Piran Ditta had been injured by anybody. There is no burking the fact that the real motive behind this transfer application is obviously communal. The petitioners are Sikhs: the other side are Muslims, and the Magistrate is a Muslim. Added to this is the fact that the case ought normally to have gone to the Magistrate of the Ilaka who is a Sikh, but it was sent to the present Magistrate by the order of the predecessor of the learned District Magistrate.

If the communal motive were the only one, I should most emphatically refuse to entertain this application for transfer as I cannot consider it to be in any way a tenable proposition that a Magistrate is barred by reason of belonging to one community or the other from trying cases between members of those two communities. But when a Magistrate finds himself placed in such a position, it is incumbent upon him to exercise the greatest tact and discretion in handling the case, and here we find the Magistrate has been guilty of two errors of procedure. I do not think that there is actually any communal bias in his mind but the effect of these must be considered on the mind of the petitioners, and it is impossible for them to ignore the fact that the effect of these two errors in procedure has been against their interests. In the circumstances therefore it seems to me to be impossible to escape the conclusion that the petitioners have an apprehension which, in the case of persons of their mentality, cannot be considered to be unreasonable that they are not likely to get an impartial trial. Therefore it seems to me that this case must be transferred, and I accordingly accept the petition and direct the case to

be transferred to the Court of some other Magistrate. I would repeat, in passing this order which I pass with considerable reluctance that there appears to be no ground for thinking that the present Magistrate really is biased against the petitioners, and the order is passed because of circumstances which appear to be sufficient to give the petitioners reason for thinking that he may be so biased.

R.M./R.K.

Petition accepted.

A. I. R. 1938 Lahore 577

ADDISON AND DIN MOHAMMAD JJ.

Lala Nanak Chand — Plaintiff — Appellant.

v.

Kanwar Sardar Singh and others — Defendants—Respondents.

First Appeal No. 390 of 1936, Decided on 16th December 1937, from decree of Senior Sub-Judge, Jhelum, D/. 12th May 1936.

Companies Act (1913), S. 235—Proceedings against directors under S. 235 for misfeasance—Subsequent suit against them for compensation for misfeasance and fraud is incompetent on principle of res judicata.

If the company is being wound up the remedy against a delinquent director whether for negligence, fraud or misfeasance is under S. 235, Companies Act. Where such proceedings have been taken against a director, subsequent suit against him for compensation for fraud or misfeasance is incompetent on the principle of res judicata. Such suit is also time-barred under Art. 36, Lim. Act, if brought more than two years after the date of misfeasance and S. 18, Lim. Act cannot help the plaintiff if it is not established that the knowledge of his right was kept from him by means of fraud.

[P 578 C 2; P 579 C 1]

Shamair Chand and R. C. Manchanda— for Appellant.

M. L. Puri, and J. G. Sethi and Malik Barkat Ali — for Respondents 1 and 2 to 6 respectively.

Addison J.—A suit was brought by Nanak Chand of Chakwal against eight persons for recovery of Rs. 6500 by way of compensation and damages. It was alleged that the defendants opened a bank by name "Indian States Bank, Limited, Agra," and agreed to become directors of the bank; that on 8th March 1930 they registered the memorandum and articles of association and on 27th May 1930 published under their signatures the prospectus, whereby they invited the public to purchase shares of the bank; and that

the necessary certificate from the Registrar, Joint Stock Companies, Lucknow, was obtained on 6th August 1930 by fraud, although prior to that they had commenced working and had been selling and allotting shares. It was alleged that the prospectus contained false and misleading matter. Further, it was alleged that the defendants appointed Harbans Lal of Khushab as Superintendent of the Punjab branches of the bank and also appointed him as their agent to open a branch at Chakwal and that the plaintiff believed the fraudulent and misleading assertions of Harbans Lal and considered the prospectus to be a true and correct one; he therefore purchased 100 shares and paid Rs. 2500 on 28th October 1930 as application money, and on 12th December 1930 Rs. 2500 more as allotment money; that Harbans Lal promised to the plaintiff that the Chakwal branch would continue to function for a year and that this promise was confirmed by defendant 7, one Vidyarthi. The bank however closed its doors on 5th September 1931 and went into voluntary liquidation on 21st September 1931 and an order for compulsory liquidation was obtained from the Allahabad High Court on 18th December 1931 when an Official Liquidator was appointed. It was further stated that the books were incorrectly kept, that the allotment of shares to the plaintiff was made without authority, that the Chakwal branch was closed before one year and that the defendants had contravened the provisions of Ss. 100, 101 and 102, Companies Act and committed fraud and misfeasance and were therefore liable to pay to the plaintiff compensation and damages to the extent of Rs. 5000 with interest thereon at Rs. 7 per cent. per annum, thus making the total claim of Rs. 6500. It was admitted in the plaint that misfeasance proceedings had been taken against the defendants in the Allahabad High Court which gave its decision in April 1934 that fraud and misfeasance were disclosed in this judgment, and that the plaintiff came to know this in January 1935. The cause of action, according to the plaint, arose on 28th October 1930, 24th November 1930 and in January 1935 at Chakwal. Accordingly the plaintiff brought the present suit.

The plaintiff omitted to state in the plaint that he himself was a joint tortfeasor along with the defendants. Misfeasance proceedings were also taken against

him in the Allahabad High Court where he compromised on payment of Rs. 10,000. His statement in the Allahabad High Court shows that he also committed fraud and misfeasance. He wrote applications and pronotes for his friend Sita Ram to whom payment was made without any security whereas the plaintiff knew that Sita Ram was practically insolvent. It may be mentioned here that the plaintiff was a local director of the Bank at Chakwal. Obviously the plaintiff was using the branch at Chakwal and Dudial for his own ends. He got his son employed there: he connived at payments to Sita Ram; he concealed material particulars. The trial Judge dismissed the suit and the plaintiff has appealed.

On Issue 8, which was as follows: "was the plaintiff misled by any misrepresentation of any of the defendants or their agent in applying for shares", the trial Judge has held in the negative. It appeared to the trial Judge that the plaintiff was induced to become a local director by Harbans Lal in order to obtain payment of Rs. 20 per meeting. In his agreement with Harbans Lal nothing was mentioned about the prospectus. The trial Judge held that he was mainly induced to become a director and to take shares in order to advance his own ends. His agreement with Harbans Lal, who was an ordinary employee of the Bank, was not such an agreement as would make the directors liable as Harbans Lal had no power to enter into it. The trial Judge has further held that the suit is incompetent seeing that misfeasance proceedings were taken against the defendants under S. 235, Companies Act in the Allahabad Court, where the plaintiff himself was proceeded against under that section. On general principles of *res judicata* the trial Judge stated that he could not be allowed to bring a suit after such proceedings. It was further held that the suit was barred by limitation, being governed by Art. 36, Lim. Act and that S. 10 of the Act did not extend limitation as there were numerous authorities to the effect that directors were not trustees. Further, the plaintiff knew what was going on at the end of 1931 when he himself went to Allahabad in connexion with the liquidation proceedings. There was no question therefore of his coming to know about fraud and misfeasance early in 1935 after the Allahabad High Court's judgment in 1934.

It was contended before us that a separate suit lay as well as proceedings under

S. 235, Companies Act. The plaintiff has based his cause of action on S. 100, Companies Act and there is no question that any liability under that section has to be decided by the Court having jurisdiction under the Companies Act and it has been so decided. The law on this point is clearly stated at p. 216 of Palmer's Company Law, Edition 15, where it is said :

The civil remedy of a company against a delinquent director, whether for negligence, fraud, misfeasance, or breach of trust, is whilst the company is a going concern by action (that is by suit). If the company is being wound up, the remedy is, except where the parties are not amenable to the winding up jurisdiction, under S. 276, English Act (which corresponds to 235 of the Indian Act), commonly known as the misfeasance section, which gives power to the Court in a summary way to order any director or officer of the company who has been guilty of misfeasance to replace the moneys misapplied or to pay compensation.

Such an application may be made by either the official receiver or the liquidator or a creditor or contributory. We do not doubt that the same is the law in India where the scheme of the Act is the same; otherwise there would be no finality attaching to liquidation proceedings. In fact, the plaintiff has had the effrontery to come to the Civil Courts after he himself had been penalized under S. 235, Companies Act. S. 229, Companies Act shows that in the winding up of a company the same rules shall prevail and be observed as in the case of insolvency proceedings. We therefore hold that this suit is incompetent, while we are further in agreement with the finding of the trial Judge that in the case of the plaintiff no misrepresentation has been established, his motive for joining the company not being the false representation of the directors but his own greed to acquire money dishonestly. The suit is also barred by limitation which under Art. 36 is two years from the date of malfeasance, misfeasance or nonfeasance. If there was any malfeasance, etc., it took place in 1930. S. 18, Lim. Act cannot help the plaintiff as he was not by means of fraud kept from the knowledge of his right or the title on which it was founded. His action may be based on fraud but it is not established that the knowledge of his right was kept from him by means of fraud. He himself was as fraudulent as anyone else. The suit is thus long time-barred. It may here be mentioned that defendant 2, Nawab Jamshed Ali Khan, withdrew his name from the directorate in August 1930 before the plaintiff joined the company. He certainly cannot

be made liable. These were the only questions agitated before us and we dismiss the appeal with costs one set to respondent 1 and one set to defendants 2 and 3 who alone were represented before us.

D.S./R.K.

Appeal dismissed.

A. I. R. 1938 Lahore 579

TEK CHAND J.

Saran Dyal — Defendant —

Petitioner.

v.

Dal Chand — Plaintiff — Respondent.

Civil Revn. Petn. No. 428 of 1937, Decided on 28th October 1937, from decree of Judge, Small Cause Court, Delhi, D/. 25th February 1937.

Contribution—Suit for—Parties putting forward joint false defence—Costs awarded to opposite party—Anyone can claim contribution in costs paid—Liability should be proportionate.

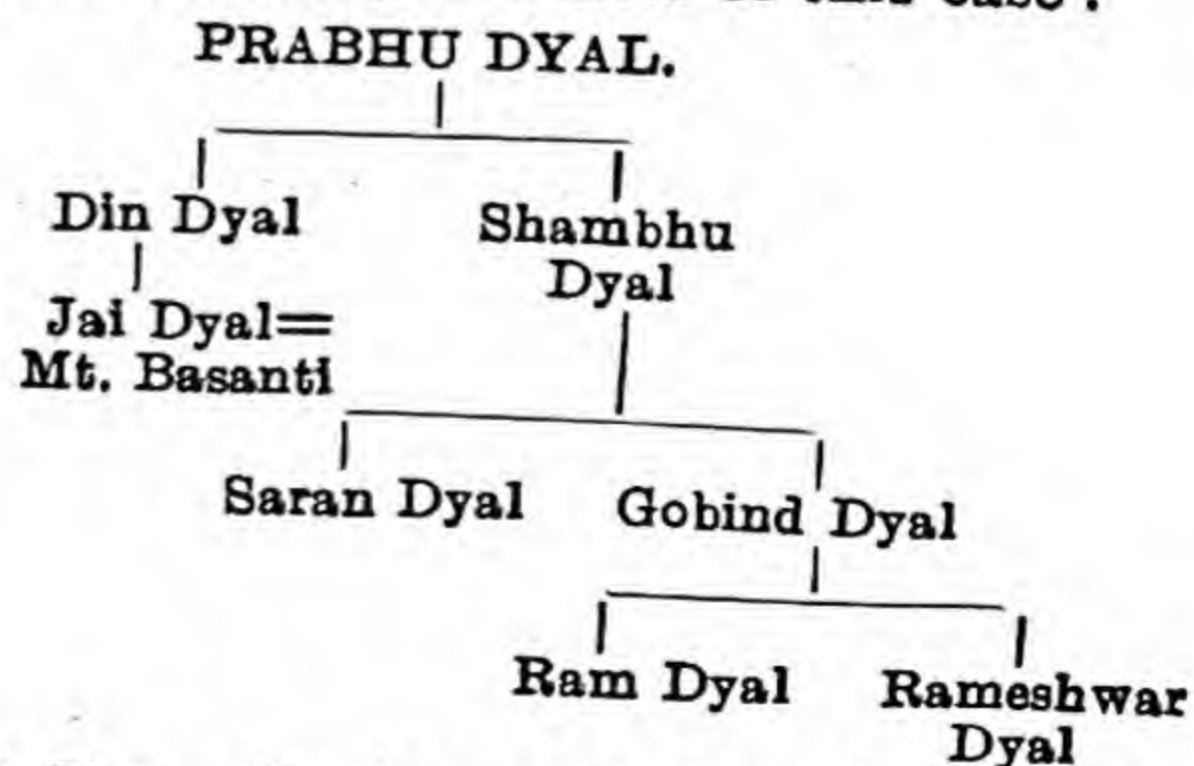
Where different sets of defendants had jointly put forward a false defence in a previous case and had been ordered to pay the costs of the opposite party, any of them is entitled to maintain a suit for contribution against the others: *A I R 1935 Mad 347; A I R 1923 All 67 and (1894) A C 318, Rel. on.* [P 580 C 2]

In the absence of any direction to the contrary in the decree, the costs should be apportioned among the sets equally. [P 580 C 2]

Shamair Chand — for Petitioner.

Bishen Narain — for Respondent.

Judgment.—This revision petition arises out of a suit brought by Dal Chand against Saran Dyal for recovery of Rs. 289-2-9 as contribution for costs, which had been allowed by the High Court in a certain litigation in which they both were defendants along with certain other persons. The trial Court has decreed the suit. The defendant Saran Dyal has come in revision. The following pedigree-table will be helpful in understanding the facts of this case:



Mt. Basanti, widow of Jai Dyal, alienated certain property in favour of Dal Chand

and Mangli. One Ram Roop, as representing the Hindu public of Delhi, brought a suit under Order 1, R. 8, Civil P. C., for a declaration to the effect that the said property had been made waqf by the ancestors of Jai Dyal and that Mt. Basanti had no right to alienate it to Mangli and Dal Chand. In this suit the following persons were impleaded as defendants: (1) Saran Dyal; (2) Gobind Dyal [sons of Shambhu Dyal]; (3) Mangli; (4) Dal Chand (vendees); (5) Ram Dyal; (6) Rameshwar Dyal [sons of Gobind Dyal].

Of these (1), (2), (5) and (6) were the heirs of Mt. Basanti, vendor, who had died in the meantime, and defendants (3) and (4) were the vendees in possession. The suit was dismissed by the trial Court, the parties being left to bear their own costs. On appeal by Ram Roop, the High Court reversed this decision and granted the plaintiff the declaration prayed for with costs throughout. In execution the plaintiff realized his costs from Dal Chand, vendee, only. Dal Chand has now brought a suit against Saran Dyal for contribution, claiming one fourth of the costs of the previous litigation which he had to pay to Ram Roop. The lower Court has decreed the suit.

On revision, Mr. Shamair Chand for the petitioner has pointed out that both the vendors and the vendees had put similar defences in the previous litigation denying the waqf nature of the property. He has also drawn attention to the finding of the High Court that the vendees had purchased the property with the knowledge that it was waqf. He urges therefore that the vendors and the vendees were both in the position of joint tort-feasors, and that on their failure in that litigation, one of them cannot sue the others for contribution in respect of the amount of costs paid to the successful party. In support of this contention the learned counsel has cited 7 Mad 89.¹ This decision and several other earlier cases proceeded upon the principle laid down in (1799) 16 R R 810.² The authority of that case however is considerably shaken if not altogether annihilated by the later decision of the House of Lords in (1894) A C 318,³ where it was held that in such cases the foundation of the plaintiff's claim rested on the joint decree which

had been passed against the plaintiff and the defendant in the former litigation and which had created a civil debt. It was pointed out that in view of the joint decree, the action could not be regarded as one to enforce a right to "contribution in the case of a delict proper". Following that decision, it has been held recently by the Courts in this country that where different sets of defendants had jointly put forward a false defence in a previous case and had been ordered to pay the costs of the opposite party, any of them is entitled to maintain a suit for contribution against the others: see 45 All 99,⁴ A I R 1927 Mad 790⁵ and A I R 1935 Mad 347.⁶

The first contention raised by Mr. Shamair Chand is unsustainable. The next point raised is whether the petitioner Saran Dyal is liable to pay one fourth of the total amount of costs which had been realized from him in execution of the joint decree. That decree did not specify in what proportion the costs were to be paid by the various defendants. As stated already, there were two sets of defendants in that case; (1) Mangli and Dal Chand, vendees; and (2) Saran Dyal and Gobind and Ram Dyal and Rameshwar Dyal, sons of Gobind Dyal (heirs of the vendor). In the absence of any direction to the contrary in the decree, the costs should be apportioned among these sets equally; the vendees being liable to pay one-half and the other defendants one-half. Among the vendors inter se Saran Dyal represented one branch of the heirs of Mt. Basanti, and Gobind Dyal and his minor sons Ram Dyal and Rameshwar Dyal the other branch. Saran Dyal was therefore liable to pay one fourth of the entire amount, and this is what the plaintiff Dal Chand had claimed from him in this suit and for which the lower Court has passed a decree against him. The petition for revision fails and is dismissed with costs.

B.D./R.K.

Petition dismissed.

4. Parsotam Das v. Lachmi Narain, (1923) 10 A I R All 67=69 I C 688 = 45 All 99 = 20 A L J 890.

5. Narayanamurthi v. Chandraiyya, (1927) 14 A I R Mad 790=102 I C 835=53 M L J 174.

6. Veerareddi v. Angayya, (1935) 22 A I R Mad 347=159 I C 507.

1. Manja v. Kadugochan, (1884) 7 Mad 89.

2. Merryweather v. Nixon, (1799) 16 R R 810=8 T R 186=1 Sm L O (10th Ed) 383.

3. Palmer v. Wick Steam Shipping Co., (1894) A C 318=6 R 245=71 L T 163.

A. I. R. 1938 Lahore 581

ABDUL RASHID AND ADDISON JJ.

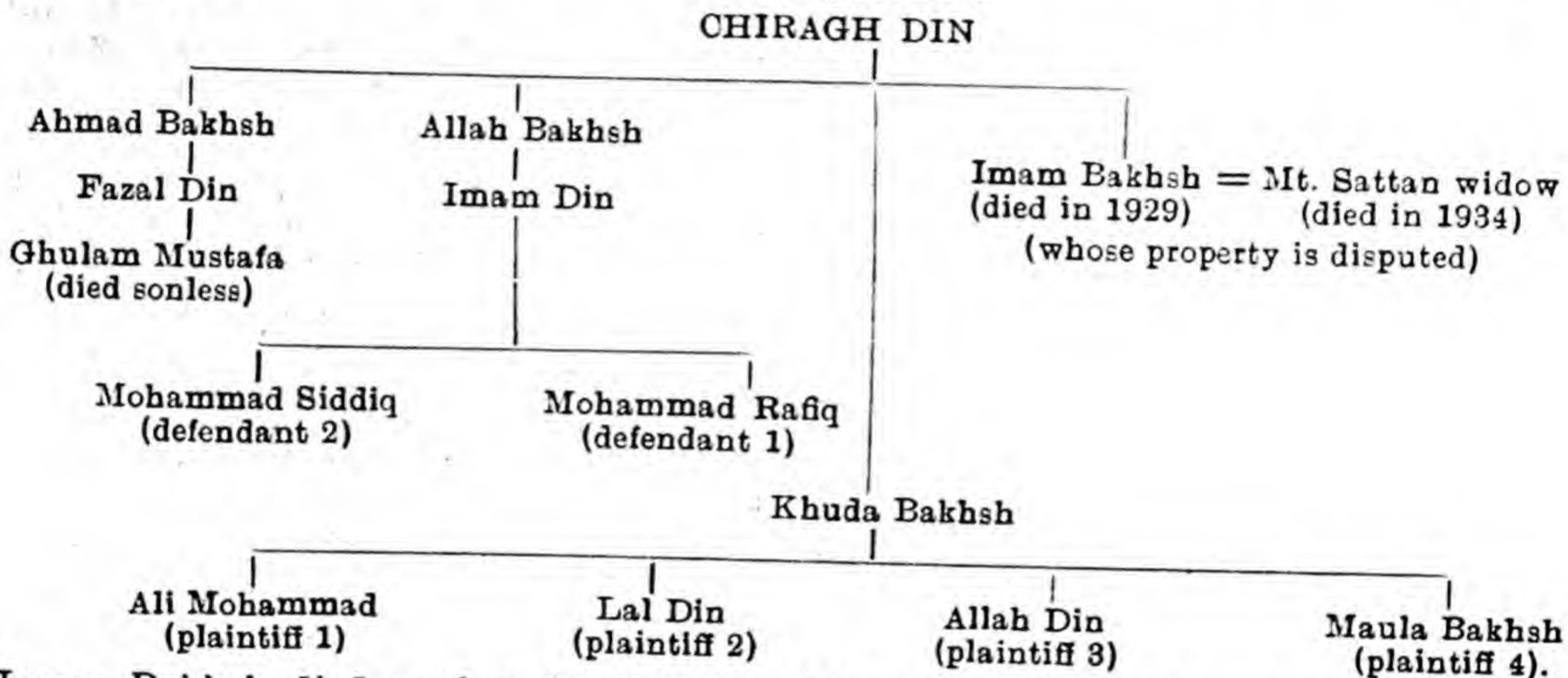
*Ali Mohammad and others —**Plaintiffs—Appellants.*
v.*Mohammad Rafiq and another —**Defendants—Respondents.*

First Appeal No. 346 of 1936, Decided on 30th November 1937.

Custom (Punjab)—Applicability—Pawalis of Bhera held not governed by custom but by Mahomedan law.

Where a person asserts that he is governed by custom, it is incumbent upon him to prove that he is so governed and further to prove what that custom is: *A I R 1917 P C 181, Foll.* [P 581 C 2]*Held* that Pawalis of Bhera in Shahpur District are not proved to be governed by custom but by Mahomedan law. [P 582 C 1]Mehr Chand Mahajan and Shiv Charan Gosomey — *for Appellants.*P. A. Bahl — *for Respondents.*

Abdul Rashid J. — The following pedigree table shows the relationship of the parties :



Imam Bakhsh died sonless in October 1929, and his land was mutated in favour of his widow Mt. Sattan. She died in December 1934. The present suit was instituted by the plaintiffs on 27th August 1935. The allegations of the plaintiffs were that they being nephews of Imam Bakhsh deceased, were entitled to succeed to his property consisting of agricultural land and houses, to the exclusion of the defendants who were Imam Bakhsh's brother's grandsons, in accordance with the provisions of Mahomedan law. Mohammad Rafiq defendant pleaded, inter alia, that Imam Bakhsh was an Awan and not a Pawali as asserted by the plaintiffs, that the parties were governed by Customary law and that he and Mohammad Siddiq were therefore entitled to one-half of the property. Mohammad Siddiq did not appear and contest the plaintiffs' suit. The trial Court framed the following issues:

(1) Whether the parties follow Customary law, whereunder the parties are entitled equally to the property in dispute? (2) Whether under Mahomedan law the plaintiffs exclude the defendants?

The trial Court held that the parties were governed by Customary law, and on that finding dismissed the plaintiffs' suit. The plaintiffs have preferred an appeal to

this Court. It has been held in 45 Cal 450¹ that when a person asserts that he is governed by custom, it is incumbent upon him to prove that he is so governed and further to prove what that custom is. Two witnesses were produced on behalf of the defendants, namely Khuda Bakhsh (D. W. 1) and Allah Bakhsh (D. W. 2). They stated that the Pawalis of Bhera were governed by Customary law. This evidence is worthless. Reliance was placed on behalf of the defendants on three documents, Exs. D/2, D/3 and D/4. D/3 is a copy of a judgment passed by Mehta Jagan Nath, Munsif, Bhera, on 15th October 1884. In this case Hashmat, the uncle of Fazal, Pawali of Bhera, claimed that he was an heir to his nephew in respect of his residential house and a number of shops. The defendants were the sister and the sister's sons of the last male-holder. The plaintiff prayed that an enquiry might be held by Court and he further showed his readiness to have the case decided under Mahomedan law. The plaintiffs' suit was decreed on the ground that he was entitled to succeed to

1. *Abdul Hussein Khan v. Mt. Bibi Sona Dero*, (1917) 4 A I R P C 181=48 I C 306=45 Cal 450=45 I A 10=12 S L R 104 (P C).

his nephew to the exclusion of his married sister and her sons under Customary law. Ex. D/2 is a copy of a judgment dated 11th July 1887. In this case there was a contest between the nephew of the last male-holder and his married daughter. The case was decided in favour of the nephew solely because it had been decided in Hashmat's case that the Pawalis of Bhera were governed by Customary law. The third instance (Ex. D/4) consists of a judgment of Sardar Teja Singh, District Judge, Shahpur at Sargodha, in the case in *Mt. Rajan v. Raja, etc.* This case was decided on the strength of the decisions given in the two cases cited above.

Pawalis are not a notified agricultural tribe in the Shahpur District. All the tribes that were consulted at the time of the preparation of the Customary law of the Shahpur District in the year 1896, are mentioned in the preface. Pawalis are not one of the tribes that were called at the time of the preparation of the *riwaj-i-am*. In our opinion the defendants have failed to establish that they are governed by custom. In the year 1867 one Imam Pawali of Bhera brought a suit (Ex. P/11) for partition of certain ancestral property. The case was decided in accordance with the provisions of Mahomedan law after an award to that effect had been obtained from the arbitrator. Ex. P/10 refers to a case that was decided in April 1890 and the parties to which were Pawalis of Bhera. The case was decided in accordance with the Mahomedan law after an award had been obtained from an arbitrator to that effect. Ex. P/9 is a copy of a judgment in the case in *Karam Din v. Mohammad* decided on 3rd June 1890 in accordance with the provisions of Mahomedan law. The parties to this litigation were also Pawalis of Bhera. The plaintiffs have also tendered some oral evidence. This oral evidence is as valueless as the evidence tendered by the defendants. In view of the conflicting nature of the documentary evidence, we hold that it has not been established that the parties are governed by custom. The case must therefore be decided in accordance with the provisions of Mahomedan law. For the reasons given above, we accept this appeal, set aside the judgment and the decree of the lower Court and decree the plaintiffs' claim. Having regard to all the circumstances, we leave the parties to bear their own costs throughout.

V.B.B./R.K. Appeal allowed.

A. I. R. 1938 Lahore 582

TEK CHAND J.

Samand Khan and others — Defendants
— Petitioners.

v.

Mohammad Ramzan Khan and others
— Plaintiffs — Respondents.

Civil Revn. No. 22 of 1938, Decided on 21st March 1938, from decree of Senior Sub-Judge, Jullundur, D/- 29th November 1937.

(a) Civil P. C. (1908), O. 23, R. 1—Reference to arbitration—Permission to plaintiff to withdraw suit to bring fresh one is illegal.

Where a suit has been referred to arbitration and no grounds mentioned in O. 23, R. 1 exist for withdrawing the suit to bring fresh suit, the Court has no jurisdiction to permit plaintiff to withdraw the suit to bring a fresh suit : *A I R 1938 All 56 ; A I R 1935 Pat 251 ; A I R 1928 Mad 1085 and 9 All 168, Rel. on.* [P 583 C 1, 2]

(b) Civil P. C. (1908), Sch. 2, Para. 12—Suit against joint owners for injunction referred to arbitration—Some of the owners being minors—Sanction of Court in respect of them not obtained — Award cannot be corrected by separating it as against minors.

Where a suit against joint owners of property for injunction is referred to arbitration and some of the joint owners are minors and no sanction of the Court is obtained in respect of them, the award is not separable and hence cannot be corrected by separating it in respect of minors and granting the injunction against major owners only. [P 583 C 2]

(c) Arbitration — Minor — Proceedings are voidable at his option unless leave of Court is expressly obtained.

Unless leave of the Court has been expressly obtained and recorded, the arbitration proceedings are voidable at the option of the minor : *95 P R 1912 and A I R 1919 Lah 314, Rel. on.*

[P 584 C 1]

Shamair Chand — for Petitioners.

Barkat Ali — for Respondents.

Order. — The plaintiffs-respondents instituted a suit for a declaration that a certain site, described in detail in the plaint, was owned by them and defendants 10 and 11 and that defendants 1 to 9 had no right in it. They also prayed for an injunction restraining defendants 1 to 9 from obstructing the plaintiffs from constructing a wall on a portion of the site marked A B on the plan and from discharging their water on the site in dispute. The suit was contested by defendants 1 to 9, of whom defendants 5 and 6 were minors under the guardianship of their brother, defendant 4. After the trial of the suit had proceeded for some time, an application was presented before the Subordinate Judge on 22nd July 1937, praying that the whole suit be re-

ferred to the arbitration of a local pleader. The application was signed, amongst others, by the mukhtar of defendant 4. In the application however it was not stated that two of the defendants were minors, nor was the sanction of the Court for making the reference to arbitration asked for or granted by the Court. Indeed it appears to have been overlooked at the time, that some of the defendants were minors. The learned Judge granted the application and referred the suit to arbitration.

On 30th August 1937 the arbitrator filed his award in the Court in favour of the plaintiffs. To this award, objections were filed by the major defendants and the two minor defendants separately. The former set of defendants alleged that the arbitrator was guilty of misconduct. They however failed to substantiate their contention. On behalf of the minors, it was contended that the award was bad as there was no proper reference on their behalf, sanction of the Court not having been asked for or granted as required by law. Counsel for the plaintiffs conceded that this was so and that there was no valid reference, or legal award against these defendants. The plaintiffs then put in an application that they be allowed to withdraw the suit against the minor defendants with liberty to bring a fresh suit against them. The application was opposed by the minor defendants but it was granted by the learned Subordinate Judge. He further held that the award against the major defendants was separable from that against the minor defendants, and he accordingly corrected the award under Para. 12 of Sch. 2 and granted the plaintiffs the decree prayed for against the major defendants.

The defendants have come in revision and the first contention raised on their behalf is that the learned Judge had no jurisdiction to allow the suit to be withdrawn against the minor defendants under O. 23, R. 1, Civil P. C., with permission to bring a fresh suit against them. I have no doubt that this contention is well founded and must succeed. R. 1 of O. 23 lays down that permission may be granted to the plaintiff to withdraw from a suit, or abandon part of his claim, with liberty to institute a fresh suit in respect of the subject-matter of the suit, or such part of a claim, where the Court is satisfied (a) that a suit must fail by reason of some

formal defect, or (b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim. In this case, it is conceded by the learned counsel for the plaintiffs-respondents that there was no formal defect, by reason of which the suit must have failed, nor has any other sufficient ground, ejusdem generis, been shown for allowing the plaintiffs to institute a fresh suit against the minor defendants. In these circumstances it is obvious that O. 23, R. 1 was inapplicable, and the order of the learned Judge allowing the suit to be withdrawn against the minor defendants with liberty to bring a fresh suit against them is illegal: see A I R 1938 All 56,¹ A I R 1935 Pat 251,² A I R 1928 Mad 1085³ and 9 All 168.⁴

This being so, the question arises whether the learned Judge could have "corrected" the award under Para. 12 of Sch. 2 and passed a decree in favour of the plaintiffs against the major defendants only. The answer to this question depends on whether the award of the arbitrator as against the major defendants was separable from that against the minor defendants. Looking at the award, as well as the claim of the plaintiffs, there can be no doubt that neither the claim nor the award were separable in the manner suggested. Defendants 1 to 9 are joint owners of the portion marked red in the plan, and in the plaint the relief was claimed jointly against them as such. In these circumstances, it is difficult to see how a perpetual injunction could have been granted against some of the joint owners only, in a suit to which the remaining owners were not parties. I hold that the award was not separable and could not have been "corrected" in the manner done by the learned Judge. Mr. Barkat Ali contended however that the original reference to arbitration cannot be held to be invalid so far as the minor defendants are concerned, as the mukhtar of their guardian ad litem, who had a common interest with them, had signed the petition for making the reference to arbitration. But the view of the law which

1. Pooran Chand v. Babu Ram, (1938) 25 A I R All 56=173 I C 895=I L R 1938 All 146=1937 A L J 1163.

2. Sukumar Gupta v. Chairman, District Board, Gaya, (1935) 22 A I R Pat 251=155 I C 210.

3. Nagamma v. Lakshminarasu, (1928) 15 A I R Mad 1085=112 I C 312.

4. Sheoambar v. Deo Dat, (1887) 9 All 168=1887 A W N 13.

has been uniformly taken since 1912 in the Chief Court and this Court is that unless leave of the Court has been expressly obtained and recorded, the arbitration proceedings are voidable at the option of the minor: see 95 P R 1912⁵ and 145 P R 1919.⁶ In this case the minors have exercised their option in avoiding the proceedings and the plaintiffs themselves have conceded that the minors could not be held to have joined in the reference and that the proceedings before the arbitrator and the arbitration were null and void against them.

On these findings I am constrained to hold that the award should have been set aside in its entirety and the decree of the learned Judge based on the "corrected" award against the major defendants cannot be sustained. I accept the petition for revision, set aside the decree of the Court below and direct that the suit be restored at its original number and tried by the Subordinate Judge in accordance with law from the stage at which it was when the reference to arbitration was made. Having regard to all the circumstances I leave the parties to bear their own costs of these proceedings. Both counsel have been directed to cause their respective clients to appear before the Senior Subordinate Judge, Jullundur, on 25th April 1938 when a date for further proceedings will be fixed.

D.S./R.K.

Petition accepted.

5. Ganesha v. Mul Chand, (1912) 95 P R 1912 = 15 I C 161 = 159 P W R 1912.

6. Mahomed Ibrahim v. Allah Bakhsh, (1919) 6 A I R Lah 314 = 52 I C 327 = 145 P R 1919.

A. I. R. 1938 Lahore 584

TEK CHAND J.

Naurata and others — Plaintiffs —
Appellants.

v.

Ran Singh and others — Defendants —
Respondents.

Second Appeal No. 15 of 1938, Decided on 24th March 1938, from decree of Dist. Judge, Ambala, D/- 2nd October 1937.

Custom (Punjab)—Succession—Claimant and deceased belonging to same got — Deceased leaving no heir — Claimant cannot succeed merely on claim of same got.

The mere circumstance that a person is of the same got as the deceased cannot give that person any right to succeed to deceased's property even though the deceased has left no issue or near relations: *A I R 1927 Lah 255 and 68 P R 1892, Rel. on.* [P 584 C 2]

Tek Chand — for Appellants.

Shamair Chand — for Respondents.

Judgment. — The land in dispute is situate in mauza Kambali, tehsil Kharar, District Ambala, and was owned by one Jiwna, a Sandhu Jat of the village. Jiwna died many years ago without wife, children or near agnatic relations. The land devolved on his sister Mt. Manglan who remained in possession till her death in May 1933. On her death the revenue authorities sanctioned mutation of the land in favour of defendants 1 to 12 who are collaterals of Mt. Manglan's husband. The four plaintiffs who are Jats of the Sandhu got and are proprietors in the village managed to take possession of the land. In November 1935 the plaintiffs brought a suit for a declaration that they were the owners in possession of the land in dispute alleging that they had succeeded to the land in dispute as heirs of Jiwna. They based their right of inheritance on three grounds: (1) that they were his collaterals; (2) that they belonged to the same got and (3) that they were the descendants of the founder of the village and as such had a right to succeed against defendants 1 to 12 who, it was alleged, were mere trespassers. The suit was contested by defendants 1 to 8 and 10 to 12 who denied all the allegations. The suit was dismissed by the Subordinate Judge and his decree has been affirmed on appeal by the learned District Judge. After hearing counsel at length and examining the record, I see no force in this appeal. The plaintiffs produced no evidence whatever to support their allegation that they were collaterals of the deceased Jiwna. The first ground on which they claimed to be the heirs therefore fails.

They no doubt are Sandhus and are of the same got as Jiwna but this circumstance cannot give them any right to succeed to his property even though he has left no issue or near relations: 100 I C 917¹ and 68 P R 1892.² The third ground was that the plaintiff as the descendants of the founder of the village had a right to succeed. Neither Court below has recorded a clear finding on this point and it was urged by the learned counsel for the appellants that the case should be remanded for the purpose. As the parties have led all available evidence on the point, I did not think it

1. Duni Chand v. Lekhu, (1927) 14 A I R Lah 255 = 100 I C 917.

2. Mahomed Rafi v. Khazan Singh, (1892) 68 P R 1892.

necessary to prolong the litigation by ordering a remand but allowed counsel to address me on the evidence on the record. For the appellants reliance is placed upon the kafi-yat dehi which shows that the village was founded by two persons, Gurbakhsh, a Sandhu Jat, and Massa, a Basanti Jat. It is claimed that the plaintiffs are the descendants of Gurbakhsh. There is however no proof on the record in support of this claim. Moreover the kafi-yat dehi shows that subsequent to the foundation of the village several other persons acquired land in this village. It is therefore clear that the original common bond was broken and there is no compact or homogeneous community in the village. On these facts the plaintiffs can have no possible claim to succeed to the property of Jiwna. They raised no objection to Mt. Manglan succeeding on Jiwna's death. The property must be regarded as Mt. Manglan's own acquisition and in the absence of her issues or other near relations of her own, her husband's heirs cannot be said to be mere trespassers. The plaintiffs' claim was therefore rightly disallowed. The appeal fails and is dismissed with costs.

B.D./R.K.

Appeal dismissed.

*** A. I. R. 1938 Lahore 585**

DALIP SINGH AND BLACKER JJ.

*Lahore Electric Supply Company Ltd.,
Lahore — Plaintiff — Appellant.*

v.

*Secretary of State and others — Defen-
dants — Respondents.*

First Appeal No. 332 of 1937, Decided on 22nd April 1938, from decree of Sub-Judge, First Class, Lahore, D/- 14th April 1937.

(a) Government of India Act (1935), S. 179
(2)—Original suit pending at commencement of Act of 1935—Appeal — Province cannot be impleaded as respondent.

An appeal is merely a continuation of the proceedings within the meaning of sub-s. (2) of S. 179. Hence, if the original suit was pending at the commencement of Act of 1935, the Province cannot be impleaded as a respondent in appeal and the only respondent is therefore the Secretary of State within the meaning of sub-s. (2) of S. 179.

[P 587 C 1,2]

(b) Specific Relief Act (1877), Ss. 54 and 57
—Grant by Government of license to supply electricity—Grant of license is not contract so as to give rise to perpetual injunction—Assuming it to be contract, grant of license does not imply any negative covenant on part of Gov-

ernment not to start similar work to supply electricity during currency of license—Start of work to supply electricity by Government therefore does not give ground for granting injunction in favour of licensee.

The deposit of Rs. 500 under R. 11 of the rules under the Electricity Act is not only not a consideration for the license but it is not even a fee for the license. It is merely a fee for the application. Similarly the sum which is deposited as security is to be refunded by Government and therefore that also is not a consideration. Therefore the grant of license to supply electricity is without consideration and cannot be held to be a contract. It is possible to go even further than this and to contend that the right to sell electric current is not property within the meaning of S. 54 and that therefore it is extremely doubtful whether an injunction can be granted at all under S. 54. Even assuming that this license is a contract or is a matter in respect of which an injunction could be granted, it is impossible to read in it any negative agreement that the Government in granting the license shall refrain from taking any particular action. The Government has the inherent power to generate and supply electricity under this Act if it so wishes. Hence there is no negative covenant either express or implied which can be read into the terms of the license so as to lay upon the Government an obligation to refrain from supplying energy within the area of the license.

[P 588 C 1, 2]

* (c) Government of India Act (1935), S. 150—Provision of electric supply is a purpose of India or part of India.

Possibly under the Act of 1919 it might have been held that the generation and supply of electric current was not one of the purposes of the Government of India within the meaning of S. 20 of that Act. But under S. 150 of the Act of 1935, a public utility service such as the provision of electric supply is a purpose of India or of a part of India : 28 Bom 314 and 38 Cal 754, held no longer good law.

[P 589 C 2 ; P 590 C 1]

Sir Tej Bahadur Sapru, Dewan Chaman Lal and S. M. Sikri — *for Appellant.*
Sleem, Advocate-General and Inder Dev Dua — *for Respondents.*

Blacker J.—This appeal is from the judgment of a Subordinate Judge of the First Class at Lahore, dismissing the suit of the plaintiff-appellant for a declaration and an injunction. The facts of the case are that on 25th November 1912 the Punjab Government by a Gazette Notification granted to the Peoples Bank of India Limited, Lahore, a license to supply electrical energy within the municipal limits of Lahore. This license was known as "The Lahore Municipal Electric License, 1912." It was granted to the Peoples Bank on 25th November 1912 but was assigned by it on 28th October 1913 with the permission of Government to the Lahore Electric Supply Company, the present appellant. This license provided inter

alia that the area in which it should operate would be the limits of the Lahore Municipality and it also laid down the prices which should be charged for the electrical energy supplied. It also laid down the term of the license as thirty years. It was amended in 1927 and was thereafter known as "the Lahore Electric License 1912 as amended 1927." The amendments of 1927 are not relevant to the case as although the area was extended, the whole of the municipal limits was still comprised in it. The Company worked this license and is still working it. It supplied energy generally to the public in Lahore but did not supply it to the Lahore Junction Station of the North Western Railway or to the Mughalpura Workshops of the same Railway. The electrical energy used there was generated by the North Western Railway itself in its own power station. On 5th January 1932 the Punjab Government issued a notification that the Punjab Government (Ministry of Local Self-Government) had applied for a license to supply electrical energy in a certain area which included area of the license of 1912. Objections were called for within three months and the plaintiff Company did put in objections on 9th February 1932.

In spite of these objections, on 20th July 1932 a notification was issued under R. 17 of the 1922 rules under the Electricity Act granting a license to the Punjab Government (Ministry of Local Self-Government) to be known as "The Punjab Districts Electric License 1932." License was granted to the Ministry to supply energy within an area which consisted of a number of civil districts including the District of Lahore. Negotiations had been going on between the plaintiff Company and the North Western Railway with regard to the supply of electrical energy to the Lahore Railway Station and the Mughalpura Workshops by the plaintiff Company which already supplied energy for the railway stations at Badami Bagh and Shahdara. But on 3rd October 1934 the Chief Engineer of the Public Works Department, Electricity Branch, intimated that the Punjab Government as licensees intended to supply energy to the North Western Railway under the license of 1932 and were not prepared to admit that the plaintiff Company had any ground for contesting the legality of the action taken. On 11th January 1935 the plaintiff Company sent a notice to the defendants and on 22nd February 1936

filed the present suit. In the plaint it was claimed amongst other things that it was a necessary implication of the license granted to the plaintiff that the licensor had covenanted that he shall not himself do anything by setting up a rival business to cause loss or injury to the plaintiff's business. It was pleaded that the Punjab Government (Ministry of Local Self-Government) was neither a separate Government nor was co-equal with the Punjab Government as a separate entity, nor was it as such a juristical person apart from the Local Government and that therefore the Ministry of Local Self-Government as such had no power to enter into a contract or to spend for the purposes of trade any amount out of the revenues of India.

It was further contended that the license of 1932 was wholly invalid in law, first because it was ultra vires of the licensor as the licensor and the licensee could not be identical; secondly as the licensee was not a juristical person and finally as it was not open to the Local Government or to any section of it to engage in any trade or business or to apply the revenues of India for any purpose other than the purposes of the Government of India alone. These pleadings were controverted by the defendants.

The findings of the learned Subordinate Judge were: (1) that the Ministry of Local Self-Government was not a person within the meaning of the Electricity Act; (2) that the license granted to the Ministry for Local Self-Government on 5th January 1932 was invalid; (3) that the Mandi Electricity Scheme, which was the scheme which was being worked under this license, was within the competence of Government as a public utility scheme; (4) that the license in favour of the plaintiff did not preclude another license in the same area and that the plaintiff had no monopoly, and (5) that the Government could do itself what it permitted others to do, that is to say, it could supply electrical energy without any license. The lower Court accordingly held that the supply to North Western Railway was not a setting up of rival business, and dismissed the entire suit with costs. In appeal before us Sir Tej Bahadur Sapru for the plaintiff-appellant argued two main points. The first was that assuming that the Punjab Government could carry on a business, it was not open to them to carry on the same business in the same area as was covered by the appel-

lant's license. The second was that under the Government of India Act of 1919, which was in force in 1932, it was not open to the Punjab Government to carry on any trade or business or to invest the public revenues in any other manner than that allowed by the statute. As a corollary to this, the counsel argued that even under the present Government of India Act, which came into force before judgment had actually been delivered by the lower Court, the position was the same.

Before dealing with these points raised by counsel for the appellant, it is necessary to deal with a preliminary question regarding the frame of the suit and of the appeal. The original suit was against the Secretary of State in Council and the Punjab Government (Ministry of Local Self-Government). It is not clear how, if, as pleaded by the plaintiff and found by the lower Court, defendant 2 was not a juristic person, any injunction could possibly be granted against it. Learned counsel was not able to give any satisfactory reply on this point, but it is not of any great importance now as the position has changed. Part 3 of the Government of India Act, 1935, came into force on 1st April 1937 whilst the suit in the lower Court was still pending and defendant 1, "the Secretary of State in Council," became under the provisions of S. 179 (2) of the Act "the Secretary of State." The Secretary of State was rightly impleaded as a respondent to this appeal but two other respondents were also impleaded, namely "the Government of the Punjab" and "the Province of the Punjab." The learned counsel for the appellant has admitted that respondent 2 was superfluous and his name is accordingly struck out of the appeal. With regard to respondent 3, "the Province of the Punjab," the learned counsel has relied upon S. 179 (1) of the Act which lays down that any proceedings which, if the Act had not been passed, might have been brought against the Secretary of State in Council, may, in the case of any liability arising before the commencement of Part 3 of the Act, be brought against a Province, or at the option of the person by whom the proceedings are brought, against the Secretary of State. It seems difficult to accept learned counsel's argument that this sub-section applies to the present case as the original suit was still pending at the commencement of the Act and the appeal was merely a continuation of the proceedings within the meaning of sub-s. (2) of the

same section. I am therefore of the opinion that the Province cannot be impleaded as a respondent in this appeal and that the only respondent is therefore the Secretary of State within the meaning of sub-s. (2), S. 179. The result of this is a curious one because if we had to grant the injunction we could have only granted it against the Secretary of State who is not now a person who has any concern with the subject-matter of the appeal and any injunction granted against him would have been superfluous and infructuous.

Coming now to the first point on which learned counsel relies, it was argued by him that under S. 57, Specific Relief Act an injunction could be granted to perform a negative agreement, express or implied, not to do a certain act, which was contained in a contract embodying an affirmative agreement with regard to which the Court was unable to compel specific performance. This statutory provision of the law is clear and learned counsel did not advance his case any further by the authorities which he has cited before us. None of those authorities went beyond the clear words of the statute. In each of them there was some contract and the Court was able to find either that there was or was not an express or implied negative covenant and granted or refused to grant an injunction accordingly. In fact in one of the cases cited by him, (1897) 75 L T 528,¹ it was remarked by Lindley L. J., that if you can extract from a contract of this kind a negative covenant which is sufficiently clear and definite to enable you to put your finger upon it, and state exactly what a man is not to do, that is as good as a covenant absolutely and clearly negative in terms. That appears to be the principle which must be applied in this case. Is it possible to lay one's finger upon the license and say definitely that there was something in it which the Punjab Government had agreed not to do? However before coming to this point it is desirable to see whether the license is a contract at all. It was argued for the appellant that it was not a bare license but a license with a grant. This may be so but even if it is a license with a grant, it still requires the support of a consideration to make it a contract. Three circumstances were argued on behalf of the

1. *Mutual Reserve Fund Life Association v. New York Life Insurance Co., and Harvey*, (1897) 75 L T 528.

appellant as constituting such consideration. One was the fee of Rs. 500 referred to in para. 3 of the plaint which was one of the paragraphs admitted to be correct in his replication by the defendant. The learned counsel for the Crown however said that in admitting this paragraph as correct, the defendant was not understanding it as an assertion that this Rs. 500 was a consideration for the contract. This appears to be correct as a reference to Rule 12 of the Rules under the Electricity Act would show. Under Rule 11, before an application is considered a sum of Rs. 500 has to be deposited in the treasury. Rule 11 (2) further lays down that this fee is liable to be retained by Government even though no license is granted. It is therefore not only not a consideration for the license but it is not even a fee for the license. It is merely a fee for the application. The second circumstance relied upon is the existence in the license of certain stipulations as to the prices to be charged for the energy supplied. These however cannot be regarded as a consideration and are merely terms of the license. Similarly the sum of Rs. 5000 which was deposited as security, is to be refunded by Government and therefore that also is not a consideration. Therefore this grant was without consideration and cannot be held to be a contract. It is possible to go even further than this and to contend that the right to sell electric current is not property within the meaning of S. 54, Specific Relief Act, and that therefore it is extremely doubtful whether an injunction could be granted at all under Section 54.

But to turn to the question of the existence of the negative covenant, even assuming that this license was a contract or was a matter in respect of which an injunction could be granted, it is impossible to read in it any negative agreement that the Government in granting the license shall refrain from taking any particular action. It is contended by counsel that the mere grant of the license by itself necessarily implies that during its currency the licensor would not do anything himself which might be destructive of the license or prejudicial to it. Not only is it very difficult to see any such stipulation in the license, but it is also clear on the facts that what the defendant has done, namely to start supplying energy himself, is in no way destructive of the appellant's rights under the license or

prejudicial to them. S. 3, sub-s. (2) (e), Electricity Act, makes it perfectly clear that this license is no monopoly in favour of the plaintiff-appellant. All that he is permitted to do is to generate and supply electricity at certain rates and there is no specific or implicit condition that he shall have an exclusive right to do so within the area named. Moreover there are several sections of the Electricity Act itself which show that the Act itself contemplates that the Government may itself, if it so wishes, generate and supply electricity. *Prima facie* it would appear more or less axiomatic that if a person can grant a license to another person to do a thing he has the inherent right to do that thing himself. But it is only necessary to refer to S. 5 (d) of the Act which gives the Provincial Government the option of purchasing an electrical undertaking, to S. 49 which clearly refers to energy supplied by works belonging to any Government in British India and to S. 30, Cl. (3) which in laying down certain restrictions upon persons other than licensees, with regard to the transmission or use of energy, lays down that the provisions of this section shall be binding on the Crown. It seems perfectly clear therefore then that the Government has the inherent power to generate and supply electricity under this Act if it so wishes. I am of opinion therefore that there is no negative covenant either express or implied which can be read into the terms of the license so as to lay upon the Government an obligation to refrain from supplying energy within the area of the license of 1912 as amended in 1927.

The second point raised by counsel has now to be considered, namely that the Punjab Government cannot carry on trade or business or invest the public revenues in any other manner than that allowed by the Government of India Act, 1919. In support of this argument reliance was placed on S. 20, Government of India Act of 1919 which runs as follows:

The revenues of India shall be received for and in the name of His Majesty, and shall, subject to the provisions of this Act, be applied for the purposes of the Government of India alone.

The words "Government of India" have been defined in 28 Bom 314² as meaning "the superintendence, direction or control of the country." This definition was ap-

2. *Shivabhanjan v. Secretary of State*, (1904) 28 Bom 314=6 Bom L R 65.

proved and followed in 38 Cal 754.³ It may be suggested with the very greatest deference that this definition does not carry the matter very much further. It is a case of defining one term by using three other terms which are themselves equally in need of definition. No doubt in view of that definition, the Judges in the two particular cases cited were able to hold that the matter before them did not come within the scope of "the superintendence, control and direction of the country" of India but that is not of much assistance in deciding whether the present matter does or does not so come. It is argued on behalf of the respondent that the provision of electricity by means of what is known as the Mandi Scheme is a public utility service and as such one of the legitimate activities of the Government of the country. This view certainly has a good deal of common sense in it and even if by a strict interpretation of the terms the generation and supply of electrical energy by Government in this country is considered to be a trade or business, so equally are the activities of the Post-Office, the Telegraph Office, the various State-owned railways, the Salt Department, the Irrigation Branch of the Public Works Department and many other activities which could be named. If the Mandi Scheme is ultra vires of Government, it would appear that all these other activities are equally ultra vires. An attempt was made on behalf of the appellant to distinguish some of these activities on the ground that with regard to them the Government had a monopoly and was not in competition with any private person. It is difficult to see, however, that the mere fact that a trader has a monopoly makes his trade any less a trade. It is true that in one of the cases cited before us, i. e. (1927) 1 Ch D 196,⁴ it was held by Lawrence J. that the Post-Office was not a trade as it was a business which in no sense could be said to be competing with any private individual. This decision was however appealed against and although the appeal was dismissed, there are words in the judgments of the appeal Judges, particularly in that of Warrington L. J., which tend to show that this argument of Lawrence J. was not relied upon. Warring-

3. *Srinibash Prosad Singh v. Kesho Prosad Singh*, (1911) 38 Cal 754=9 I O 862=18 C L J 965=15 C W N 475.

4. *Frampton v. Gillison*, (1927) 1 Ch D 196=95 L J Ch 555=70 S J 965=42 T L R 749=136 L T 600.

ton L. J. in particular decided the case against the plaintiff on the ground that although the business of a sub-postmaster might, as an abstract proposition, be said to be a trade, it was clearly not such a trade as was conceived by the parties when they entered into that particular covenant. This therefore is not a very clear authority for the attempt to distinguish a business activity of Government from a trade by saying that Government has a monopoly. In any case it is not clear how this could apply, for instance, to a case of a State-owned railway which under normal conditions certainly does compete with private individuals who carry passengers and goods by road from points connected by rail. To hold therefore that any such activity of Government is barred by the Government of India Act, 1919, would be to give to the statute what appears to be a very unreasonable meaning.

It could be contended that the statute was referring back to the statute of 1833 by which the East India Company was forbidden to engage in trade. The trade in which the East India Company used to engage was apparently a trade of which the profits were taken by private individuals who were the shareholders of the Company and did not go into the revenues of the State. But there is again an equal difficulty in taking this as the criterion, because if that were so, Government could legitimately engage in any trade or business such as the selling of grocery or haberdashery as long as the profits went back to the revenues of the country. This seems to be just as sweeping as the other aspect of the matter. A third possible solution of the question would be to hold that the primary intention of Government should be regarded. If Government's primary intention is purely to make money then it is a trade. If its intention is to supply a public need and merely to recoup its costs in doing so, then it would not be a trade. But this discussion is to a considerable extent academic in the present case as since the suit was instituted the constitutional law on the subject has become clearer. Possibly under the Act of 1919 it might have been held that the generation and supply of electric current was not one of the purposes of the Government of India within the meaning of S. 20 of that Act. But different language is now used in the Act. S. 150 of the Act of 1935 runs as follows :

No burden shall be imposed on the revenues of the Federation or the Provinces except for the purposes of India or some part of India.

I am of opinion that a public utility service such as the provision of electric supply is a purpose of India or of the Punjab which is a part of India. But if there is still any doubt upon the matter, further light is thrown by Ss. 154 and 155. S. 154 lays down that property vested in His Majesty for purposes of the Government of the Federation shall generally speaking be exempt from all taxes imposed by a Province, and S. 155 lays down that the Government of a Province shall not be liable to Federal taxation in respect of income accruing, arising or received in British India, provided that where a trade or business of any kind is carried on by the Government of a Province in any part of British India outside that Province, nothing in the section shall exempt that Province from any Federal taxation in respect of that trade or business. This proviso clearly shows that the Act contemplates that a Provincial Government may engage in trade or business. It is impossible to appreciate the argument of the learned counsel for the appellant that there is necessary implication that the Local Government shall only engage in trade or business outside its own border. It appears *a fortiori* that if it may invest its revenue in trade or business outside its own borders, it may certainly do so within its own borders. But the greatest significance of this section is that by expressly providing for the carrying on of the trade or business by the Government of India it makes it clear that the law laid down in 28 Bom 314² and 38 Cal 754³ is no longer valid.

In conclusion it is merely necessary to state one other point and that is that no damages have been proved by the appellant to have been incurred by him by the action of the respondent. To sum up therefore it appears in this case that the license of 1912 was not a contract, and that the action of the respondent with regard to it did not give any ground for a perpetual injunction under S. 54, Specific Relief Act. Even if it were a contract, it is impossible to find in it any negative covenant by the licensor that he would refrain from any act with regard to it. Secondly even if under the Act of 1919 the action of the Local Government in engaging in this business of the supply of electrical energy was *ultra vires*, it is not *ultra vires* under the Act of 1935 and there-

fore no declaration is possible and no injunction can be made restraining the Government from carrying on their business. The appeal therefore fails and is dismissed with costs.

It is however now necessary under S. 205, Government of India Act for this Court to record a finding whether the case involves a substantial question of law as to the interpretation of the Act and if the finding is in the affirmative, to grant a certificate and if the finding is in the negative, to withhold a certificate. The only question of law which is really involved in this case is whether under the Act of 1935 the Government is precluded from engaging in any undertaking of a commercial nature such as the generation and supply of electricity. The law on the point appears to be perfectly clear and I therefore do not consider that any substantial question of law is involved within the meaning of the section and I therefore do not consider it necessary to grant a certificate.

Dalip Singh J. — I agree.

D.S./R.K.

Appeal dismissed.

A. I. R. 1938 Lahore 590

ABDUL RASHID J.

Nanu Mal—Decree-holder — Appellant.
v.

Amar Nath — Surety — Respondent.

Exn. First Appeal No. 285 of 1937, Decided on 14th January 1938, from order of Sub-Judge, First Class, Karnal, D/- 28th June 1937.

(a) Limitation Act (1908), Arts. 181 and 182—Decree for possession—Execution stayed pending appeal on furnishing of security for mesne profits—Appeal dismissed—Execution against surety held governed by Art. 182 and not by Art. 181.

Although a decree is not passed against a surety, it may still be executed against him by reason of S. 145, Civil P. O., and the limitation for an application for execution of a decree against him is laid down by Art. 182, Limitation Act and the decree-holder cannot break away from that Article. [P 592 C 2]

Execution of a decree for possession of certain lands was stayed pending appeal on the judgment-debtor furnishing security for mesne profits till disposal of appeal. The surety executed a bond undertaking to pay mesne profits to a certain extent if the appeal was dismissed. On the dismissal of the appeal, the decree-holder sought execution against the surety to the extent mentioned in the bond :

Held that the application was one for the execution of an order of a Civil Court under S. 145,

Civil P. C., and was governed by Art. 182 and not by Art. 181, Limitation Act: *A I R 1922 Lah 208, Applied; A I R 1933 Oudh 209; A I R 1933 Lah 876 and A I R 1936 Mad 801, Disting.; A I R 1927 Lah 346, Ref.* [P 592 C 2]

(b) Execution—Order in execution—Record consigned to record room and attachment maintained—Effect is that application is dismissed and attachment is vacated.

Where in execution of a decree, Court ordered that "record be consigned to the record room and the attachment be maintained," the order howsoever worded means that the execution application is dismissed and that attachment has terminated. Such application cannot be revived: *A I R 1922 Lah 108 and A I R 1934 Lah 395, Rel. on.* [P 592 C 2]

Shamair Chand and Parkash Chand —
for Appellant.

Faqir Chand Mittal and Lala Achhru Ram — for Respondent.

Judgment. — On 28th January 1925, Nanu Mal obtained a decree for possession of certain lands and houses against Balak Ram High School and Gaushala, Panipat. The defendants preferred an appeal to the High Court, and asked for stay of execution of the decree. On 29th April 1925, Jai Lal J. passed the following order on their application:

Notice. In the meanwhile the execution to be stayed on the petitioner giving security to the satisfaction of the executing Court that he will restore the property in suit and refund the mesne profits to the respondent, if so ordered by the Court.

On 8th May 1925, Amar Nath executed a bond undertaking to pay mesne profits to the extent of Rs. 10,000 in case the defendants' appeal was dismissed by the High Court. This bond was accepted by the executing Court the same day. On 27th February 1930 the appeal preferred by the defendants was dismissed by the High Court. On 25th January 1933, Nanu Mal presented an application for execution stating that mesne profits to the extent of Rs. 10,000 should be realized from Amar Nath, the surety. Amar Nath raised a number of objections. These objections were considered by the executing Court and an order was passed on 11th August 1934, to the following effect:

Thus for the period in question the mesne profits would certainly be over Rs. 10,000 and the surety's counsel clearly admitted this in his arguments. I need not therefore discuss the other evidence on this issue. For all these reasons, I hold that the surety is liable on his bond whose limit is Rs. 10,000 and for the full amount of that limit. He will also pay the costs of this enquiry.

Amar Nath presented an appeal against this order which was dismissed by Agha

Haidar J. on 8th March 1935. On 4th February 1936, the application for execution presented by Nanu Mal on 25th January 1933 was consigned to the record room. The order of the executing Court was in the following terms:

The statement of the counsel for Nanu Mal is to the effect that attachment may be maintained but that the case may be consigned to the record room. As there is hope of a compromise I consign the record to the record room and maintain the attachment.

On 12th February 1936, another application was presented by Nanu Mal asking for execution to the extent of Rs. 10,000 against Amar Nath, the surety. The concluding words in this application were that "the previous application for execution had been consigned to the record room on 4th February while the attachment was maintained. The previous applications may be restored and execution may be proceeded with in accordance with law." The executing Court has held that this application is barred by limitation under Art. 181, Lim. Act. Against this decision Nanu Mal has preferred an appeal to this Court.

It is common ground between the parties that if Art. 181, Lim. Act applies to the present application, it is barred by limitation, and that the application is within time if Art. 182, Lim. Act is applicable. Art. 181 is a residuary Article and would apply only if the present application does not fall within the purview of Art. 182. It was contended by the learned counsel for the respondents that Art. 182 is applicable only to the execution of decrees or orders of any Civil Court which are passed antecedent to the presentation of the application for execution. It was urged that the decree of the High Court in favour of Nanu Mal was merely a decree for possession of land and houses. It did not contain a provision that the defendants would be liable for mesne profits. According to the learned counsel therefore there was no decree or order of a Civil Court of which the execution was sought by means of the applications dated 25th January 1933, and 12th February 1936. The contention of the learned counsel for the respondents was that execution of an order or decree does not stand on the same footing as the enforcement of an agreement, and that the executing Court was merely enforcing the agreement, whereby Amar Nath became a surety against him by demanding the sum of Rs. 10,000 from him. As there was no decree or order of a Civil Court against

Amar Nath for the payment of Rs. 10,000 prior to 25th January 1933, or 12th February 1936, the present application did not fall under Art. 182. In support of this contention, the learned counsel relied on A I R 1933 Oudh 209,¹ A I R 1933 Lah 876² and A I R 1936 Mad 801.³ In my opinion none of these rulings is applicable to the facts of the present case. In A I R 1933 Oudh 209,¹ Art. 181 was applied as the application for execution did not fall under any one of the seven clauses of Art. 182. A I R 1936 Mad 801³ deals specifically with rules framed by the Madras High Court under its rule-making power for the ascertainment of mesne profits. The question involved in A I R 1933 Lah 876² was whether any limitation at all was applicable to applications for ascertainment of mesne profits and it was observed that such applications would fall under Art. 181, Lim. Act. Art. 182 was not considered at all.

The surety is liable for the payment of Rs. 10,000 under the provisions of S. 145, Civil P. C., which lays down that where any person has become liable as surety for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or in any proceeding consequent thereon, the decree or order may be executed against him, to the extent to which he has rendered himself personally liable, in the manner herein provided for the execution of decrees, and such person shall, for the purposes of appeal, be deemed a party within the meaning of S. 47. The surety bond of Amar Nath to the extent of Rs. 10,000 was accepted by the executing Court on 8th May 1925. On that date the Court passed an order in the following words: "Zamanat-nama manzur hai." By virtue of S. 145, Civil P. C., this order can be executed against the surety even though the amount of mesne profits may have to be ascertained during the course of execution proceedings. As mentioned already, the executing Court passed an order on 11th August 1934 holding that mesne profits were more than Rs. 10,000 and that the surety was liable to pay

Rs. 10,000 to Nanu Mal. This order was affirmed on appeal by the High Court. This order is also antecedent to the presentation of the present application for execution. I am therefore of the opinion that the present application is one for the execution of an order of a Civil Court under S. 145, Civil P. C. Reference may be made in this connexion to A I R 1927 Lah 346⁴ where it was held that where execution of a decree for possession of immovable property is stayed on the judgment-debtor giving security for mesne profits accruing from the date of the decree up to the disposal of an appeal therefrom, the order means that such mesne profits would be realized in the execution proceedings and that no further proceedings by way of a separate suit would be necessary.

Clause 7 of Art. 182 applies in the present case and recourse cannot therefore be had to Art. 181 which is a residuary Article. It was held in A I R 1922 Lah 208⁵ that although a decree is not passed against a surety, it may still be executed against him by reason of S. 145, Civil P. C., and the limitation for an application for execution of a decree against him is laid down by Art. 182, Lim. Act and the decree-holder cannot break away from that Article. The facts of that case were not very similar to the facts of the present case, but the principle underlying that ruling is fully applicable. The learned counsel on both sides referred to a large number of other authorities but I consider it unnecessary to deal with them as they are clearly distinguishable. The learned counsel for the appellant also addressed lengthy arguments to the effect that the first application of Nanu Mal dated 25th January 1933 had not been dismissed but had merely been suspended, and that that application could be revived, as a request to that effect was made by means of the application dated 12th February 1936. I am not in agreement with the contentions of the learned counsel on this point. I hold that the application dated 25th January 1933 was dismissed by the executing Court on 4th February 1936, that the attachment terminated with the dismissal of the application and that it was not possible to revive this application. Reference may be made in this connexion to 3 Lah 7⁶ and

1. Shyam Lall v. Nasiruddin Beg, (1933) 20 A I R Oudh 209=143 I C 808=8 Luck 427=10 O W N 571.

2. Mt. Karam Bibi v. Mehr Ali Khan, (1933) 20 A I R Lah 876=144 I C 553.

3. Rama Rao v. Sreeramamurthi, (1936) 23 A I R Mad 801=164 I C 670=71 M L J 388.

4. Jawala Singh v. Sundar Singh, (1927) 14 A I R Lah 346=103 I C 328=28 P L R 178.

5. Wazir Bakhsh v. Hari Ram, (1922) 9 A I R Lah 208=60 I C 265.

6. Fateh Din-Allah Ditta v. Qutab Din, (1922) 9 A I R Lah 108=67 I C 543=3 Lah 7.

A I R 1934 Lah 395.⁷ It is unnecessary to deal with this point at any length as the present application must be held to be within limitation in view of the reasons given by me in the earlier part of this judgment. For the reasons given above I accept this appeal, set aside the order of the executing Court dated 28th June 1936 and direct the Court to proceed with the present execution application dated 12th February 1936 in accordance with law. Having regard to all the circumstances I order that the parties will bear their own costs throughout.

B.D./R.K.

Order accordingly.

7. Daim Shah v. Vir Bhan, (1934) 21 A I R Lah 395=150 I C 1053=36 P L R 241.

A. I. R. 1938 Lahore 593

ADDISON J.

Sheikh Rahim-ud-Din Shaikh Alla Dia
—Decree-holder—Petitioner.

v.

Murli Dhar and others — Judgment-debtors — Respondents.

Civil Revn. No. 129 of 1938, Decided on 14th April 1938, from order of Dist. Judge, Delhi, D/- 23rd October 1937.

Civil P. C. (1908), S. 145—Surety—Attachment—Notice to surety is essential—Notice can be given either by Court passing decree or by Court to which it is sent for execution.

There must be notice to the surety of some kind before his property can be attached in execution of the decree, attachment of the surety's property without notice being ultra vires. It is immaterial however whether such notice is given by the Court which passed the decree or the Court to which it is sent for execution: *A I R 1929 Lah 205 and 29 Bom 29, Rel. on.* [P 593 C 2]

Mohd. Amin — for Petitioner.

Qabul Chand Mittal — for Respondents.

Order. — Rahim-ud-Din obtained an ex parte decree against the judgment-debtors in the Small Cause Court, Delhi. One of the judgment-debtors, Maharaj Kishore, applied to have the ex parte decree set aside and his application was entertained on condition that security was forth coming for satisfaction of the decree in case his application should be unsuccessful. The ex parte decree was not set aside. The decree-holder realized part of this decree from his judgment-debtors and then applied to the Small Cause Court to transfer the decree to the Court of a Subordinate Judge, Fourth Class, for further execution. A transfer

certificate was granted by the Judge, Small Cause Court, the balance of the decretal amount outstanding being shown to be Rs. 344 and it was also made clear that the execution of the decree was transferred as against the three judgment-debtors and the surety Kidar Nath. After the transfer certain immovable property of the surety was attached. The surety at this stage appeared and objected that the Subordinate Judge, Fourth Class, had no power to execute the decree against him. The transferee Court held that the decree had not been fully satisfied and that the surety admitted that he was liable under the terms of his bond, but refused to execute the decree against him on the ground that it had no jurisdiction to do so. Against this decision this petition for revision has been preferred to this Court.

Under the terms of S. 145, Civil P. C., a surety is undoubtedly liable and the decree or order may be executed against him, provided that such notice as the Court thinks sufficient has been given to the surety. In the present case no notice was given to the surety as to why the decree should not be executed against him. His property was at once attached. It was held by me in *A I R 1929 Lah 205*¹ that there must be notice to the surety of some kind before his property can be attached in execution of the decree, attachment of the surety's property without notice being ultra vires. I also pointed out that it was optional for the executing Court to allow the decree to be executed against the surety or against the original judgment-debtors, this question depending upon various elements. In *A I R 1929 Lah 205*¹ the executing Court was also the original Court. It was held however by a Division Bench in *29 Bom 29*² that it was immaterial whether such notice was given by the Court which passed the decree or the Court to which it was sent for execution. I see no reason to differ from this decision.

In the result I accept this petition, set aside the order of the transferee executing Court and hold that the transferee Court has jurisdiction to execute the decree against the surety, but that it should in the first instance issue notice to him to show cause why this should not be done. I have directed the parties to appear before the

1. Muhammad Ewaz v. Nanah Mian, (1929) 16 A I R Lah 205=117 I C 226=30 P L R 131.
2. Lakshmi Shankar v. Reghu Mal, (1905) 29 Bom 29=6 Bom L R 657.

transferee executing Court on 16th May 1938. On that date the notice required by law can be handed to the surety and an adjournment allowed him to show cause. He may be able to induce, after receiving the notice, the judgment-debtors to pay the amount or he may be able to point out to the Court that the judgment-debtors have ample unencumbered property which can be easily got at. The question of his liability under the surety bond does not arise as he has admitted that he is liable. With these remarks the record will be sent back to the Subordinate Judge, Fourth Class, Delhi, who is executing the decree. The parties will bear their own costs here.

B.D./R.K.

Petition allowed.

* A. I. R. 1938 Lahore 594

YOUNG C. J. AND RAM LALL J.

*Akbar Badr Din and another
Convicts — Appellants.*

v.

Emperor.

Criminal Appeal No. 95 of 1938, Decided on 24th March 1938, from order of Addl. Sess. Judge, Lahore at Ferozepore, D/- 20th January 1938.

(a) Criminal Trial—Motive—Motive is to be judged by reasonable standards.

Motive for a crime has to be judged by reasonable standards, though what may appear insufficient for one may be a compelling spring of action for another. [P 597 C 2]

* (b) Criminal Trial — Confession — Magistrate taken by Sub-Inspector in charge of investigation of murder to witness the accused discover dead body — Magistrate instead taking charge of investigation and recording confession in instalments — Sub-Inspector merely looking on — Genuineness of confession is doubtful.

Where in a murder trial a Magistrate, who accompanied the Sub-Inspector in charge of the investigation to witness the accused discover the dead body, instead of doing what he was brought to do, took charge of the investigation and taking the accused away recorded the confession of the accused in instalments, while the Sub-Inspector looked on till the post mortem examination, when the latter proceeded to inquire and take a note of what the accused had stated to the Magistrate :

Held that the behaviour of the Sub-Inspector and the Magistrate was so abnormal that it cast a good deal of doubt on the genuineness of the confession. [P 599 C 1]

(c) Criminal Trial—Confession — Oral proof of confession that could be recorded is inadmissible.

Oral proof by a Magistrate of a confession which he could have recorded is inadmissible, for

when the Legislature has prescribed a particular mode of proof, no other method will suffice : *A I R 1936 P C 253, Foll.* [P 601 C 1]

(d) Criminal Trial—Confession—Whole confession unreliable — Discovery too is unreliable.

Where the confession as a whole is unreliable, the discovery which is but a part of that confession should also be held to be unreliable.

[P 602 C 2]

Ralli, Maurice, Manzur Qadir and Fazal Din — *for Appellants.*

Jhanda Singh for Advocate-General — *for the Crown.*

Ram Lall J.—Five persons, Akbar and his brother Mahbub, sons of Badr Din, Ilam Din and his brother Muhammad Din, sons of Bali, who is a tenant of Badr Din, and Hidayat, a servant of Badr Din, were tried by the learned Additional Sessions Judge of Ferozepore for the alleged murder of one Muhammad Said, a young lad of 15, the son of Muhammad Din, a Sub-Inspector of Police, posted at the time of the occurrence at Okara in the Montgomery District. The occurrence is stated to have taken place on 11th August 1937 at village Rukhanwala to which the accused persons belong and which is situated at a distance of about three miles from village Sattoke in the Ferozepore District which is the original home of Mohammad Din, Sub-Inspector, and where the deceased had come during his holidays from school. The learned Judge acquitted Mahbub, Mohammad Din and Hidayat, convicted Akbar and Ilam Din under S. 302 and sentenced each of them to death. They have appealed through Mr. D. C. Ralli and Sardar Sahib Jhanda Singh has appeared in support of the conviction. The prosecution case as put forward finally in the Court of the Additional Sessions Judge is very short and simple but so many peculiar incidents came to pass during the different stages of the evolution of this story that it is worthwhile setting out the main facts in some detail.

It is said that on 10th August in the afternoon the deceased borrowed a bicycle from Jamal Din, P. W. 11, promising to return it the next morning. The deceased went on this bicycle to village Charagh Din Wala to visit one Siraj Din, a relative of his, who was lying seriously ill and who died that very night. The way to Charagh Din Wala lay along a canal minor on which is situated village Rukhanwala where Badr Din, father of Akbar, appellant owns lands. The deceased boy is alleged to have

travelled part of the way with Inayat Khan, P. W. 16, who was also on a bicycle. At R. D. 76 where Badr Din has some lands under cultivation they were accosted, according to Inayat Khan, by Akbar and Ilam Din, appellants, and Roshan. They dismounted and on Akbar's inquiry Muhammad Said deceased informed him that he was going to visit Siraj Din and would return by the same route next morning as he had to return the bicycle at 9.30 A.M. to the owner thereof. It is stated by Inayat that the two actually made an appointment to meet the next morning at the same place and take some light refreshments (lassi). The next day Muhammad Said was seen by Chiragh Din (P. W. 17) at a place about 7 miles from Chiragh Din Wala on his way back home at about 8.45 A.M. Chiragh Din inquired from him about Siraj Din and was told that Siraj Din had died. This according to the prosecution witnesses was the last that was seen of Muhammad Said alive.

When the boy did not return to Sattoke, inquiries began to be instituted but without success. On 15th August the disappearance of the boy was reported to his father at Okara and he took a week's leave and came into Sattoke at 3 or 4 P.M. on the 18th and immediately sent a Rukka to the police station at Luliani within the jurisdiction of which village Sattoke is situated. The Sub-Inspector in charge of the thana arrived in Sattoke that very evening, put up with Muhammad Din in Sattoke and commenced investigation. This Sub-Inspector Pandit Radhka Narain (P. W. 22) remained in charge till 26th August when he handed it over to D. W. 1 Mumtaz Ahmad Khan. It is the evidence of Pandit Radhka Narain that the first clue about the murder was the statement of Hukam Din Lambardar, an uncle of the accused, on 20th August 1937 which has been proved as Ex. P. J. and has been treated as the first information report in the case. This document recites that while searching for the missing boy Hukam Din came to village Rukhanwala where he spent the night of the 19th. On the morning of the 20th he mentioned the disappearance to a person who is related both to Badr Din and to himself, whereupon this person offered to give information if Hukam Din took an oath that his name would not be disclosed at any stage. Under this seal of secrecy he told Hukam Din that Akbar, appellant,

wished to marry a girl to whom the deceased had been engaged and because of this motive, Akbar and Mahbub, Ilam Din and Mohammad Din and Hidayat had killed Muhammad Said, that the corpse would be recovered and that enquiry should be made from Akbar. On getting this information Hukam Din started towards the Abadi and came upon Dulla who was on his way to the railway station as the sun was rising and narrated to him what he had heard, but without giving him the name of the informant. The two then walked together towards Sattoke when they happened to meet Ilam Din, appellant, and his young brother Muhammad Din from whom they made enquiries and Ilam Din after a brief conversation confessed that he along with Akbar, Mahbub, Muhammad Din and Hidayat had murdered Muhammad Said on the morning of 11th August on the Ram Thamman canal minor at the instance of Akbar and had buried the corpse. Mohammad Din supported what Ilam Din said and also confessed that he had joined in the murder. At this stage Dulla went off to catch his train and Hukam Din came to village Sattoke and reported what he had heard to the Sub-Inspector. He says he did not bring Ilam Din or his brother with him so that the other suspects might not come to know of what they knew.

When the Sub-Inspector had recorded this information, he went to Rukhanwala and after making enquiries from Ilam Din arrested him. He was satisfied that Ilam Din would be prepared to recover before a Magistrate the corpse of Mohd. Said, but he made, so he says, no enquiry from the accused whether or not he would be prepared to repeat his confession before a Magistrate. Either this statement, however strange, must be true, or the Sub-Inspector made no enquiry at all from the accused himself for he went straight to Kasur and made an application, Ex. P. B., asking that a Magistrate be deputed to witness the discovery of the corpse of Mohd. Said which the accused Ilam Din had agreed to point out to him from the "adjoining sugarcane field of Akbar, son of Badar Din". On this application, Lala Pran Nath, Magistrate, First Class Kasur, came with the Sub-Inspector and reached the place where Ilam Din was detained on the canal minor near the sugarcane field in question at about 4 P. M. It is worthwhile considering what information was available to the investigating authorities at this stage

and what was the natural course of conduct that could be expected of them, in order to judge the action that they are proved to have taken. The first thing that is obvious is that though for 11 days no clue of any kind was available, suddenly on the morning of 20th the whole mystery was revealed, the motive disclosed, the identity of the culprits known, two confessed, and the whereabouts of the body discovered. The reaction of the lambardar to whom the confessions were made by Ilam Din and of Din Mohammad, are somewhat curious; and the action of the Sub-Inspector on this still more curious. In this connexion I would first consider the implications of the statement Ex. P. J.

If what is stated in P. J. be correct then an uncle of the deceased, who is himself a lambardar, suddenly stumbles on information which is of vital importance and within a few minutes of this happens to meet two of the culprits each of whom confesses to him and yet he takes no step to detain the confessing accused. The explanation offered is that he did not bring Ilam Din to Sattoke, a distance of not more than three miles, because he was afraid the other accused would come to hear of it, does not appear to me to be satisfactory. On the other hand to leave these two accused alone was most likely to apprise the others of what was happening. In the second place the sugarcane field in which the body was buried was very close to the place where the accused confessed and yet the lambardar did not take the trouble to have the field indicated to him. In the third place the person who gave the original information to Hukam Din, witness, has not been produced and his name was mentioned only when Hukam Din appeared as a witness in Court. In the fourth place, the information that the deceased had made an appointment to meet Akbar and others on the 11th morning must already have been known through Inayat and that the boy had been seen on the morning of the occurrence at 8.45 P. M. on his bicycle getting on to the bank of the Ram Thaman Rajhab, i. e. very near the place of murder, must have been known through Haji Charagh Din, P. W. 17, who himself belongs to Sattoke. In addition, the fact that Akbar, Mahbub and three others had been seen together at the alleged time and place of murder must have been known through Charagh Din, P. W. 18, and Nur Mohammad, P. W. 19, and yet no enquiry was

made from these persons till Hukam Din is told of the murder under a vow of secrecy. The deceased was the son of a Sub-Inspector of Police, and belonged to a family which on the record is shown to be influential in the neighbourhood; the field of enquiry had been restricted and yet no clue was found for nine days. This does lead to the inference that the evidence on the point of the clue is not above suspicion. In the fifth place, from the point of view of the accused, it is strange that immediately on being questioned Ilam Din and his brother should both have confessed to a village lambardar who is a near relative of the deceased, when they, in common with the whole countryside, must have known that no clue had been discovered up to date. The association of Dulla, P. W. 20, in this incident also appears to me to be suspicious and I shall deal with the credibility of this witness later when discussing the merits of the confession. It is sufficient at this stage to say that he was not examined by the police till 26th August and explains his absence by saying that he was away from his village for some days, but as I will show later, he can give no sensible explanation of his visit to Lahore and Kasur during this period. In the sixth place, the motive is stated to be the desire of Akbar to obtain the hand of Mt. Nazir Begum who was engaged to the deceased and that because of this Akbar forced the others to join him in this crime.

It appears to me from the foregoing discussion that if the story as put forward now be correct, then enquiries should have been made from Akbar and others much earlier, that if in fact no clue was known, Hukam Din was not a likely person to whom Ilam Din and his brother would confess immediately on being questioned, and that, if they did, one would expect Hukam Din to take both of them with him straight to the Sub-Inspector who was then at a distance of 3 miles only, and if necessary, Dullah and Hukam Din would have taken the confessing accused by force after getting from them the whereabouts of the corpse. Turning now to the reactions of the Sub-Inspector. He is told for the first time in an important case that two accused are confessing and mentioning the names of three others and also offering to show where the corpse had been buried. He arrests Ilam Din but does not arrest Mohd. Din who was produced before him with two others two days later. The impli-

cation is clear that either the statement of Hukam Din and Dullah is false that both accused were confessing, or the Sub-Inspector sadly neglected his elementary duty to arrest and question Mohammad Din, accused. In the second place any Sub-Inspector of experience would have got the accused to point out the corpse then and there in the presence of respectable persons, and would have made efforts to apprehend the other persons named by Ilam Din and at least to lock up their houses. Instead of this obvious course he goes to Kasur to get a Magistrate not according to his own statement to record a confession but to witness the accused discovering the dead body. He says:

Ilam Din never stated before me that he wanted to make a statement of confession before a Magistrate. . . . I never applied that the Magistrate should record the statement of accused Ilam Din. I did not know as to whether the accused wanted to or was prepared to make a statement of confession before a Magistrate.

The reason why the Sub-Inspector is making this statement appears to me to be obvious. If the accused was willing to make a statement to a Magistrate, he should straightway have taken him to a Magistrate but he did not do so. The conduct of the Sub-Inspector in this respect lends colour to the contention of learned counsel for the defence that the whereabouts of the body were already known and that is why the Sub-Inspector waited to get a Magistrate to witness the formal discovery rather than do this part of the investigation himself, and further that the accused was not in fact willing to confess and that this is the reason why he was not taken to record his confession, or Mohammad Din arrested and his confession recorded, or an attempt made to lock up the houses of the other suspects. If the story for the prosecution be true, the conduct of the Sub-Inspector appears to me to be highly incompetent and suspicious.

Before considering what further action was taken by the police and the Magistrate who was brought to the spot at 4 P. M. on the 20th, I think it will be convenient to examine the broad features of the confession as given in Ex. P. J. and in the statements of Hukam Din and Dulla, witnesses. The first feature is the motive. The point of note in this connexion is that all facts constituting the motive were already within the knowledge of the relatives of the deceased. With the knowledge that some at least of these relatives and

friends must have heard that Akbar had met the deceased on the 10th and had asked him to meet him again the next morning on his way home, no enquiry was made from Akbar. This shows that the motive was not strong enough to excite suspicion in the mind of the family of the deceased. The motive has a basis in an engagement that according to Mohammad Din, P. W., the father of the deceased, took place at least five years previous to the occurrence, but since then Akbar had married and had got a son: vide the statement of Karam Din, P. W. 8. In the circumstances it appears to me that any annoyance that Akbar might have felt at the betrothal of Mohammad Said must have worn off, and certainly would not be such as to impel him to murder an innocent boy. If the motive is weak qua Akbar, it hardly affects his young brother and the sons of his father's tenant or their servant. To my mind it is unthinkable that because of such a motive Akbar, who was apparently maintaining friendly relations with the deceased and whose father Badr-ud-Din according to the statement of the deceased's father actually visited him at Okara on the 18th should have compelled his young brother of 17 and the sons of his father's tenants to commit an offence of this character. Motive after all is a matter of guess work on the part of those who did not take part in the offence and what may appear insufficient to me, may be a compelling spring of action for another but it has to be judged by reasonable standards. Neither Akbar, judged by any such reasonable standard, would force the other four to join him, nor would the other four yield to this pressure. Not only does the motive appear to me to be wholly inadequate but in so far as it is put forward in the confessions as the only motive disclosed by Akbar the confessions appear to me on this point to be false.

The next main feature of these alleged confessions is the manner of executing the murder. As I have shown before according to the statement of Inayat, P. W. 16, Akbar, Ilam Din and Roshan knew that the deceased would be returning presumably alone on 11th August along the Ram Thaman minor and would pass near the fields of some of the accused. It seems to me to be unlikely in the highest degree that in order to murder a boy of 15 who was unsuspecting and unarmed and who was expected to be alone, Akbar should collect a band of five persons and by threats or

otherwise coerce these four, including two lads of 16 or 17 to join him in this enterprise. It would be more natural for him to have carried out this job alone and there is very little doubt that no more than one man was required either to murder or to dispose of the body. The more the people who are taken into confidence, particularly when they are unwilling and without a personal interest in the motive, the more dangerous does the plan become. This unnatural mode of executing a simple plan appears to me to cast considerable doubt on the whole story.

It has been seen that the Sub-Inspector in charge of the investigation went to fetch a Magistrate after leaving Ilam Din on the Ram Thaman minor near the field where the body was buried, without arresting Mohammad Din or attempting to arrest the others or lock up their houses. Mr. Pran Nath Bhalla, Magistrate, First Class, P. W. 13, accompanied the Sub-Inspector who also took the precaution of carrying back with him Dr. Mohammad Afiat Khan, P. W. 1, the Assistant Surgeon of Kasur. The party reached the Ram Thaman minor at 4 P. M. and met Ilam Din, accused, who was detained there. The Magistrate instead of doing what he had been brought to do, viz. to witness the accused discover the dead body, apparently takes charge of the investigation and takes Ilam Din with him in a lorry to a rest house about half a mile away and there proceeds to record his statement under S. 164, Criminal P. C. The procedure of the Magistrate appears to me to be most extraordinary. At Kasur no request was made to him to record a confession. The Sub-Inspector according to his own statement did not know, nor had even enquired from Ilam Din whether he would be prepared to make a confession and therefore the idea of recording a confession must have originated with the Magistrate himself. When the Magistrate first came into contact with Ilam Din, accused, he put no question to him from which it could appear to anyone that he wanted to record a confession. On this point the Sub-Inspector makes the following statement :

The Magistrate did not make any enquiries from the accused in my presence. So I cannot tell why he took him to the rest house. I did not request the Magistrate to take the accused to the rest house. I did not try to find out why the Magistrate was taking the accused away. My idea at the time was that the Magistrate was taking him away in order to inquire from him about the place which he wanted to indicate.

This last idea must clearly be wrong because in Ex. P/B itself, in which the Sub-Inspector asked for the services of a Magistrate, he himself stated that the "corpse was buried in an adjoining sugar-cane field of Akbar, son of Badr Din." The Magistrate himself does not specifically say how the idea of recording a confession under S. 164 presented itself to him. He merely states that he met the accused almost opposite the place where the body was eventually found and took him to the rest house, where he got his handcuffs removed and, as the accused was prepared to make a statement, he gave him half an hour to decide whether or not he would confess. He goes on to say that after the statement had been recorded, he dictated to the Sub-Inspector the substance of the statement made to him by the accused as the Sub-Inspector "wanted to know orally what the accused had said." The first remarkable thing that strikes me in this connexion therefore is that the Magistrate should have undertaken the burden of the investigation without even a request from the Sub-Inspector. The second equally remarkable thing that appears on the evidence is that the Sub-Inspector allowed himself to disappear in the background till the confession had been recorded, the body recovered, and he then tried to find out what the accused had said. The third and still more remarkable circumstance is the method of recording the confession. This was as follows : The Magistrate who says he "knew no fact of this case when he recorded the confessional statement of Ilam Din accused" meets him near the place where the body is buried and without attempting to get the accused to discover the corpse, separates him from the Sub-Inspector and takes him to the rest house in a motor lorry. At the rest house he gets his handcuffs removed and has a talk with him alone in a room and when he is satisfied at 4.15 P. M. that the accused is prepared to make a statement after the usual warning prescribed by law, he leaves him to ponder over the matter for half an hour and resumes his examination of the accused at 4.45 P. M. and subjects him to a number of questions again which he incorporates in his memorandum, Ex. P.C/1 and proceeds to record his statement at the rest house. This statement is Ex. P.C/2. Thereafter the accused is alleged to have said "accompany me and I will show you the place where we all buried the corpse of the

deceased." He then puts the accused with him in a lorry and goes with the Assistant Surgeon, Maula Bakhsh lambardar of Okara and dispenser of the Kasur Dispensary to the place where the accused pointed out the place where some clothes of the deceased were burnt and the body buried. This information is incorporated in a memorandum which is Ex. P.C/3. At the end of all this is appended the usual certificate that the confession is a true record of what was stated and that it was made voluntarily. This certificate is Ex. P.C/4 and this is then followed by Ex. P.C/5 which is a memorandum recording the discoveries of the corpse, ashes and a broken bicycle. At the end of this memorandum there is a note that the accused was ordered to be sent to the judicial lock-up and the confession sent to the Ilaka Magistrate. Apparently the Magistrate recorded this confession at different places and at different times and the record thereof is one document which comprises Ex. P.C to Ex. P.C/5, which last was written during the post mortem examination. Having done all this a recovery fard, Ex. P/D, is prepared and signed by the Magistrate himself.

It is noteworthy that the Sub-Inspector is absent throughout all these proceedings, and apparently arrived only during the post mortem examination to enquire and take a note of what the accused had stated to the Magistrate. It appears that the investigation had been conducted by the Magistrate from 4 P. M. onwards and the Sub-Inspector merely looked on. Whatever be the explanation, it shows to my mind that both the Sub-Inspector and the Magistrate had mistaken their true and appropriate functions. I am unable to believe the Sub-Inspector when he says that he did not know that the accused was prepared to confess to the Magistrate, nor can I bring myself to believe that the Magistrate without any suggestion from any person took the accused to a canal bungalow and recorded his confession in the manner in which he says he recorded it. It seems to me that both these officials are deliberately suppressing a good deal of information as to what they did that afternoon and why they did it. The behaviour of both has been so abnormal that it casts a good deal of doubt on the genuineness of such a confession recorded in instalments.

This confession, Ex. P.C/2, recites that one Fattu met the deceased on the 10th

and came to know that the boy would be returning the next morning along the canal bank, and then a plan to murder was made. To carry out this plan five persons assembled together and killed the boy with a spear and a kandhali blow, buried his dead body and his bicycle in the sugarcane field of Badr Din. The most remarkable feature of this confession is that the accused implicates five persons as the murderers, viz. Umar Din, Roshan, Fattu, Akbar and (himself) Ilam Din. The first three of these were not implicated in the confession which Ilam Din is alleged to have made that very morning to Hukam Din and which is incorporated in Ex. P/J, nor were the first three challaned by the police. It is obvious from this that either this confession, or the earlier confession, if not both, are false, and in the circumstances neither can be acted upon with any degree of safety. That these confessions are worthless is shown by another circumstance. The first confession of Ilam Din to Hukam Din and Dulla is, in my opinion, not admissible in evidence as being induced by the promise of a temporal advantage, for Dulla stated to the committing Magistrate that he and Hukam Din asked Ilam Din to disclose the true facts and "we would do nothing against them." This confession is not relied upon by the prosecution itself because no action was taken against Umar Din, Fattu and Roshan. Both these confessions therefore should be eliminated from consideration.

But two important matters in connexion with these confessions cannot be left without further comment. After the confession had been recorded, the Magistrate ordered that the accused should be sent to the judicial lock-up but this order was not complied with. Lala Pran Nath Magistrate's evidence makes it clear that a note to this effect was recorded (*vide* Ex. P.C/5) during the post mortem examination; at this time the Sub-Inspector Radhka Narain was present as he took down in his own hand the substance of the confession. The Magistrate says that the accused was left at the spot in the custody of the police with a written direction that he should be taken to the judicial lock-up at Kasur. It follows from this that the Sub-Inspector must have been given this direction. The Sub-Inspector on the other hand says that the Magistrate did not give me any written order that the accused Ilam Din was to be sent to the judicial lock-up nor do I remember that he had

given any oral order. The accused Ilam Din was not kept in a judicial lock-up.

This Sub-Inspector relinquished charge of the thana on 26th August 1937 and was succeeded by Mumtaz Ahmad Khan, D. W. 1. On 2nd September 1937 an application, Ex. D/G, was made to a Magistrate at Kasur complaining that the accused were all being kept in police custody and it was prayed that the police should be ordered to put the challan in Court. It is strange that the Sub-Inspector Radhka Narain should be ignorant of the order of the Magistrate ordering Ilam Din to be taken to the judicial lock-up. It is obvious that either the Sub-Inspector defied the order and is now telling a lie, or that he did not care to acquaint himself with an order which should necessarily have been made after a confession had been recorded. Again in this instance the Sub-Inspector appears to have acted either dishonestly or with gross negligence.

The suggestion of the defence is that the accused were all kept in the custody of the police in order to induce one or other of them to accept the King's pardon. There is good evidence on the record to show that attempts in this direction were being made. In the first place Sub-Inspector Mumtaz Ahmad who assumed charge of the investigation says as D. W. 1 that Ilam Din was taken to Lahore with the object of tendering a pardon to him but he expressed his unwillingness to obtain such a pardon. This happened on 4th September, two days after the application, Ex. D/G referred to above, and while Ilam Din, accused, was admittedly in police custody. Again Mr. Pran Nath Bhalla, P. W. 13, says that an accused other than Ilam Din was produced before him some days after he had recorded Ilam Din's confession, but that other accused refused to make a statement and apparently no record of the proceedings was prepared. This is a forcible indication to my mind, that a good deal of what was happening in the course of the investigation has been concealed from the Court, and it is impossible to regard this investigation therefore with confidence. Nothing material seems to have been done on 21st August, but on the 22nd Akbar, Mohammad Din, Mahbub and Ilam Din are stated to have made oral confessions to one Sardar Bahal Singh, a Zaildar and Honorary Magistrate, Second Class, of Kasur, who had joined the investigation and was in fact an attesting witness to

some of the recoveries alleged to have been made that day. Hidayat, accused, was still absconding. The statement of Sardar Sahib Bahal Singh deserves close examination because it appears to me to throw considerable light on the manner in which this investigation was conducted. This witness says that the Sub-Inspector had asked him to talk to the three accused Akbar, Mohammad Din and Mahbub, and he talked to each of them separately. First Akbar confessed to having given the spear blow, then Mahbub stated to him that he had dismantled the bicycle of the deceased and then Mohammad Din confessed to having helped in burying the body. Thereafter Akbar took a party to his village and produced a blood-stained spearhead in a leather scabbard from his father's haveli and two dangs from a manure-heap in the courtyard of the adjoining haveli. One of these dangs was a "kandhali" which was stained with blood and into the other the spearhead mentioned above could be screwed. This gentleman's statement to the police on 22nd August 1937 has been proved and exhibited as Ex. D/C. This is a short statement and is in the following words :

I have made enquiries from Akbar, Mohammad Din, Ilam Din and Mahbub, one by one. They have confessed their guilt before me. Akbar accused is prepared to give the lethal weapons and the iron kassis. I have satisfied myself in this behalf.

This witness was examined in the Court of the committing Magistrate but the record of the committing Magistrate shows that there is no mention in his statement of these confessions. I am not prepared to believe the explanation of the witness that the committing Magistrate did not record this portion of his statement as he probably considered that it was inadmissible and that is the reason why the witness himself did not object when the statement was read out to him. In the second place when it was pointed out to the witness in cross-examination that in his statement to the police he did not give the details of what the accused were alleged to have stated to him, and which he deposed to in Court, he said that the Sub-Inspector had omitted to record these details. The witness made no memorandum of what the accused told him and it is difficult to believe that the Sub-Inspector omitted to record the details if they were given to him. Not content with charging the Sub-Inspector with having omitted to write down his statement fully, he goes on to say that the Sub-Inspector

had wrongly recorded in Ex. D/C that Ilam Din also had confessed to him. The Privy Council has held in the recent case in 17 Lah 629¹ that oral proof by a Magistrate of a confession which he could have recorded is inadmissible, for, when the Legislature has prescribed a particular mode of proof, no other method will suffice. Apparently Sardar Sahib Bahal Singh is not authorized to record statements under S. 164, Criminal P. C., and therefore it could be urged that an oral confession to him could be deposed to. Whether this is sufficient to distinguish the Privy Council decision or not, it is not without suspicion that such a Magistrate was introduced into the case to get round the effect of this decision. On the merits of the statement itself, I am not prepared to believe Sardar Sahib Bahal Singh when he says that the Sub-Inspector added to or subtracted from his statement and three of the assessors found that Sardar Sahib Bahal Singh's evidence was false. I am myself inclined to agree with this opinion, and the Additional Sessions Judge disregarded the evidence of the witness on the point, as I shall do.

The next step in the investigation was the recoveries alleged to have been made by Akbar on the 22nd from his father's haveli. The evidence of the Sub-Inspector is that as soon as Akbar was produced before him on the 22nd he undertook to produce the weapons of assault. I have already commented at length on the failure of the Sub-Inspector to get hold of this accused among others for three days, and one is not left without a suspicion in these circumstances that the accused was not "produced before" the Sub-Inspector till he was ready to discover articles. The Sub-Inspector says the accused produced a spear-head, a gandali and a dang into which the spear-head could be screwed from the haveli of his father, from a straw heap and a manure heap respectively. The haveli is a cattle shed and the places of concealment would ordinarily be easily accessible to anyone. The explanation of the accused himself is that the weapons were really discovered by the Sub-Inspector in his presence and the recovery falsely charged to him. Whether this be so or not, it appears to me strange that this accused person should have preserved these ordinary articles in a blood stained condition for 11 or 12 days. The

most curious part of the affair is that Hakam Din, P. W. 21, says that he was told by Khan Bahadur (who himself has not appeared as a witness) that he heard the accused "deliberating together with the purpose of removing the dead body because the police were on the spot." If the accused were anxious to remove the dead body, they would have destroyed or at least washed the weapons of offence and not allowed them to stay in easily accessible places. In the circumstances I am not inclined to take the evidence of recoveries seriously against the appellants.

The evidence for the prosecution can be conveniently classed under six separate heads: (a) the motive; (b) the oral confessions of Ilam Din and Mohammad Din to Dulla and Hakam Din, P. Ws. 20 and 21; (c) the confession Exhibit P. C. of Ilam Din to Lala Pran Nath, Magistrate, recorded under S. 164, Criminal P. C.; (d) the recovery of the dead body at the instance of Ilam Din, which has been regarded by the Magistrate as an integral part of his recorded confession; (e) the oral confession of four accused persons to Sardar Sahib Bahal Singh on 22nd August; and (f) the recoveries of the weapons of offence at the instance of Akbar, appellant. I have already shown that the motive suggested could not possibly be regarded as adequate and inasmuch as it is put forward in the confessions, it must be untrue. This item of proof should therefore be disregarded altogether.

I have also shown that neither the oral nor the recorded confessions can be acted upon with any degree of safety and both must be ignored. The oral confession is inadmissible as having been induced by the persons to whom it is alleged to have been made, if it was made at all. The proof of the confession rests on the statements of Dulla and Hakam Din. Dulla could give no sensible explanation of his presence at the spot where the confession was made. He says that he was on his way to a railway station to catch a train for Lahore where he had a debt to collect. It is not clear why he should have left for the station so early. Dulla was not examined by the police for several days and his explanation is that he was not in his village. To the committing Magistrate he said that he returned to Kasur (from Lahore) the following day. He had also stated there that the purpose of his visit to Lahore was to obtain some certified copies and made an application for these after taking with

1. Nazir Ahmad v. Emperor, (1936) 23 A I R P C 253=1936 Cr O 752=163 I O 881=37 Cr L J 897=17 Lah 629=63 I A 872 (P C).

him the agent of a Kasur lawyer. At the trial he admitted that he had no case in which he required copies, though to the police he had stated that he had to attend at Lahore on a particular date in connexion with a case. It is obvious that when the witness could not substantiate the original story of having to go to Lahore for a case, he has now invented a new story. If the story be incorrect, his failure to appear before the police for several days becomes very damaging to his statement. I have already shown that the omission by the relations of the deceased and by the police to make enquiries from the accused persons, who must have been the objects of suspicion if the prosecution evidence is true is extremely suspicious. P. W. 19 Nur Mohammad makes this suspicion all the stronger when he says that his own suspicions were excited when he in company with Chiragh Din, P. W. 18, saw the accused sitting together on the minor and when the disappearance of the boy was known he went to village Sattoke and actually made the suggestion that inquiries should be made from the accused persons. If this statement of the witness be true, it is not intelligible why the statements of this witness and his companion were not recorded by the police till 21st August.

The oral confessions, I have already shown, are not believable for the reason that the story told therein is unnatural, both in its conception, its execution and still more in the time and manner in which the confessions were made, as also because of the person to whom they were made. The confessions are not believable for the further reason that neither the lambardar nor the Sub-Inspector acted in the manner in which a normal person would be expected to act in the circumstances. I am clearly of the opinion therefore that apart from the question of admissibility, the oral confessions cannot be relied upon and should therefore be ignored. Item 3 of proof is still less convincing from the point of view of the prosecution. The Magisterial confession is a strange document in itself, having been recorded in instalments at different places. It gives the names of a set of murderers three of whom are considered innocent by the prosecution and this fact alone condemns this document. I have shown that this document was recorded in circumstances which are clouded with suspicion and by a Magistrate in whose favour the Sub-Inspector had abdicated his func-

tions. I consider that the prosecution cannot derive any benefit from this item of proof which too should be discarded. With this also goes item 4, viz. the discovery of the body by Ilam Din. If the confession as a whole is unreliable, the discovery which is but a part of that confession should also be held to be unreliable. It may well be that the place where the body was found was already known and the recovery was fastened on to a person who was under suspicion, or it may be that the place of concealment was known to Ilam Din but, in the circumstances, this fact, even if established, is not enough to bring home a charge under S. 302 or S. 201, I. P. C. Item 5 of proof, viz. the alleged confessions to Sardar Sahib Bahal Singh, is in my view, perhaps the most unsatisfactory feature of this investigation. I have shown already that the statement of Sardar Sahib Bahal Singh cannot be believed and the Additional Sessions Judge has not relied upon it. The last item is the recovery of weapons and this too appears to me not to be above suspicion as shown before.

The net result is that there is not a single item of proof which is not tainted with suspicion. I am of the opinion that the conduct of those concerned with the investigation, particularly the two Magistrates and the Sub-Inspector, has been such that it would not be fair either to the police force or to the Magistracy as a whole to allow matters to rest here. In the interest of these services it appears to me that the attention of the Punjab Government should be called to their conduct with a recommendation that a further enquiry with a view to taking departmental action is called for. For the reasons that I have detailed above I would accept the appeal and order the release of both appellants.

Young C. J.—I concur and have nothing to add.

V.B.B./R.K. *Convictions set aside.*

A. I. R. 1938 Lahore 602

ABDUL RASHID J.

Daru Mal — Decree-holder —

Appellant.

v.

Todar — Judgment-debtor —

Respondent.

Execution Second Appeal No. 1376 of 1937, Decided on 24th January 1938, from order of District Judge, Karnal, D/- 14th July 1937.

(a) **Punjab Relief of Indebtedness Act (7 of 1934), S. 36**—Limitation for having adjustment certified expiring before Act coming into force—Executing Court can still give effect to such adjustment.

In the Punjab, sub-r. (3) of O. 21, R. 2, Civil P. C., has been repealed by S. 36, Punjab Relief of Indebtedness Act, and the effect of this repeal is that where a judgment-debtor pleads in execution of the decree a payment or adjustment in whole or in part out of Court, the executing Court must go into the question although the judgment-debtor has not taken advantage of the permission given to him by O. 21, R. 2 (2) to apply to the Court to issue a notice to the decree-holder for certification: *A I R 1938 Lah 126, Rel. on; A I R 1936 Lah 842, held Overruled.* [P 603 C 2]

Hence, even if the limitation for having the adjustment certified had already expired before coming into force of Relief of Indebtedness Act the Court can give effect to this adjustment.

(b) **Civil P. C. (1908), O. 21, R. 2—Compromise making over certain decrees owned by judgment-debtor to decree-holder — Balance agreed to be paid by instalments**—In default decree-holder to execute decree for each instalment as it fell due—Provision held did not amount to substitution of new decree for old one.

A compromise stated that four decrees amounting to certain sum which were the property of the judgment-debtor, had been made over to the decree-holder in partial adjustment of his claim. The balance was to be paid by means of three instalments and if the judgment-debtor failed to pay these instalments the decree-holder would be entitled to execute his decree for each instalment as it fell due:

Held that so far as the provision regarding three instalments was concerned it could not be said that it amounted to substitution of a new decree for the old decree. The compromise was therefore adjustment. In any case, under Cl. (2) of O. 20 R. 11, Civil P. C., even after the passing of the decree the Court could fix instalments with the consent of the decree-holder: *A I R 1931 Lah 608 and A I R 1934 Lah 679, Disting.*

[P 603 C 2; P 604 C 1]

Qabul Chand Mittal — *for Appellant.*

Faqir Chand Mittal — *for Respondent.*

Judgment.—There are only two points involved in this appeal. Firstly, whether S. 36, Punjab Relief of Indebtedness Act, is applicable to the present execution proceedings in view of the fact that the compromise between the parties embodying an adjustment took place on 24th January 1934, when the Punjab Relief of Indebtedness Act had not come into force. Mr. Qabul Chand for the appellant contended that as the Relief of Indebtedness Act came into force on 19th April 1935, and as the limitation for having the adjustment certified had already expired on 24th April 1934, the Court could not give effect to this adjustment. This contention is unsustain-

able in view of a Division Bench ruling of this Court reported in 40 P L R 14.¹ It was held in that case that, in the Punjab, sub-r. (3) of O. 21, R. 2 has been repealed by S. 36, Punjab Relief of Indebtedness Act and that the effect of this repeal is that where a judgment-debtor pleads in execution of the decree a payment or adjustment in whole or in part out of Court, the executing Court must go into the question although the judgment-debtor has not taken advantage of the permission given to him by O. 21, R. 2 (2) to apply to the Court to issue a notice to the decree-holder for certification. The learned District Judge relied on *A I R 1936 Lah 842*² which is a Single Bench ruling of this Court. This Single Bench ruling has been definitely dissented from by the Division Bench ruling referred to above. It was open to the judgment-debtor therefore to rely on the adjustment embodied in the compromise, dated 24th January 1934. The learned District Judge, after going into the evidence, has given a finding to the effect that the compromise as it stands was agreed to between the parties. This finding of fact cannot be interfered with in second appeal.

The second point urged by the learned counsel for the appellant was that a compromise can be held to be an adjustment only when all the terms thereof have been fulfilled by the judgment-debtor, and that a compromise which substitutes one decree for another, cannot be given effect to. Reference was made in this connexion to *A I R 1931 Lah 608*³ and *A I R 1934 Lah 679*.⁴ In my opinion the facts of the reported cases were very different from the facts of the present case. In the present case, the compromise stated that four decrees amounting to Rs. 1700, which were the property of the judgment-debtor, had been made over to the decree-holder in partial adjustment of his claim. The balance of Rs. 380 would be paid by means of three instalments and that if the judgment-debtor fails to pay these instalments the decree-holder would be entitled to execute his decree for each instalment as it falls due. So far as the sum of Rs. 1700

1. *Murlidhar v. Firm Besheshar Lal Moti Lal*, (1938) 25 A I R Lah 126=40 P L R 14.

2. *Shadi v. Ram Ditta*, (1936) 23 A I R Lah 842=165 I C 358=39 P L R 6.

3. *Bakshi Ram v. Des Raj*, (1931) 18 A I R Lah 608=132 I C 670=32 P L R 365.

4. *Hukam Chand v. Sadaq*, (1934) 21 A I R Lah 679=148 I C 446.

is concerned, it must be taken to have been paid to the decree-holder at the time of the compromise on 24th January 1934. So far as the provision regarding three instalments is concerned, it cannot be said that it amounts to substitution of a new decree for the old decree. In any case, under Cl. (2) of O. 20, R. 11 of the Civil Procedure Code even after the passing of the decree the Court can fix instalments with the consent of the decree-holder. In the present case the compromise was signed by the decree-holder. He therefore agreed to the payment of Rs. 380 to him by means of three instalments. For the reasons given above, I am of the opinion that there is no force in either of the contentions raised by the learned counsel for the appellant. I therefore dismiss this appeal with costs.

D.S./R.K.

Appeal dismissed.

A. I. R. 1938 Lahore 604

ADDISON AND DIN MOHAMMAD JJ.

Sardar Singh — Plaintiff — Appellant.
v.

Messrs. Nawal Kishore Kharaiti Lal of Cheera Khana, Delhi and others — Defendants — Respondents.

Letters Patent Appeal No. 8 of 1938, Decided on 9th March 1938, from decree of Bhide J. in S. A. No. 644 of 1937, D/- 25th November 1937.

Civil P. C. (1908), Sch. 2, Paras. 20, 15 (c) — Grounds for invalidity in Para. 15 (c) do not cover matters of procedure and not raised before arbitrator — Application under Sch. 2, Para. 20 — Objection that applicant was partner of opposite party and so could not claim specific amount—Point decided against opposite party by trial Court but no decision of High Court obtained on that point — No such objection raised before arbitrator — Separate suit for dissolution of partnership against applicant by opposite party—Award held could not be challenged in suit — Decision on question whether parties were partners did not operate as *res judicata*.

The grounds of invalidity of an award contemplated in Para. 15 (c) refer to those matters which apparently go to the root of the award and matters which merely pertain to procedure and have not been agitated before the arbitrator are not covered by it. [P 605 C 2]

In proceedings on an application under Sch. 2, Para. 20 an objection was raised on the ground that the party applying was a partner of the opposite party and consequently could not make a demand for a specific sum of money. No such objection was raised before the arbitrator. The opposite party did not persist in obtaining a decision on this point from the High Court, after it

had been decided against him by the trial Court. The opposite party brought a separate suit for dissolution of partnership and rendition of accounts against the applicant. The defence was that the decision on the question whether the opposite party was a partner of the applicant operated as *res judicata* :

Held that it was open to the opposite party to agree to the reference, although it was being sought by a partner, and to have the mutual adjustment of account made in a separate proceeding. Not having raised any objection before the arbitrator on the score of partnership to the claim put forward by the applicant, he could not afterwards challenge the award on the ground that it had been obtained by one partner against another for a specific sum. [P 605 C 2]

Held also that the objection in Sch. 2, Para. 20, Civil P. C. proceeding was not covered by Sch. 2, Para. 15 (c) and so the mere fact that opposite party did not persist in its objection did not debar it from contesting the question in the suit for dissolution of partnership. There the question was directly and substantially in issue and on it hinged the decision of the whole case. [P 605 C 2; P 606 C 1]

Mehr Chand Mahajan and Shamshair Bahadur — *for Appellant.*

Bagwat Dayal and J. N. Aggarwal — *for Respondents (Defendants 1 and 4 respectively).*

Din Mohammad J.—This Letters Patent Appeal has arisen in the following circumstances : On 28th March 1933, the firm Nawal Kishore Kharaiti Lal through one Babu Mal on the one side and Sardar Singh and Mithu Mal, proprietors of the firm Mithu Mal Company on the other, made a reference to arbitration without the intervention of a Court on which an award was made by the sole arbitrator, Hazari Mal, on 4th April 1933. It may be remarked that Mithu Mal after whom the second firm is called is the same Mithu Mal who is a son of Kharaiti Lal. Later, an application was made under Para. 20, Sch. 2, Civil P. C., that the award be filed in Court. This application was resisted by Sardar Singh on various grounds. He contended *inter alia* that first Babu Mal, who had signed the reference, on behalf of the firm Nawal Kishore Kharaiti Lal, was not a person authorized to make the reference and consequently the reference was illegal and secondly, that no specific sum could be claimed from him or the firm which he represented inasmuch as the firm Nawal Kishore Kharaiti Lal as such was a partner of the firm Mithu Mal Company and the sum demanded if recoverable at all could only be claimed in the partnership account. The trial Court, while holding that the partner of the firm Mithu Mal Company was Mithu Mal in his individual capacity

and not the firm Nawal Kishore Kharaiti Lal, dismissed the application on the ground that Babu Mal was not a person authorized to make the reference in question. From that order an appeal was preferred to this Court which came on for hearing before Abdul Rashid J. He did not agree with the Court below on the point decided against the firm Nawal Kishore Kharaiti Lal and allowed the appeal. He however pronounced no decision on the other point referred to above as it was not agitated before him by the respondents' counsel. Against his order a Letters Patent Appeal was presented but it was dismissed in limine.

In the meantime, on 22nd May 1934, Sardar Singh had lodged a suit for the dissolution of partnership and rendition of accounts against the firm Nawal Kishore Kharaiti Lal along with Kharaiti Lal, Babu Mal and Mithu Mal in their own names. In that suit the defendants contended that the question whether the firm Nawal Kishore Kharaiti Lal was a partner of the firm Mithu Mal Company could not be tried inasmuch as it could have been raised before the arbitrator in the first instance and could also have been taken in objections when an application was made for filing the award. The Subordinate Judge, First Class, upheld the bar of res judicata on both the grounds stated above. On appeal the District Judge maintained the decision of the Court below solely on the ground that the question at issue had been raised in the course of objections to the award and decided against Sardar Singh. A further appeal was preferred to this Court against the order of the District Judge which was disposed of by Bhide J. He came to the conclusion that although S. 11, Civil P. C., did not apply in terms, the general principles of res judicata were applicable and that inasmuch as Sardar Singh did not succeed in his plea to the same effect before the Court ordering the award to be filed, he could not be allowed to re-open the matter in the regular suit. Hence this Letters Patent Appeal.

Counsel for the appellant has criticized the judgment of Bhide J. on three grounds: (1) that the question whether the firm Nawal Kishore Kharaiti Lal was a partner of the firm Mithu Mal Company was not relevant to the arbitration proceedings or to the proceedings under Para. 20, Sch. 2; (2) that both the parties to the reference hav-

ing joined in making the reference the award made thereon could not be declared to be invalid even if the firm making the application was a partner of the opposite party and that consequently an objection on that score was not covered by Para. 21 read with Para. 15 (c), Sch. 2, Civil P. C., and (3) that in any circumstances the Explanation to S. 11, Civil P. C., which was technical in its character could not be invoked in this case even if it were possible to hold that the general principles of res judicata applied. The crucial point in this case is whether the words "otherwise invalid" as contained in Para. 15 (c) can be so interpreted as to include an objection raised on the ground that the party applying under Para. 20 was a partner of the opposite party and consequently could not make a demand for a specific sum of money. If it is once found that the objection set forth above is not contemplated by Para. 15 (c), the question of res judicata loses its importance.

Could a decree obtained in a regular suit in similar circumstances be declared to be a nullity or avoided otherwise in appeal? The answer is clearly in the negative. First, it is not all suits for specific sums of money between the partners that are barred: see Lindley on Partnership (Edn. 10), page 652, and Singhal's Law of Partnership in British India, page 363. Secondly, even if a suit for a specific sum of money by one partner against another is not competent, it is open to the partner who is being sued to waive this objection and to allow the decree to be passed. Once having done so, he cannot afterwards challenge the decree on the ground of the incompetency of the suit. Similarly, it was open to Sardar Singh to agree to the reference, although it was being sought by a partner, and to have the mutual adjustment of account made in a separate proceeding. Not having raised any objection before the arbitrator on the score of partnership to the claim put forward by the firm Nawal Kishore Kharaiti Lal, he could not afterwards challenge the award on the ground that it had been obtained by one partner against another for a specific sum. The grounds of invalidity of an award contemplated in Para. 15 (c) in our view refer to those matters which apparently go to the root of the award and matters which merely pertain to procedure and have not been agitated before the arbitrator are not covered by it. If therefore Sardar Singh did not persist in obtaining a decision on

this point from this Court on appeal, even after it had once been decided against him by the trial Court, he is not debarred from contesting the matter in the present suit. Here the question is directly and substantially in issue and on it hinges the decision of the whole case. The decision on a matter which could not or should not have been raised before does not operate as res judicata in a subsequent suit.

In face of this finding it is not necessary to decide whether the proceedings under Para. 20 could be called a 'former suit' within the meaning of Expln. 1 to S. 11, Civil P. C. Holding therefore that the question at issue can be raised in this suit we allow the appeal, set aside the judgment of the learned single Judge of this Court and remand the case to the trial Court for disposal in accordance with law. In the peculiar circumstances of the case there will be no order as to costs before us.

V.B.B./R.K.

*Appeal allowed.***A. I. R. 1938 Lahore 606**

ADDISON AND DIN MOHAMMAD JJ.

Sardar Zorawar Singh and others —
Plaintiffs — Appellants.
v.

Jasbir Singh and others — Defendants
— Respondents.

First Appeal No. 256 of 1937, Decided on 28th April 1938, from decree of Sub-Judge, First Class, Rawalpindi, D/- 9th March 1937.

(a) Punjab Pre-emption Act (1 of 1913), Sec. 22 (5) (b)—Time once fixed cannot be extended.

The Legislature must be intended to mean what it has plainly expressed, and consequently there is no room for construction. It matters not in such a case what the consequences may be. Where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the Legislature, it must be enforced, even though it be absurd or mischievous. The underlying principle is that the meaning and intention of a statute must be collected from the plain and unambiguous expression used therein rather than from any notions which may be entertained by the Court as to what is just or expedient. Had the Legislature intended to empower the Court to extend time under sub-s. (5) (b) it would have conferred this power in explicit terms. Hence the Court has no power to extend the time once fixed by it under sub-s. (5) (b) of S. 22 : (1909) 78 P R 1909 and 18 I C 458, Ref. [P 607 C 2]

(b) Pre-emption—Equities are not involved—Subordinate Court exercising its powers in legitimate manner — Court of appeal would ordinarily not interfere.

In a case of pre-emption, where artificial rights brought into existence by the Legislature are used to defeat the legal rights of persons dealing with property, no equities are involved and if a subordinate Court exercises its legitimate powers in legitimate manner, a Court of Appeal would be loath to interfere unless any strong or cogent reasons exist justifying interference. [P 608 C 1]

Mehar Chand Mahajan and R. L. Chawla
— *for Appellants.*

Badri Das, Harnam Singh, Shamair Chand, Sain Das Bhagat and Dev Raj Sawhney — *for Respondents.*

Din Mohammad J.—The only question involved in this appeal is whether the order of the Court below dismissing the plaintiffs-appellants' suit for pre-emption for non-compliance with an order made under S. 22 (5) (b) is legally maintainable. The facts are these. Rai Bahadur Buta Singh died on 5th September 1920. He was succeeded by his four sons, Harnam Singh, Jaidev Singh, Atma Singh and Hardial Singh. Of these Harnam Singh died on 28th November 1923, leaving him surviving a son, Jasbir Singh. On 1st June 1929, the property belonging to Jasbir Singh and his three uncles mentioned above was placed under the superintendence of the Court of Wards. The Court of Wards by three different transactions, one of which was completed on 18th September 1933, and the other two on 18th May 1934, transferred a considerable area of land to Sardarni Karam Devi, widow of Rai Bahadur Buta Singh, for Rs. 1,37,000 in all. Thereupon the four sons of Jaidev Singh instituted a suit for pre-emption on the ground of relationship with the wards on whose behalf the Court of Wards had effected the transfers. Prior to the institution of the suit the land in question appears to have been transferred to more than 200 persons, all of whom were impleaded as defendants in the case.

Under Sec. 22 (1) the plaintiffs were required to give security for the payment of the entire sum stated above and they produced one Ram Chand Chadha as a surety on their behalf and his security bond was accepted by the Court. On 19th June 1936, Sardarni Karam Devi, who had been impleaded as a defendant in the case, made an application under S. 22 (5) (b) pointing out to the Court that the security furnished had become insufficient inasmuch as Ram Chand had gone on the verge of insolvency and praying that the plaintiffs should be called upon to furnish fresh security. It was further prayed that in view

of the circumstances of the case and the "doubtful value" of the security bonds, an order should be made requiring the plaintiffs to deposit in Court a sum equal to one-fifth of the value of the property in suit. The plaintiffs put in their reply on 13th July traversing the allegations made by Sardarni Karam Devi. They however expressed their willingness to furnish fresh security if so required, at the same time resisting the prayer for cash deposit. The case dragged on for some time and eventually on 11th February 1937 the Court made an order that fresh security should be given on 18th February. On 14th February the plaintiffs made an application asking the Court to extend the period for furnishing security. This application came for hearing on 18th February when it was resisted by Sardarni Karam Devi and Sardarni Sant Kaur who was a rival pre-emptor. The Court after hearing arguments on the question refused to extend the time prayed for and dismissed the suit for non-compliance with its order under S. 22 (5) (b). Hence this appeal by the plaintiffs.

Counsel for the appellants has contended that the Court below was authorized in law to extend the time and that its decision that it was not so authorized is contrary to law. He has relied in this connexion upon 78 P R 1909¹ and 75 P R 1913,² but in our view these judgments are of no use to him in this matter, inasmuch as whatever the interpretation that could be put on the old provisions of law, here the question is how to interpret the amended law which came into existence in 1913, presumably on account of the two judgments referred to above. It may be remarked that prior to the enactment of the Pre-emption Act, 1 of 1913, which is now in force, Act 2 of 1905 laid down the law relating to pre-emption in the Punjab. Under S. 19 of that Act the Court was empowered to require the plaintiff to furnish security or to make a cash deposit within such time as was fixed by it. Subsequent to the enactment of that statute, a question arose as to whether the Court was empowered to extend the time so fixed, if the plaintiff had not been able to comply with the order of the Court within the

fixed time. In 78 P R 1909,¹ a Division Bench of the Punjab Chief Court composed of Johnstone and Rattigan JJ. held that it could under certain circumstances. A similar rule was laid down in 75 P R 1913² in a suit which had obviously been instituted prior to 1913. In 1913 the law as to the making of deposits and filing of securities was amended along with the general amendment of the statute and Sec. 22, Pre-emption Act then replaced S. 19. In sub.s. (4) of S. 22, a clear authority was conferred upon the Court by the insertion of the words "or within such further time as the Court may allow." In the course of that amendment, a fresh provision of law was added in the shape of sub.s. (5) (b) providing for those cases where the security furnished had become void or insufficient. In that case the words used were "within a time to be fixed by the Court" and the other words referred to above, viz. "or within such further time as the Court may allow" which had been deliberately inserted in sub.s. (4) on account of the two judgments referred to above, were not repeated. The conclusion is obvious that the intention of the Legislature was not to confer the power of extending time in the latter case as it was in the former and that consequently no Court can arrogate to itself the power which does not vest in it by virtue of any clear provision of law. It is a well recognized canon of interpretation that :

The Legislature must be intended to mean what it has plainly expressed, and consequently there is no room for construction. It matters not in such a case what the consequences may be. Where by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the Legislature, it must be enforced, even though it be absurd or mischievous. The underlying principle is that the meaning and intention of a statute must be collected from the plain and unambiguous expressions used therein rather than from any notions which may be entertained by the Court as to what is just or expedient. (Maxwell on the Interpretation of Statutes, pp. 3 and 4.)

Had the Legislature intended to empower the Court to extend time under sub.s. (5) (b) it would have conferred this power in explicit terms as it had done in sub.s. (4). The omission cannot be due to inadvertence as the Legislature was alive to the importance of the question. We have no hesitation in holding therefore that the Court below had no power to extend the time once fixed by it under sub.s. (5) (b) of S. 22. The only question that now falls for determination is whether the time fixed by the

1. Narsingh Dass v. Ghulam Nabi, (1909) 78 P R 1909=3 I C 605=129 P W R 1909=144 P L R 1909.

2. Chanda Singh v. Ismailji, (1913) 75 P R 1913=18 I C 458=46 P W R 1913=95 P L R 1913.

Court for filing the security was so unreasonably inadequate as to justify our interference on that ground. We have already stated above that the insufficiency of the security furnished by the plaintiffs was brought to their notice through Court as far back as June 1936 and although the plaintiffs repudiated the allegation of insufficiency made against Ram Chand, they knew, or with little diligence could have known, full well as to what his financial position was and they had at least eight months within which to prepare themselves for the contingency that was sure to arise. They cannot therefore complain that they were taken by surprise or that the Court was unduly harsh in allowing them only one week within which to furnish a fresh security. In a case of pre-emption, where artificial rights brought into existence by the Legislature are used to defeat the legal rights of persons dealing with property, no equities are involved and if a Subordinate Court exercises its legitimate powers in a legitimate manner, a Court of Appeal would be loath to interfere unless any strong or cogent reasons exist justifying interference and it is obvious that there are no such reasons in this case. We accordingly maintain the order of the Court below and dismiss this appeal with costs.

D.S./R.K.

Appeal dismissed.

A. I. R. 1938 Lahore 608

ADDISON AND DIN MOHAMMAD JJ.

*Firm Gurparshad Dewat Ram —**Decree-holder — Appellant.*

v.

*Kishen Chand and another —**Judgment-debtors — Respondents.*

Exn. Second Appeal No. 25 of 1938, Decided on 2nd March 1938, from order of Senior Sub-Judge, Rohtak, D/. 2nd October 1937.

Execution—Attachment—Exemption—Judgment-debtor agriculturist—Property exempted coming to legal representatives of judgment-debtor after his death — Property retains its immunity from attachment.

Property which is exempted from attachment because the judgment-debtor is an agriculturist retains its immunity from attachment even after the death of judgment-debtor, even though the property goes into the hands of the legal representatives who are not agriculturists. Exemption attaches to the property itself and not to the person holding it for the time being. And a finding that the property is exempt from attachment obtained in an execution against the judgment-

debtor operates as *res judicata* in subsequent execution against his legal representative: *A I R 1936 Lah 895; A I R 1924 P C 202; A I R 1929 Lah 470 and A I R 1931 Lah 6, Rel. on.*

[P 609 C 1]

Faqir Chand Mittal and Nand Lal Salooja — *for Appellant.*

Qabul Chand Mittal — *for Respondents.*

Din Mohammad J. — This appeal has arisen in the following circumstances: In 1933 the firm Gurparshad Dewat Ram obtained a decree against one Dulle, a Jat of Mahem, for payment of certain sum of money. On 27th April 1935 the firm started execution proceedings and got three houses belonging to Dulle attached. On 1st June 1935 Dulle claimed exemption on the grounds stated in cl. (c) of the proviso to sub-s. (1), S. 60, Civil P. C. On 30th August 1935 the execution Court holding that Dulle was an agriculturist and that the houses were covered by cl. (c) of the proviso to sub-s. (1), S. 60, set aside the said attachment. Some time afterwards Dulle died and was succeeded by his son, Kishen Chand, and the widow of his predeceased son, Mt. Sahjo. The decree-holder firm again got the same houses attached and the legal representatives of the deceased judgment-debtor put in objections claiming exemption under S. 60, Civil P. C. The execution Court disallowed the objections on the ground that Kishen Chand was a Patwari at Ferozepore and was consequently not carrying on the profession of a cultivator and that Mt. Sahjo had lost all her right on account of remarriage to Kishen Chand. From this order an appeal was preferred to the Senior Subordinate Judge who allowed the appeal and set aside the order of the execution Court. The decree-holder made a further appeal to this Court which has been placed before us for disposal.

The questions that arise for decision in this case are: (1) Whether the decision of 30th August 1935 operates as *res judicata*? (2) Whether it is necessary for the legal representatives of the judgment-debtor to establish that they in their own right are entitled to claim exemption under cl. (c) of the proviso to sub-s. (1), S. 60, or whether they can take advantage of the status held by the deceased judgment-debtor? and (3) whether the legal representatives can in their own right claim exemption under the said clause? After hearing counsel on both sides, we have come to the conclusion that the decision of all the three questions for-

mulated above should go in favour of the respondents. On the question of res judicata, counsel for the respondents has relied on A I R 1924 P C 202,¹ A I R 1929 Lah 470² and A I R 1931 Lah 6,³ and in our view, these judgments go a long way to support his contention. In A I R 1924 P C 202,¹ in a case in which a decree-holder's application for the discharge of a receiver of the judgment-debtor's property had been dismissed and he had made a second application to the same effect, their Lordships of the Privy Council remarked that the previous decision operated as a bar to the trial of the second application and that the bar proceeded not upon Sec. 11 but upon general principles of law. In A I R 1929 Lah 470,² Tek Chand J. remarked that the execution Court has no jurisdiction to entertain a second application of objection to the attachment and sale when one has failed. In A I R 1931 Lah 6,³ Johnstone J. observed that the dismissal of a previous objection was a bar to a second objection and that the same principle applied to objections preferred under S. 47, Civil P.C.

Referring now to Cl. (c) of the Proviso to sub-s. (1) of S. 60, we find that all that is necessary to be established is that the houses for which exemption is claimed should belong to an agriculturist and are not let out on rent or lent to others or left vacant for a period of a year or more. As stated above, the decree was against Dulle and not against the legal representatives and as such it is being executed against the property of the deceased judgment-debtor and not against the legal representatives personally. Exemption attaches to the property itself and not to the person holding the property for the time being and consequently if the property happens to come within the meaning of Cl. (c) of the Proviso, it is immune from attachment. It is admitted that in the hands of Dulle the property was exempt under the said clause and we do not consider that that exemption vanishes merely because Dulle dies and some other person steps into his shoes as his legal representative. Supposing Dulle had not left him surviving any adult or able-bodied heir, who could carry on the pursuit of agriculture himself, the pro-

perty would still have been exempt even though the heir at the time when it was being attached, was not cultivating any land with his own hand and, in our view, it should make no difference if the legal representative of the deceased happens to be an adult but does not cultivate any land himself. In a converse case a similar view of the matter at issue was taken by a single Judge of this Court in A I R 1936 Lah 895⁴ and as at present advised we see no reason to differ from him.

These questions however do not arise in this case as on the record it is clearly established that Kishan Chand is an agriculturist in the real sense of the term. There is abundant evidence on the record to support this conclusion and there is no reason to discredit that evidence in any manner. Reference may in this connexion be made to Ex. J.D/2 as well as the statements of Ramji Lal, son of Tirkha, Ramji Lal, son of Bhonra, Gumani, Mt. Sahjo, Mt. Melo, wife of Kishan Chand, and Kishan Chand himself. From whatever point of view therefore the case is looked at, the conclusion is irresistible that these houses are exempt under Cl. (c) of the Proviso to sub-s. (1) of S. 60, Civil P. C. We accordingly affirm the order of the lower Appellate Court and dismiss this appeal with costs.

B.D./R.K.

Appeal dismissed.

4. Hirda Ram v. Mahomed Din, (1936) 23 A I R Lah 895=167 I C 457.

A. I. R. 1938 Lahore 609

ADDISON AND ABDUL RASHID JJ.

Milkhi Ram — Plaintiff — Appellant.

v.

Mt. Rajji and others — Defendants — Respondents.

First Appeal No. 410 of 1936, Decided on 30th November 1937, from decree of Senior Sub-Judge, Ferozepore, D/- 4th May 1936.

Custom (Punjab) — Nauhria Aggarwals of Dharam Kot do not follow custom but Hindu law — Special custom that after death of husband leaving widow without sons and sons by another wife, widow gets life interest in half of husband's property cannot be established by one instance.

Nauhria Aggarwals of Dharam Kot are a trading and money-lending class and are not agriculturists. They do not follow custom but Hindu law. Hence, the burden to prove that they are governed by a special custom, namely that after the death of a husband leaving a widow without sons and

1. Rameshwar Singh v. Hitendra Singh, (1924) 11 A I R P C 202=81 I C 576 (P C).

2. Nanak Chand Daulat Ram v. Boota Singh, (1929) 16 A I R Lah 470=117 I C 816.

3. Sitaram v. Pir Bakhsh, (1931) 18 A I R Lah 6=180 I C 406=32 P L R 413.

sons by another wife, the widow gets a life interest in half of the property of her husband, is on the widow. Such special custom cannot be established by only one instance to that effect. [P 610 C 2]

Mehr Chand Mahajan and Vishnu Datta
— *for Appellant.*

Achhru Ram and D. N. Aggarwal —
for Respondents.

Addison J. — Milkhi Ram, plaintiff, obtained certain money decrees against the firm Phuman Mal-Raghunath Das, the proprietor of which is Raghunath Das. In execution of those decrees he attached certain agricultural land. Mt. Rajji, a widow of his father Phuman Mal, who is the step-mother of Raghunath Das, put in an objection in the executing Court to the effect that she was entitled to a life interest in a half share of the attached land as one of the heirs of her husband. Her objection was successful and the plaintiff has instituted this suit under O. 21, R. 63, Civil P. C for a declaration to the effect that the half share of the land which was released by the executing Court from attachment belonged to Raghunath Das and was liable to attachment. In the meantime Raghunath Das has become insolvent and the Official Receiver has also been impleaded. The suit was contested only by Mt. Rajji who pleaded inter alia that she succeeded under a special custom to a half share of her husband's property for her life. The trial Judge has accepted this contention and dismissed the suit. Milkhi Ram has appealed. Raghunath Das and his mother are Nauhria Aggarwals, a trading and money-lending class who are not agriculturists. It was not pleaded that they were governed by the Customary law of the Ferozepore District and in fact as a witness Raghunath Das admitted that they followed Hindu law subject to a special custom that when a person dies, leaving a widow without sons and sons by another wife such widow was entitled to a life interest in half of her husband's property for her life.

It has been established that with respect to other properties left by Phuman Mal, Raghunath Das has been dealing with them as his own without any objection on the part of Mt. Rajji. It has also been established that Mt. Rajji is living with Raghunath Das who looks after the entire land and lets it out to tenants. It is true however that in 1921 as regards this agricultural land a mutation was entered by the patwari to the effect that the son and

widow were entitled to succeed to the land in equal shares and this mutation was sanctioned. It is impossible to say whether any real effect was ever given to this mutation as Mt. Rajji lives with Raghunath Das who manages the entire land. This mutation is in dispute and cannot be taken as an instance establishing the special custom at variance with Hindu law set up in this case. There is however an instance amongst these Nauhria Aggarwals of Dharam Kot where in 1917 Mt. Saddi, widow of Labhu Ram, a Nauhria Aggarwal, got a share in the agricultural land equal to that of the sons of his second wife. This is the only piece of evidence on the record. The trial Judge has remarked that very few instances will prove such a custom as it is unreasonable to expect a large number of instances where a special custom is set up in the case of a small group of families. There appear to be 32 families of these Aggarwals in Dharam Kot so that there are a fair number of them in the village. The initial burden of proof may have been on the plaintiff as the objection in the execution case was decided against him but that onus immediately shifted when it was made clear that parties followed Hindu law. As they follow Hindu law it is for Mt. Rajji to establish a special custom at variance with Hindu law. In our judgment the one instance relied upon cannot be held to be sufficient to establish that custom in the circumstances already described.

Among persons who follow Customary law in the Ferozepore District, it is clear from the compilation of Customary law of that District, published in 1914, that according to question 35 there are a few sub-tribes of agricultural Jats and Khosas who in the Fazilka Tahsil follow that particular custom but on the whole the majority of the tribes do not follow this custom. It may be that in this particular village and its surroundings some agricultural tribes do follow this custom and that may explain why the mutation was entered. In any case as the Nauhria Aggarwals of Dharam Kot do not follow custom but Hindu law it was for Mt. Rajji to establish the special custom she relied on and this she has failed to do. We therefore accept the appeal and decree the plaintiff's suit with costs of the trial Court to be paid by Mt. Rajji. Parties will bear their own costs here. It will however be the duty of the Insolvency Court to make any provision

for the maintenance of Mt. Rajji to which she may be legally entitled. That question does not form the subject of the present suit.

D.S./R.K.

*Appeal accepted.***A. I. R. 1938 Lahore 611**

ABDUL RASHID J.

Mt. Indo and others — Defendants — Appellants.

v.

Jagta and others, Plaintiffs and another, Defendant — Respondents.

Second Appeal No. 647 of 1937, Decided on 19th November 1937, from decree of Addl. Dist. Judge, Amritsar, D/. 12th March 1937.

Punjab Tenancy Act (16 of 1887), S. 59— Occupancy right jointly acquired by several persons—Tenancy does not revert to landlord until extinction of all descendants.

The provisions of S. 59 are not exhaustive and if a tenancy has been jointly acquired, the heirs of all the joint tenants succeed by survivorship. It is obvious that until all the descendants have become extinct, the tenancy does not revert to the landlords: *A I R 1930 Lah 515, Rel. on.*

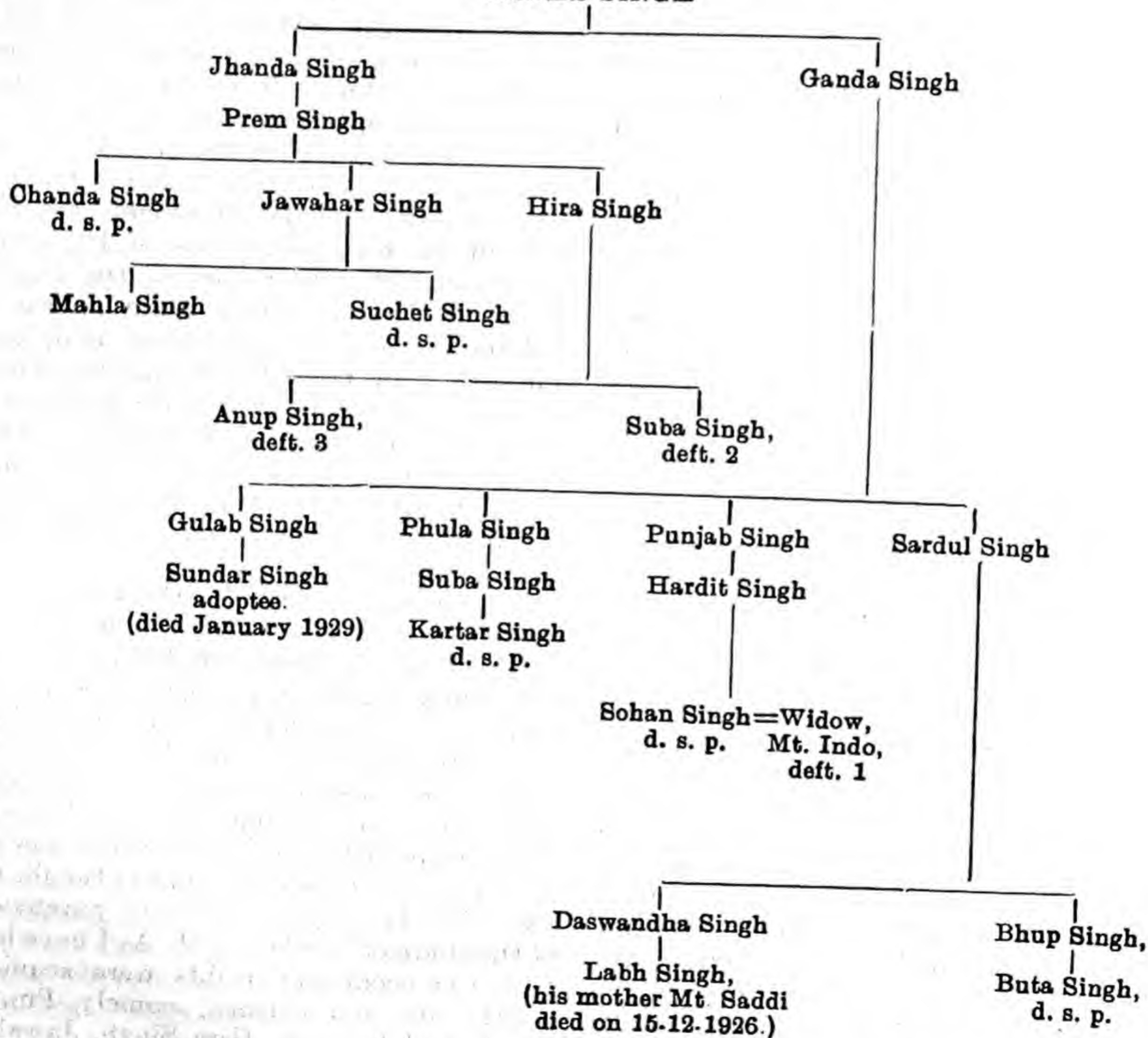
[P 613 O 1]

Shamair Chand and Parkash Chand —
for Appellants.

Bhagwan Dass and Madan Gopal —
for Respondents (Plaintiffs).

Judgment.— The following pedigree-table will be helpful in understanding the facts of this case:

LAKHA SINGH



The land in dispute measures 89 kanals and 7 marlas. The plaintiffs are the owners of this land. The defendants claim occupancy rights under S. 6, Punjab Tenancy Act. The plaintiffs instituted the suit, out of which the present appeal has arisen, on 23rd March 1935, for possession of the

land in dispute on the ground that Mt. Indo, defendant 1, Suba Singh, defendant 2, and Anup Singh, defendant 3 were no longer occupancy tenants in respect of this holding and that the plaintiffs were entitled to resume it on the extinction of the line of Hardit Singh. The trial Court dis-

missed the plaintiffs' suit on the ground that the tenancy was jointly acquired by Gulab Singh, and Punjab Singh, sons of Ganda Singh, and Chanda Singh, Jawahar Singh and Hira Singh, sons of Prem Singh; and that so long as the branch of any of these five persons had not become extinct, the landlords were not entitled to a decree. Dissatisfied with this decision the plaintiffs preferred an appeal in the Court of the learned Additional District Judge. The learned Judge came to the conclusion that Anup Singh and Suba Singh had no right in the land in dispute as the tenancy was acquired by Punjab Singh and Gulab Singh only, who associated with them their brothers Phula Singh and Sardul Singh. He held that as none of the descendants of Jhanda Singh had acquired occupancy rights in the land in dispute, the descendants of that branch were not entitled to resist the claim of the plaintiffs. On these findings the plaintiffs' appeal was accepted and they were given a decree for possession of the land in suit with costs throughout. The contesting defendants, namely Mt. Indo, Anup Singh and Suba Singh, have preferred a second appeal to this Court.

The history of the acquisition of the occupancy rights in the land in dispute has been given in great detail in the judgment of the trial Court. I have verified the facts mentioned in the trial Court's judgment from the revenue records and find that the facts have been given accurately. The learned Additional District Judge has observed in his judgment that the occupancy rights in the land in dispute were acquired some time before 1865 by Punjab Singh and Gulab Singh who associated with them their brothers Phula Singh and Sardul Singh. This observation is the real basis of the judgment of the learned Additional District Judge. This observation however does not represent the facts correctly. In 1865 the land in dispute was in possession of Gulab Singh and Punjab Singh, sons of Ganda Singh, and Chanda Singh, Jawahar Singh and Hira Singh, sons of Prem Singh, on a lease for a period of fifteen years. The occupancy rights were not acquired in 1865. On 2nd July 1870 occupancy rights were acquired in this land not by Punjab Singh and Gulab Singh alone but by the five persons mentioned above who were in possession of the land in dispute as lessees. The revenue records of the year 1865, therefore make it perfectly clear that the occupancy rights were jointly acquired for

five persons, three of whom were the descendants of Jhanda Singh. This mistake has vitiated the entire judgment of the learned Additional District Judge.

It was contended by the learned counsel for the respondents that in the revenue records of the years 1906-1907 and 1911-1912, we find that Gulab Singh and Punjab Singh had associated their brothers Phula Singh and Sardul Singh with themselves and that each one of these four persons was in possession of one-fourth of the land in dispute. It was urged that this fact showed that Chanda Singh, Jawahar Singh and Hira Singh had sold their occupancy rights in favour of Phula Singh and Sardul Singh. The inference drawn by the learned counsel from the absence of the names of Chanda Singh, Jawahar Singh and Hira Singh from the revenue records of 1911-1912 does not appear to me to be justified. If there were any sale by the descendants of Jhanda Singh in favour of Phula Singh and Sardul Singh after the year 1870, that would have undoubtedly found a place in the revenue records. Moreover, we find that in the revenue records of 1926-1927 and 1930-1931, the names of the descendants of Jhanda Singh again appear as holding portions of the property in dispute. Further, I am not satisfied that the names of the descendants of Jhanda Singh had completely disappeared from the revenue records of 1906-1907 and 1911-1912. The name of Mahla Singh appears in the records of 1906-1907 as the holder of part of the land in dispute.

The learned counsel for the respondents contended that as Sundar Singh had sold his holding to Hardit Singh, Anup Singh and Suba Singh, the appearance of the names of the descendants of Jhanda Singh in the revenue records of 1926-1927 was explainable as some of them were the vendees from Sundar Singh. It must however be remembered that Mahla Singh was not one of the vendees from Sundar Singh, nor were Mahla Singh's ancestors purchasers of the share of Sundar Singh. As I have held that the occupancy rights were acquired jointly by five persons, namely Punjab Singh, Gulab Singh, Hira Singh, Jawahar Singh and Chanda Singh in respect of the land in dispute on 2nd July 1870, the plaintiffs are not entitled to a decree until the descendants of these persons have lost the occupancy rights either by sale or any other reason. As mentioned above, the finding of fact given by the learned Additional

District Judge has been completely vitiated by his misreading the revenue records of 1865 and 1870. It has been held in a Full Bench ruling of this Court, reported in 11 Lah 427,¹ that the provisions of S. 59, Punjab Tenancy Act, are not exhaustive and that if a tenancy has been jointly acquired, the heirs of all the joint tenants succeed by survivorship. It is obvious that until all the descendants have become extinct, the tenancy does not revert to the landlords. For the reasons given above, I accept this appeal, set aside the judgment and decree of the learned Additional District Judge and restore that of the trial Court. Having regard to all the circumstances of the case, I leave the parties to bear their own costs throughout.

D.S./R.K.

Appeal accepted.

1. Sheo Nath v. Giani, (1930) 17 A I R Lah 515 = 127 IC 1 = 11 Lah 427 = 31 P L R 644 (FB).

A. I. R. 1938 Lahore 613

TEK CHAND J.

Budh Ram — Plaintiff — Appellant.

v.

Municipal Committee, Delhi —

Defendant — Respondent.

Second Appeal No. 851 of 1937, Decided on 12th January 1938, from decree of Dist. Judge, Delhi, D/- 8th March 1937.

Punjab Municipal Act (3 of 1911), S. 195 — There must be definite finding as to the date on which unauthorized structure had been completed.

Action under S. 195 can be taken only if notice is delivered within six months of the date of the completion of the unauthorized structure. Hence, there must be a definite finding as to the date on which the construction of the unauthorized structure had been 'completed.' Merely finding that the structure was 'constructed' in certain year is vague and indefinite. [P 613 C 2]

Shamair Chand — for Appellant.

Achhru Ram — for Respondent.

Judgment. — On 2nd March 1934, the Municipal Committee, Delhi, issued a notice to the plaintiff Budh Ram under S. 195, Municipal Act, requiring him to demolish the roof of a room and a chhaja on the third storey of the house which it was stated, he had constructed without sanction. On receipt of this notice, the plaintiff instituted a suit in the Court of the Subordinate Judge for issue of an injunction to the committee restraining it from interfering with the room and the chhaja. He contended that the structures in question had

been completed more than six months before the delivery of the notice and therefore the committee was not entitled to order their demolition under S. 195. The committee resisted the suit, urging that the structures had been built within six months of the notice. The trial Judge found that the roof and the chhaja in question had been constructed in 1931 and on this finding he decreed the suit. On appeal by the Municipal Committee, the learned District Judge has come to a contrary conclusion and holding that the roof and the chhaja "were constructed in the year 1933" he has dismissed the suit.

This finding of the learned District Judge is vague and indefinite. Action under Sec. 195 can be taken only if notice is delivered within six months of the date of completion of the unauthorized structure. The notice in this case was issued on 2nd March 1934 and must have been delivered to the plaintiff a few days later. The learned Judge should therefore have definitely found that the construction of the roof and the chhaja in question had been completed later than 4th or 5th September 1933. In the absence of a clear finding to this effect it has become necessary for me to consider the evidence bearing on the point. The learned District Judge has rightly accepted as true the evidence of the witnesses produced by the plaintiff whom he has described as "independent and respectable and having no interest in making false depositions in favour of the plaintiff." On their testimony he has held that in 1931 the plaintiff had purchased building materials including girders, cement, lime, paints and varnishes. He has also considered as reliable the evidence of the masons produced by the plaintiff, but he has apparently misunderstood what these masons had said. From their evidence the learned Judge has concluded that in 1931 they were employed in "building the walls of the room in question." The masons however have definitely deposed that the walls were old and were not built or raised by them in 1931. One of them further stated that in 1931 the old roof was changed and instead of wooden rafters, iron girders, which had then been newly purchased, were put up, and the chajja also was rebuilt. The other mason, P. W. 2, worked for a short time only and he states that in 1931 the "old rafters in the roof were exchanged into iron rails." This evidence therefore does not warrant the conclusion that in 1931 the masons were employed in

"building the walls of the room with the materials purchased in that year." This matter is indeed put beyond doubt by the terms of Resolution (No. 12) passed by the Municipal Committee itself on 2nd March 1934 when notice under S. 195 was ordered to issue to the plaintiff. In this Resolution it was stated distinctly that "all the walls of the room were old and that only the roof and the chhaja had been recently built." It was therefore neither party's case that the walls of this room were built in 1931. This finding of the learned Judge is clearly based on a misapprehension of the evidence.

The learned Judge has further relied upon the evidence of D. Ws. 1, 2 and 3, who, he says, "are unanimous in stating that a new roof was being put to the room in September 1933" and has held that he regarded their statement as absolutely correct. The most important of these witnesses is D. W. 3, Lala Sham Lal, Naib Tehsildar. But he by no means supports the evidence of the other two witnesses on this point. He visited the spot on one occasion only in November 1933 when he made a report. In this report he stated that the "roof had been built already." He does not say either in the report or in his deposition in Court as to how long earlier the roof had been built—whether it was two months or two years or more. His evidence therefore is of no assistance in the matter. D. W. 1 is a Building Jamadar and D. W. 2 a Building Inspector of the Municipal Committee. They no doubt have stated that in the latter part of September 1933 the roof and the chhaja were under construction. I am however not inclined to accept their evidence uncorroborated as it is by any other reliable evidence in preference to the plaintiffs' evidence which the learned District Judge himself has held to be reliable. It appears most unlikely that the building materials including girders, cement, lime and even paints and varnishes should have been purchased in 1931 but not used till 1933 and during these years the room would have remained without a roof.

I hold that the construction of the roof and the chhaja in question had been completed more than six months before the issue of the notice and the committee could not require their demolition under S. 195, by a Resolution passed on 2nd March 1934. I accept the appeal, set aside the judgment and decree of the lower Appellate Court and restore that of the Court of first

instance. Having regard to all the circumstances I leave the parties to bear their own costs throughout.

D.S./R.K.

Appeal accepted.

* A. I. R. 1938 Lahore 614

ADDISON J.

Bhag Singh and others—Accused
Petitioners.

v.

Emperor.

Criminal Revision No. 1710 of 1936, Decided on 19th February 1937, from order of Addl. Dist. Magistrate, Hissar, D/- 3rd November 1936.

* Criminal P. C. (1898), S. 403, Illus. (e)—*A* acquitted by Second Class Magistrate of charge under S. 323, Penal Code — *A* cannot subsequently be retried under S. 324, Penal Code.

Where an accused is acquitted by a Second Class Magistrate of an offence under S. 323, Penal Code, he cannot afterwards be re-tried on the same facts under S. 324, Penal Code as that charge could have been framed by the Magistrate, Second Class.
[P 614 C 2; P 615 C 1]

Shamair Chand — *for Petitioners.*Jeremy for Government Advocate —
for the Crown.

Order.—Amin Lal lodged a complaint against Bhagu and four others under Sections 325/147, Penal Code. This went for trial to a Magistrate, Second Class. He charged all five accused under Section 323, Penal Code, and then acquitted Bhagu, while he convicted the four others and sentenced them to fines. A revision petition was preferred to the Additional District Magistrate. He held that the proper charge against Bhagu would have been one under Section 324, Penal Code, and as he had not been charged under that section, he ordered that he should be tried under it. Against this order of the Additional District Magistrate, this revision petition has been preferred to this Court. It must be accepted. The case is fully covered by Illus. (e) to Sec. 403, Criminal P. C., which is as follows :

A is charged by a Magistrate of the first class with, and convicted by him of, voluntarily causing hurt to *B*. *A* may not afterwards be tried for voluntarily causing grievous hurt to *B* on the same facts, unless the case comes within Para. 3 of the section.

The present case does not come within Para. 3 of the section. The only difference between this Illustration and the case before me is that the Magistrate who tried

this case was a Magistrate, Second Class, but a Magistrate, Second Class, has power to try an offence punishable under S. 324 or S. 325, Penal Code. The Additional District Magistrate therefore had no power to order that he should be re-tried under Sec. 324, Penal Code, as that charge could have been framed by the Magistrate, Second Class. For the reasons given, I accept this petition and set aside the order of the Additional District Magistrate, dated 3rd November 1936, directing the trial of Bhagu alias Bhag Singh.

D.S./R.K.

*Petition accepted.***A. I. R. 1938 Lahore 615**

ADDISON AND DIN MOHAMMAD, JJ.

Sewa and another — Plaintiffs —
Appellants.

v.

Mohan Singh and others — Defendants —
Respondents.

First Appeal No. 364 of 1937, Decided on 1st April 1938, from decree of Senior Sub-Judge, Lyallpur, D/- 9th July 1937.

Punjab Land Revenue Act (17 of 1887), S. 111—Mortgagee is not owner of land and hence cannot claim partition.

Section 111 confers the right of partition only on joint owners and joint tenants and unless a person falls under either of these categories, he cannot claim partition of agricultural land as of right. A mortgagee is not an owner of land, and hence he cannot enforce partition under S. 111 : 82 P R 1898 (F B) and A I R 1921 Lah 83, Rel. on ; 11 P R 1885 and 4 P R 1903, Ref. ; 9 P R 1895, Explained. [P 616 C 1]

Ram Lal Anand I — for Appellants.

Achhru Ram, Qalandar Ali Khan and
M. L. Chawla — for Respondent 1.

Din Mohammad J.—The facts of the case out of which this appeal has arisen may shortly be stated. One Sawan Singh mortgaged his land to three sets of persons in three different shares, and of these an 8/15th share was mortgaged to Sewa and Kahan Singh. The mortgage relating to the remaining 7/15th share was redeemed but the mortgage in favour of Sewa and Kahan Singh continued. These two mortgagees instituted a suit for possession of the whole land and on appeal to this Court obtained a decree for joint possession of an 8/15th share in the land in suit. This happened on 6th November 1935. Having obtained this decree they made an application to the Revenue Officer concerned for partition under the Land Revenue Act.

The Settlement Officer who heard the petition dismissed it on the ground that the petition could not succeed so long as the petitioners did not obtain an order from the Civil Court. Thereupon Sewa and Kahan Singh instituted the present suit praying for a declaration that they were entitled to have their own share separated off. This suit was resisted by the mortgagors and dismissed by the Senior Subordinate Judge mainly on the ground that a mortgagee was not an owner of land within the meaning of Sec. 111, Punjab Land Revenue Act and could not therefore claim partition. The plaintiffs have appealed. Counsel for the appellants has referred us to the definition of the term 'land-owner' as contained in Clause (2) of S. 3, Land Revenue Act and argued that inasmuch as a mortgagee is covered by this definition, he is a person contemplated by S. 111, Land Revenue Act, and the words "owner of land" convey the same meaning as the term "land-owner." We however consider that the interpretation put on the words "owner of land" by the appellants' counsel is not legally correct. In 82 P R 1898¹ a Full Bench of the Punjab Chief Court observed as follows :

The word used in S. 111 is 'owner', not 'land-owner' and, in our opinion, the two terms are not synonymous. 'Land-owner' has a very wide signification and includes many persons whose interests in land are of a limited or ephemeral character. The word 'owner' has not been defined in the Act and according to the accepted canons of interpretation we must, unless the context negatives such a construction, take it to have been used in its ordinary sense.

In A I R 1921 Lah 83,² Abdul Raoof J. approved of the observations made in 2 P R 1918 (Rev)³ and remarked that a mortgagee with possession might come under the definition of landlord but he was in no sense an owner and had consequently no locus standi to object to the correctness of the partition proceedings. We are in respectful agreement with the observations made in these judgments and consider that unless the interpretation as suggested by these judgments is adopted, a queer situation is likely to arise in certain cases inasmuch as a land-owner as defined in S. 3 includes even a person to whom a holding has been let in farm for the recovery of an arrear of land revenue or of a

1. Buta v. Mt Jiwani, (1898) 82 P R 1898 (F B).

2. Mahomed Din v. Mahomed, (1921) 8 A I R Lah 83=67 I C 425.

3. Thakur Das v. Sultan Bakhsh, (1918) 2 P R 1918 Rev=45 I C 405=3 P W R 1918 Rev.

sum recoverable as such an arrear. Reference has been made to 11 P R 1885⁴ and 4 P R 1903⁵ in support of the contention that in case a mortgagee obtains a decree from a Civil Court establishing his right to partition, a Revenue Officer is bound to enforce that decree. It is true that while holding that a mortgagee as such was not entitled to partition, some remarks to the effect indicated above were made in these two judgments ; but we doubt the correctness and legality of those remarks. S. 111, Land Revenue Act, confers the right of partition only on joint owners or joint tenants and unless a person falls under either of these categories, he cannot claim partition of agricultural land as of right. And when once it is held that a mortgagee is not an owner of land, we fail to see how he can enforce partition under S. 111 in any manner and how a Civil Court can support his claim.

Our attention was further drawn to 9 P R 1895,⁶ where Mr. Young, Financial Commissioner, lays down that no one even though he may be a land-owner as defined in S. 3 is entitled to claim partition unless he fulfils one or other of the three conditions of S. 111, Land Revenue Act. But with all respect we consider that while using the term 'land-owner' the Financial Commissioner did not clearly realize its full implications. The term used in S. 111 is 'owner of land' and not land-owner, and the conditions laid down in Cls. (a), (b) and (c) of S. 111 come into play only if the requirements laid down in the substantive part of the section are satisfied. So long therefore as a person cannot claim the benefit of the substantive part, the conditions enumerated in Cls. (a), (b) and (c) would not avail him in any manner. Holding that the plaintiffs as mortgagees are not owners of land within the meaning of S. 111, Land Revenue Act, we maintain the decision of the Court below and dismiss this appeal with costs.

D.S./R.K.

Appeal dismissed.

4. Nihal Singh v. Mt. Rajon, (1885) 11 P R 1885.

5. Badar Din v. Buramal, (1903) 4 P R 1903.

6. Mt. Rup Koer v. Kishen Singh, (1895) 9 P R 1895.

A. I. R. 1938 Lahore 616

BHIDE J.

*Dr. Mohammad Musa — Plaintiff —
Petitioner.*

v.

*Nabi Bakhsh and others — Defendants
— Respondents.*

Civil Revns. Nos. 987 of 1937 and 82 of 1938, Decided on 16th March 1938, from order of Dist. Judge, Hoshiarpur, D/- 4th August 1937.

Specific Relief Act (1877), S. 42—Person in joint possession with defendants of properties attached to khankah—Suit for declaration that he was gaddi nashin and entitled to exclusive possession—Suit is incompetent without consequential relief for ejectment or injunction.

A person in joint possession with the defendants of properties attached to the khankah brought a suit for declaration that he was a gaddi nashin for the khankah and for declaration that he was entitled to remain in exclusive possession of the property :

Held that the suit for such bare declaration was incompetent without prayer for consequential relief for the ejectment of the defendants or for the injunction restraining the defendants to interfere with his rights in respect of the property : *A I R 1930 All 600, Rel. on ; A I R 1933 Oudh 517 and A I R 1935 Lah 657, Disting.*

[P 617 C 2]

*Achhru Ram and Gian Singh —
for Petitioner.*

Shamair Chand — for Respondents.

Order.—Civil Revisions Nos. 987 of 1937 and 82 of 1938 are connected and will be disposed of together. They arise out of a suit for certain declarations instituted by the plaintiff Mian Mohammad Musa with respect to a khankah with certain adjacent properties situated in mauza Muradpur in the Hoshiarpur District. The defendants resisted the suit inter alia on a preliminary plea that no suit for a declaration was competent. This plea was rejected by the trial Court, but the learned District Judge has found that the defendants were in joint possession of some of the properties and that therefore he should have sued for possession also. He therefore accepted the appeal and remanded the case to the trial Court with a direction that the plaintiff be allowed to amend his plaint by including a prayer for possession. Both parties have filed petitions for revision, the plaintiff contending that a suit for a declaration was competent and no amendment was necessary and the defendants contending that permission to amend the plaint should not have been given inasmuch as the plaintiff had failed to amend the plaint in the trial Court in spite of the objection

raised by the defendants. The order passed by the learned District Judge appears to me to be unintelligible. The plaintiff according to his allegation was already in possession and this was not disputed by the defendants, who merely claimed to be in joint possession with him. In the circumstances it is not clear why the plaintiffs should have sued for possession at all. The learned District Judge perhaps meant to say that the plaintiff should have sued for ejectment of the defendants. Assuming that this was his meaning, the question arises whether it was necessary for the plaintiff to sue for such a relief.

The learned counsel for the plaintiff has contended that the plaintiff was suing merely for a declaration that he was a gaddi nashin of the khankah at mauza Muradpur and it was not necessary for him to sue for possession of any property that might be attached to the khankah. In support of this contention he relied upon A I R 1933 Oudh 517¹ and A I R 1935 Lah 657.² As regards the first ruling it appears that the plaintiff was suing in that case for a mere declaration that he was the sole mutwalli of certain waqf property. The main dispute between the parties was, whether the plaintiff was the mutwalli, and it was not disputed by the defendants that if he was the mutwalli he would be entitled to possession of the property which was in their possession. In the present instance, however the plaintiff has actually asked for a declaration that he is entitled to remain in exclusive possession of khasra Nos. 563 and 564. A I R 1935 Lah 657² is also distinguishable inasmuch as consequential relief in the shape of an injunction was asked for in that case. In the present case the plaintiff did not sue for any consequential relief at all. In view of these facts, it seems to me that the learned District Judge was justified in ordering the plaintiff to amend the plaint. The defendants' contention is that no amendment should have been allowed in view of the fact that the plaintiff had at first refused to amend the plaint. It appears however that he did put in an application subsequently stating that he was willing to amend the plaint, if any amendment was considered to be neces-

sary. The learned District Judge has, in view of this petition, held that the plaintiff should be allowed to amend the plaint and I see no good ground for interference in revision with the discretion exercised by him. As regards the nature of the amendment however, I have already pointed out that it was not necessary for the plaintiff to sue for possession of the khasra numbers inasmuch as he was already in possession and this fact was not disputed. The plaintiff could only have sued for the ejectment of the defendants or for an injunction restraining the defendants to interfere with his rights in respect of the property: *cf.* A I R 1930 All 600.³ Inasmuch as the plaintiff in this case claimed to be entitled to exclusive possession of khasra Nos. 563 and 564, it would appear that on the allegations made in the plaint the appropriate relief in respect of these numbers would have been ejectment of the defendants from these khasra numbers.

I accordingly accept the plaintiff's petition for revision to the extent of directing that the plaintiff should amend the plaint by including a prayer for ejectment of the defendants from khasra Nos. 563 and 564. It is open to him to sue also for an injunction restraining the defendants from interfering with his rights, as a manager of the khankah, if he thinks it fit to add any such relief. The amended plaint should be put in, in the trial Court on or before 11th April 1938. Parties are directed to appear in the trial Court on that date. Plaintiff has only succeeded technically in this petition for revision. As he persisted in maintaining his suit in a declaratory form and asked for amendment only at a very late stage, I direct that the plaintiff shall pay Rs. 100 on account of the costs of the defendants in this Court and in the Court of the District Judge. Other costs will follow final decision. The cross petition for revision (No. 82 of 1938) is dismissed with costs.

D.S./R.K.

Order accordingly.

8. Peerji Mahomed Nazir v. Nasimuddin Ahmad, (1930) 17 A I R All 600=128 I C 227=1930 A L J 1274.

1. Mahomed Jafar v. Mahomed Taqi Khan, (1933) 20 A I R Oudh 517=145 I O 1003=9 Luck 170=10 O W N 1163.

2. Ali Shah v. Fateh Mahomed, (1935) 22 A I R Lah 657=159 I C 237.

A. I. R. 1938 Lahore 618

BLACKER J.

Sadhu — Convict — Appellant.

v.

Emperor.

Criminal Appeal No. 1164 of 1937, Decided on 26th November 1937, from order of Magistrate, First Class, D/- 30th August 1937.

Penal Code (1860), S. 304, Part 2—Accused's father when digging channel objected by deceased — Objection resulting in altercation between them — Accused taking iron rod with which channel was being dug and striking with it on head of deceased thereby killing him — Accused held could be convicted under S. 304 — Sentence of five years held too severe.

The deceased and the accused were neighbours. One day the accused's father began to dig a water channel close to the wall of the deceased's house. The deceased begged him to dig it a little distance away so as to avert any danger of his wall collapsing. This request led to an altercation and accused's father and the deceased grappled with each other. While they were doing so, the accused came up with an iron rod with which the water-course was being dug and seizing it with both hands struck a blow on the deceased's head. The deceased fell down dead :

Held that the accused must be credited with the knowledge that the heavy iron rod was likely to cause death. He could therefore be rightly convicted under Part 2 of S. 304. However in the circumstances of the case the sentence of five years' rigorous imprisonment was unnecessarily severe. There was no antecedent enmity between the parties. The quarrel arose very suddenly. The choice of weapon was fortuitous and was not one which indicated any real intention to kill or to cause serious injury. The accused saw his father grappling with another man and to that extent there was some provocation to him to commit the act he did. These were extenuating circumstances. [P 618 C 2]

Nur Mohammad — *for Appellant.*

S. N. Bali for Advocate-General —
for the Crown.

Judgment. — Sadhu Barwala of Kang appeals from the order of a Section 30 Magistrate of Gurdaspur sentencing him to five years' rigorous imprisonment under Part 2 of S. 304, I. P. C. The deceased in this case, Harnama, and the appellant were neighbours. On the morning of 6th June last Mehr Din, the appellant's father, began to dig a water channel close to the wall of the deceased's house. The deceased begged him to dig it a little distance away so as to avert any danger of his wall collapsing. This request appears to have led to an altercation and Mehr Din and the deceased grappled with each other. While they were doing so, the appellant came up with an iron rod with which the water-course was

being dug and seizing it with both hands struck a blow on the deceased's head. The deceased fell down and his daughter Mt. Lajo came to the spot. She was also hit by Sadhu with the same rod. Sadhu then ran away and subsequently produced the rod in the course of the investigation.

The eye-witnesses of this occurrence are Sewa Singh, Bur Singh and Partap Singh. Sewa Singh is a relation of the deceased and so is Mt. Lajo who also gives evidence. There seems to be no reason to doubt the truth of their testimony on this score alone as there is no suggestion that there was antecedent enmity between the parties. They are moreover corroborated by Bur Singh and Partap Singh who are independent witnesses. There is no reason apparent on the face of the record for discrediting the evidence of these witnesses and all that the counsel for the appellant is able to do is to point out some quite immaterial discrepancies. On the other hand the story told by the defence is not only contradicted by the medical evidence but is, as has been shown by the learned trial Magistrate, ridiculous on the face of it ; so much so that even the doctor that the defence themselves produced in their attempt to show that the story for the prosecution was absurd was unable to do so and had to hedge and qualify his statement. In my opinion there is not the least doubt that this transaction happened as described by the prosecution witnesses and Sadhu must be credited with the knowledge that this heavy iron rod was likely to cause death. He has therefore been rightly convicted under Part 2 of S. 304, I. P. C. I am however inclined to think that in the circumstances of the case the sentence of five years' rigorous imprisonment is unnecessarily severe. There was no antecedent enmity between the parties. The quarrel arose very suddenly. The choice of weapon was fortuitous and was not one which indicates any real intention to kill or to cause serious injury and it must be remembered that this young man saw his father grappling with another man and to that extent there was some provocation to him to commit the act he did. These appear to me to be extenuating circumstances and taking them all into consideration I reduce the sentence of five years rigorous imprisonment to two and a half years.

D.S./R.K.

Sentence reduced.

A. I. R. 1938 Lahore 619

TEK CHAND J.

Kumman and another—Defendants—
Appellants.

v.

Sujan Singh—Plaintiff — Respondent.

Second Appeals Nos. 56 and 57 of 1938, Decided on 22nd March 1938, from decree of Senior Sub.Judge, Rohtak, D/- 10th December 1937.

(a) Punjab Municipal Act (3 of 1911), S. 3 (13) (a) Proviso — Site in use of residents of locality as open space or common courtyard — Members of public passing through it without hindrance by owner—Site is 'street' — Proviso to S. 3 (13) (a) does not apply.

Where a site has always been in use of the residents of the locality as an open space or a common courtyard and the members of the public having been passing through it without let or hindrance by the owner thereof, the site is a street within the meaning of S. 3 (13), Cl. (a). Proviso to S. 3 (13) Cl. (a) does not apply to such a case when there is no evidence to show that the owners of the site or their predecessors-in-interest, have ever excluded any person from having ingress or egress from the site: *A I R 1920 P C 43, Disting.*

[P 620 C 1]

(b) Grant—Dedication—Inference of—Dedication can be inferred from long user — Proof of express grant is not necessary—Presumption can be rebutted by proof of owner's intention that use by public was permissive.

In order to prove dedication it is not legally necessary that there should be evidence of express grant. Dedication may be inferred from long user. It is however always permissible to rebut the presumption by evidence of the owner's intention that the user by the public was permissible: *62 P R 1898, Rel. on.*

[P 620 C 2]

Ghulam Rasul — *for Appellants.*Qabul Chand — *for Respondent.*

Judgment.—This judgment will dispose of Regular Second Appeals Nos. 56 of 1938 and 57 of 1938, both of which relate to a plot of vacant site, marked A B C D on plan Ex. P. L. On 26th January 1934, the Municipal Committee, Rohtak, passed a resolution requiring Kumman (one of the defendants in the suit which has given rise to Regular Second Appeal No. 56 of 1938 and father of Shahamad, plaintiff in the other suit) to demolish a chhappar and a manger which (it was stated) he had constructed recently on a portion of the plot in dispute. On 2nd March 1934, Shahamad instituted a suit for a declaration that he was the owner of the plot in suit and that the Municipal Committee had no power to require the demolition of the manger and the chhappar constructed by him. The Municipal Committee denied the plaintiff's claim and contended that the

whole of the plot A B C D was a "street" as defined in S. 3 (13), Municipal Act and that the plaintiff had no right to raise any structures on it. While this suit was pending, Sujan Singh, who is a resident of the mohalla and owns the adjoining property, instituted another suit against Kamman and his son Shahamad for a permanent injunction that the plot A B C D was reserved as a sehan and thoroughfare for the joint purposes of the residents of the mohalla and that the defendants, by constructing the manger and the chhappar on a portion of it, had deprived the residents of their user. He therefore prayed for issue of an injunction requiring the defendants to remove the structures and restoring the site to its original shape.

The two suits were tried together and were decided by the Subordinate Judge on the same day. He decreed the suit of Shahamad against the Municipal Committee and dismissed the suit of Sujan Singh against Kumman and Shahamad. On appeal, the learned Senior Subordinate Judge, held that of the site in dispute the portion E B C F, marked red, is the private property of Shahamad but that it has been used for a very long time by the public as a common courtyard and is therefore a "street" as defined in S. 3 (13), Punjab Municipal Act. The remaining portion of the site, A E F D, he has held to be a thoroughfare. On these findings, the learned Judge has accepted the appeal of the Municipal Committee, and while declaring that Shahamad was the owner of the plot E B C F, has directed him to remove the manger and the chhappar within one month from the date of the decree. In case of disobedience, he has ordered, that it would be open to the Municipal Committee to apply for the removal of the structures at the plaintiffs' cost. In the appeal arising out of the suit instituted by Sujan Singh, the learned Judge has granted the plaintiff a decree for a permanent injunction restraining the defendants from making use of the land in dispute in such a way as to debar the residents of the mohalla from using it as common property, and ordering them to remove within one month the manger and the chhappar which had been erected thereon.

From these decrees, two appeals have been preferred before me: one by Shahamad in the case against the Municipal Committee and the other by Kumman and Shahamad against Sujan Singh. Both these

appeals have been argued together on behalf of the appellants by Mr. Ghulam Rasul. The learned counsel has not challenged the decision of the Court below relating to the plot A E F D which he concedes is a public thoroughfare. He has confined his arguments to the plot, marked E B C F and shown red on the plan. With regard to this plot the finding of the learned Judge is that it belonged originally to one Lakhmir Khan, who sold it to Muni Lal in 1903, and Muni Lal's son Shugan Chand transferred it to Shahamad in November 1933. He therefore held that the site belonged to Shahamad. He has held however after a consideration of the oral and documentary evidence on the record, that the site in dispute had always been in use of the residents of the mohalla as an open space or a common courtyard and that the members of the public have been passing through it without let or hindrance. He has therefore held it to be a "street" as defined in the Municipal Act. Mr. Ghulam Rasul has contended that on the facts as found by the learned Judge, the site cannot be said to be a "street" as defined in the Act. He relies principally upon the Proviso to Clause (a) of sub.s. (13) of S. 3. That Proviso lays down that private property, if used by any persons as a means of access to or from any public place or thoroughfare, whether such persons be occupiers of such buildings or not, shall not be considered to be "street" if the occupier of any such building has a right at all hours to prevent all other persons from using as aforesaid. In this case it has not been found by either Court below, that the plaintiff Shahamad or his father Kumman or any of their predecessors-in-interest, had ever excluded any person from having ingress to or egress from this plot, nor is there any evidence on the record of this having been ever done. This being so, the Proviso cannot possibly apply. The case therefore clearly falls within Cl. (a) of sub.s. 13 of S. 3, and the learned Judge has rightly found that the plot marked red is also a "street."

Mr. Ghulam Rasul referred me to a decision of their Lordships of the Privy Council in 1 Lah 117,¹ but the facts of that case were entirely different. There, the site in dispute was situate in the enclosed quadrangle of a market place (Mandi) and

it was found as a fact that the gate of the quadrangle was shut at night when business was over in the shops in the Mandi. This however is not the case here. The next contention raised by the learned counsel was that there is no proof of the exercise of any right by the public for a period exceeding 20 years, nor has dedication of the property (which is now owned by the plaintiff) to the public been established by any clear evidence. This contention also is without force. In order to prove dedication, it is not legally necessary that there should be evidence of express grant; dedication may be inferred from long user: 62 P R 1898.² It is of course always permissible to rebut the presumption by evidence of the owner's intention that the user by the public was permissive. But in this case there is no proof whatever that this was the case. In these circumstances, I must hold that the decision of the lower Appellate Court is correct. The appeals fail and are dismissed with costs.

R.M./R.K.

Appeals dismissed.

2. Rana Ganpat Singh v. Kangra Valley State Co., (1898) 62 P R 1898.

* A. I. R. 1938 Lahore 620

ADDISON AG. C. J. AND
DIN MOHAMMAD J.

*Messrs. Nagin Chand-Shiv Sahai —
Assessee—Petitioner.*

v.

*Commissioner of Income-tax, Punjab,
N. W. F. and Delhi Provinces,
Lahore—Respondent.*

Civil Misc. No. 99 of 1938, Decided on
5th May 1938.

* Income-tax Act (1922), S. 28—"Income" means assessable figure after all legitimate deductions and exemptions.

The word 'income' as has been used in the Income-tax Act has a wider sense and it connotes the assessable figure arrived at after accounting for all the legitimate deductions and exemptions and consequently if any assessee furnishes any false particulars about any item which is to be accounted for before the assessable figure is arrived at, he brings himself within the clutches of the law. Hence, an assessee who deliberately claims a false deduction can be penalized under S. 28: *A I R 1932 P C 178, Rel. on.* [P 621 C 1, 2]

D. N. Aggarwal — *for Petitioner.*

S. M. Sikri and A. R. Aggarwal for J. N.
Aggarwal — *for Respondent.*

Order.—This case turns upon the construction to be put upon the word 'income'

1. Muhammad Rustam Ali Khan v. Municipal Committee of Karnal City, (1920) 7 A I R P O 48=56 I O 1=1 Lah 117=47 I A 25 (P O).

as used in Sec. 28, Income-tax Act. By that section the income-tax authorities are empowered to impose a penalty upon any assessee who "has concealed the particulars of his income or has deliberately furnished inaccurate particulars of such income." The petitioner before us avers that the word "income" as used in this section means money received by the assessee and does not refer to any deduction or exemption claimed by him under the provisions of the Income-tax Act. In other words, he contends that the word 'income' has been used in this section in its popular sense. The income-tax authorities on the other hand maintain that the word 'income' has been used in this section in a much wider sense and it connotes the assessable figure arrived at after accounting for all the legitimate deductions and exemptions and consequently if any assessee furnishes any false particulars about any item which is to be accounted for before the assessable figure is arrived at he brings himself within the clutches of the law.

In order to determine the true connotation of the term 'income' as used in the Income-tax Act it will be necessary to refer to the various sections in which this term has been used. S. 2 (15) defines the term 'total income' as "total amount of income, profits and gains from all sources to which this Act applies computed in the manner laid down in S. 16." S. 3 determines all the income, profits or gains chargeable to income-tax. S. 4 lays down that the Income-tax Act applies to all income, profits or gains, as described or comprised in S. 6. S. 6 enumerates the various heads of income chargeable to income-tax and Ss. 7 to 12 describe the method in which the income under the various heads is to be computed. For example, S. 9 dealing with property, S. 10 dealing with business, S. 11 dealing with professional earnings and S. 12 dealing with other sources determine the method of computing the income under various heads after making the allowances specified therein. Then follow certain exemptions which specify the items of income which are not subject to income-tax. S. 16 lays down the method of computing the total income of an assessee. S. 22 (2) provides for the return of income to be submitted by the assessee and S. 23 (1) and (3) authorize the Income-tax Officer to assess the total income and determine the sum payable by an assessee on the basis of his

return. It would thus appear that the word 'income' in all these sections has not been used in its dictionary meaning, but in a technical sense. These sections are then followed by S. 28 which, as stated above, is a penal section and provides for a safeguard against false returns. If the interpretation put upon the word by the assessee be adopted, it would lead to absurd and anomalous results. An assessee would in those circumstances be at liberty to forge his return with impunity in any manner that he likes so far as the expenditure, deductions or exemptions are concerned and would escape the consequences of the law so long as he furnishes true particulars of his income in the narrower sense of the term. This however could never be the intention of the Legislature. We are fortified in our conclusion by the remarks made by their Lordships of the Privy Council in 59 I A 290¹ at pp. 296-97. That case is on all fours with the present case inasmuch as it particularly relates to bad debts. Those remarks are :

Although the Act nowhere in terms authorizes the deduction of bad debts of a business, such a deduction is necessarily allowable. What are chargeable to income-tax in respect of a business are the profits and gains of a year ; and in assessing the amount of the profits and gains of a year account must necessarily be taken of all losses incurred, otherwise you would not arrive at the true profits and gains.

Falsehood in accounts can take only two forms, either an item may be suppressed dishonestly or an item may be claimed fraudulently, and in penalizing concealment of the particulars of one's income as well as deliberate furnishing of inaccurate particulars, Section 28 penalizes both forms of falsehood. In the case before us it has been found as a fact that the assessee deliberately claimed a false deduction and in the light of the remarks made above, we are disposed to hold that the case of the assessee fell within the ambit of S. 28. We accordingly dismiss this petition with costs.

B.D./R.K.

Petition dismissed.

1. Commissioner of Income-tax, C. P. and Berar v. S. M. Chitnavis, (1932) 19 A I R P C 178 = 137 I C 772 = 59 I A 290 (P C).

A. I. R. 1938 Lahore 622

BHIDE AND BECKETT JJ.

Prabh Dayal—Plaintiff—Appellant.

v.

Basant Lal and another—Defendants—Respondents.

First Appeal No. 383 of 1937, Decided on 3rd June 1938, from preliminary decree of Senior Sub-Judge, Jhelum, D/- 24th August 1937.

(a) Hindu Law — Debts — Debt incurred by father for new business is not binding on sons unless transaction was for benefit of family or to benefit of estate or was supported by legal necessity — Question of legal necessity is to be decided on facts of each case.

When the business of a joint Hindu family, to finance which money has been borrowed, is a new business and not an ancestral business, the sons are not liable for payment of the loan contracted by the father for that business, unless the transaction was for the benefit of the family or to the benefit of the estate or was supported by legal necessity. The question of necessity has to be decided on the facts of each case. Where it was necessary for the father to raise money for the business in order to maintain himself and his family it amounts to a legal necessity. [P 622 C 2; P 623 C 1]

Where therefore the father borrows money for the purpose of starting a petrol and sodawater business in order to maintain himself and his family, the borrowing of the money for the business is a legal necessity so as to make the debt binding on the son: *A I R 1935 All 221, Rel. on.*

[P 624 C 1]

(b) Hindu Law — Debts — Father borrowing money to start new business—Son participating in business after attaining majority — Money borrowed is charge on family property.

Where a Hindu father borrows money for the purpose of starting a new business in order to maintain himself and his family, and his son participates in the business after attaining majority, he can be taken to have accepted it as a family business and the money borrowed for the business would be a charge on the family property: *A I R 1932 Pat 206, Rel. on.*

[P 624 C 1, 2]

J. N. Aggarwal and A. R. Aggarwal—*for Appellant.*

M. C. Mahajan, Amolak Ram Kapur and Harbans Singh for A. R. Kapur (on 27th May 1938)—*for Respondents.*

Bhide J. — This was a suit for recovery of Rs. 6950 on the basis of a mortgage of a house, effected by Partap Singh, deceased father of Basant Lal, defendant 1 and husband of Mt. Rukman, defendant 2, by a deed dated 23rd January 1925. The suit was resisted by the defendants on various pleas, but the main plea on which the defendants relied and which is the only one now material for the purposes of this appeal was that the mortgage was effected without any valid necessity and was therefore

not binding on the property which was ancestral. The learned Subordinate Judge who tried the suit found this issue in favour of the defendants and dismissed the suit and from this decision plaintiff has appealed.

According to the recital in the mortgage deed, the consideration for the mortgage, which consisted of a sum of Rs. 3000, was borrowed to serve as capital of some business (*waste sarmaya karobar*). The learned Subordinate Judge has held that this was not a valid necessity according to Hindu law (by which the parties are governed) and the learned counsel for the respondents has also strongly supported this view, relying upon the decision of their Lordships of the Privy Council in 54 All 564.¹ In that case it was held that money borrowed for the purposes of a new business did not constitute a valid necessity for alienation of ancestral property. As pointed out however in 57 All 605,² a Full Bench ruling of the Allahabad High Court, in which the question of the interpretation to be placed on the aforesaid ruling of their Lordships of the Privy Council arose, the point whether the new business in question was a necessity or whether it was for the benefit of the family was neither raised nor considered by their Lordships of the Privy Council in 54 All 564¹ and consequently that ruling cannot be taken to lay down as an unqualified or absolute proposition that money raised for a new business can never form a valid charge on ancestral property. If, for instance, ancestral property has ceased to be remunerative and there is no way of maintaining the family except by alienating that property and investing the proceeds in some business, there seems to be no reason why the alienation should not be upheld as one for valid necessity. Similarly when the alienation is for the 'benefit of the estate,' there is no reason why it should not be upheld. It was accordingly held by the Full Bench of the Allahabad High Court in 57 All 605,² that when the business of a joint Hindu family to finance which money has been borrowed is a new business and not an ancestral business, the sons are not liable for the payment of the loan con-

1. Benares Bank Ltd. v. Hari Narain, (1932) 19 A I R P O 182=137 I O 781=59 I A 800=54 All 564 (P C).

2. Ram Nath v. Chiranjil Lal, (1935) 22 A I R All 221=155 I O 136=57 All 605=1935 A L J 177 (F B).

tracted by the father for that business, unless the transaction was for the benefit of the family or to the benefit of the estate or it was supported by legal necessity.

There is a conflict of authority as to the exact interpretation of the words 'benefit of the estate.' In some cases it has been held, on the basis of the remarks of their Lordships of the Privy Council in 40 Mad 709,³ that the benefit must be of a defensive character, while in others it has been held that it need not be so restricted (*cf.* 50 All 969,⁴ 53 Bom 419⁵ and A I R 1937 Mad 496⁶). But it seems to me unnecessary to go into this question for the purpose of this appeal. The plaintiff's case is that the money borrowed by Pratap Singh by the mortgage in question was used for the purposes of a petrol and sodawater business in Kashmir. Now it cannot be said that the starting of this business meant any 'benefit to the estate.' Indeed, there is no evidence on the record to suggest that the new business was started for improving the family estate. All that is urged for the plaintiff is that Pratap Singh had no other means of maintaining the family and hence he was justified in selling the ancestral house in order to start the business. From this point of view, the question is really one of legal necessity and not of any benefit to the estate. The question of necessity has to be decided on the facts of each case. The evidence on the record in this case shows that Pratap Singh had a chequered career. He had been a storekeeper in the Army from 1906 to 1912, but was found guilty of misappropriation of liquor and was convicted and sentenced to two years' imprisonment (Ex. D. W. 12/8). On his return to his native place, he tried to engage in a shoe business in partnership with two other persons for some time, but the business did not prosper and was wound up in April 1919 (Ex. P. W. 4/1). Thereafter Pratap Singh went to Seistan in Persia as a gumashta of one Chandi Ram and tried to do some business there. But

ill luck seems to have pursued him there also. He suffered heavy losses and had to sell about 7 kanals 17 marlas of his land to Chandi Ram in order to pay off the bulk of the losses and his own expenses, leaving a balance of about Rs. 1000 still due to Chandi Ram (*see* Ex. P/9 dated 28th August 1923). On 23rd January 1925, i. e. some 16 months later, Pratap Singh effected the mortgage now in dispute and raised a sum of Rs. 3000 for business. The only point for decision is whether in the circumstances stated above, it was necessary for Pratap Singh to raise money for a business, in order to maintain himself and his family, as is urged on behalf of the plaintiff.

It is true that the plaintiff did not state in his pleas in so many words that the new business was necessary for the maintenance of Pratap Singh and his family; but he did say that the transaction was for family necessity and for the benefit of the family (*see* his replication dated 17th March 1937). Defendant Basant Lal deposed that Pratap Singh did no business at all after he was discharged from service. But the facts stated above have been proved by reliable oral as well as documentary evidence and the defendant and his witnesses seem to have clearly lied on the point. It was alleged by the defendant that Pratap Singh was given to drinking and other vices; but here too the evidence produced by the defendant seems to be unreliable and his learned counsel did not attempt to rely on it. The fact that Pratap Singh started a petrol business in Kashmir about April 1925 (i. e. within 3 months of the mortgage) and later on a sodawater factory and that he carried on this business during 1925, 1926 and 1927, is established by unimpeachable testimony of witnesses of Kashmir, who were produced by the plaintiff (*see* evidence of Amar Nath, Sheikh Mohammad Ishaq and Sant Ram). The evidence of Amar Nath and Mohammad Ishaq further shows that defendant Basant Lal himself was taking part in the work. Basant Lal has denied this, but I see no reason to disbelieve the testimony of these witnesses. Their evidence receives further support from the entries in the accounts produced by Amar Nath. There is therefore little doubt that Basant Lal has perjured himself on this point also. It was urged that Rs. 3000 would not be necessary for a petrol or sodawater business, but I do not think the sum can be said to be unreasonably large, considering that Pratap Singh

3. Palaniappa Chetty v. Devasikamony Pandara Sannadhi, (1917) 4 A I R P C 33=39 I C 722=40 Mad 709=44 I A 147 (P C).

4. Jagat Narain v. Mathura Das, (1928) 15 A I R All 454=116 I C 484=50 All 969=26 A L J 841 (F B).

5. Ragho Totaram v. Zaga Ekoba, (1929) 16 A I R Bom 251=118 I C 555=58 Bom 419=31 Bom L R 364.

6. Sellappa Chettiar v. Suppan Chettiar, (1937) 24 A I R Mad 496=171 I C 216=I L R (1937) Mad 906=(1937) 1 M L J 422.

would have to invest in a petrol pump, sodawater machine and other accessories and also maintain the family till the business began to pay.

It was pointed out by the learned counsel for the respondents that Pratap Singh owned some land, but judging from the land revenue (about Rs. 4 in all), the land could not have yielded much income. Pratap Singh was a Khatri and the family was not really dependent on agriculture. Pratap Singh's father Amar Singh was employed as an assistant to the Government Treasurer, Rawalpindi (*see Ex. D. W. 12/7*). Pratap Singh was first in service and thereafter tried to do business. As he had been convicted of misappropriation and sentenced to imprisonment, he probably found it difficult to get any suitable employment after his dismissal in 1912 and had no alternative thereafter except to engage in some business. He seems to have suffered loss in Seistan, but whatever the nature of his business in Seistan may have been, it cannot be said that the petrol or sodawater business was a rash adventure or that it was a business which a man in the position of Pratap Singh could not reasonably take to, in order to find a means of livelihood. He was then nearly 56 years of age. (He was 65 when he died in 1934: *vide Ex. D. W. 12/9*). It is therefore difficult to see what else Pratap Singh could do except to engage in some such business as he did in order to make a living. I am therefore of opinion that the borrowing of money for the above mentioned business was a legal necessity for Pratap Singh in view of the circumstances of this case.

It may be pointed out here that Basant Lal admitted in one of his statements (*vide p. 13 of the record*) that all the other alienations made by Pratap Singh were either for valid necessity or were made with his consent and therefore he did not challenge them.

The learned counsel for the appellant has pointed out that Basant Lal had nearly attained majority when the new business was started in Kashmir in April 1925. According to his birth certificate, he was born on 20th January 1908 and consequently he was over 17 years of age in April 1925 and attained majority in January 1926. The evidence on the record shows that he was working with Pratap Singh during the time the petrol and sodawater business was carried on. The entries in the accounts produced by Amar Nath show that he was

taking part in the business even in October 1926 (*see Ex. P/8*). It would thus appear that Basant Lal participated in the business after attaining majority and may be therefore taken to have accepted it as a family business. From this aspect also, the money borrowed for the business would be a charge on the family property (*cf. A I R 1932 Pat 206.*⁷) On the above findings, the mortgage in dispute must be held to be valid. As no other points were disputed, the appeal must be accepted and the case remanded to the trial Court for passing a preliminary decree and disposing of the suit according to law. Plaintiff will get his costs in both the Courts. Parties are directed to appear before the trial Court on 17th June 1938.

Beckett J.—I agree.

R.M./R.K.

Appeal accepted.

7. Benares Bank Ltd., Bhagalpur v. Krishna Das, (1932) 19 A I R Pat 206=139 I O 83=13 P L T 271.

A. I. R. 1938 Lahore 624

DALIP SINGH AND BHIDE JJ.

Rajan Shah and others — Defendants
— Appellants.

v.

Roshan Mal and others — Respondents.

First Appeal No. 333 of 1936, Decided on 10th December 1937, from decree of Asst. Collector, First Grade, Nili Bar Colony, Pakpattan, D/. 2nd June 1936.

Custom (Punjab)—Partition — Shamilat land in village Sahib Ali is to be divided according to revenue and not area.

The measure for the partition of the shamilat land in the village of Sahib Ali is the land revenue assessed on the land and not the area of land held by the co-sharers. [P 625 O 1]

Barkat Ali, Mathra Das and Qabul Chand — *for Appellants.*

J. N. Aggarwal and Asa Ram Aggarwal — *for Respondents.*

Bhide J. — This is an appeal arising out of proceedings under S. 117, Punjab Land Revenue Act, in which a question of title raised in partition proceedings was tried as a suit by the Assistant Collector. The plaintiff claimed that the shamilat was liable to be partitioned in proportion to the areas held by the co-sharers, while some of the defendants contended that it was liable to be partitioned according to the revenue assessed thereon and that the basis should be taken to be the revenue assessed on the land at the Settlement of 1880. The learned

Assistant Collector has found these points against the plaintiff and from this decision, some of the defendants, who were supporting the plaintiff's claim have appealed. The main point for decision in the case was the interpretation to be placed on the entry in the *wajib-ul-arz* relating to the partition of the *shamilat* land. The oral evidence on the point in a case of this kind is of no assistance and the question has to be decided on the basis of the wording of the various *wajib-ul-arzes* which were relied on by the parties. The wording of the *wajib-ul-arzes* of 1858 and 1898 is somewhat ambiguous, the only words used being "*hasab rasad khewat*" and it not being made clear whether "*khewat*" referred to the area of the land comprised in it or the land revenue assessed on that land; but the entries of the years 1880 and 1917-18 make the point clear. In the former the entry is "*Taqsim shamilat hasab hissas paimana malkiat yahni zar-i-malguzari*"; in the latter the wording is "*Taqsim shamilat hasab zar khewat bandobast sani*". Both these entries leave no doubt that the measure for the purpose of partition was the land revenue assessed on the land and not the area of the land. In view of these entries the decision of the learned Assistant Collector on this point appears to be clearly correct.

The learned counsel for the appellants next contended that there was a dispute as regards the title of some of the defendants, namely the Aroras and Tanwaris, who, according to the appellants, had no share in the *shamilat* land. This question was, however, not the subject-matter of the claim which was being tried by the Assistant Collector under S. 117, Punjab Land Revenue Act. The Assistant Collector had made this point clear in his orders dated 19th December 1933 and 8th December 1934. The matter can therefore be agitated by the parties concerned in separate proceedings, if so advised. I would dismiss the appeal with costs.

Dalip Singh J. — I agree.

V.B.B./R.K.

Appeal dismissed.

* **A. I. R. 1938 Lahore 625**

YOUNG C. J. AND TEK CHAND J.

Emperor

v.

Ram Rakha — Accused — Respondent.

Criminal Revn. No. 1135 of 1937, Decided on 1st February 1938, referred by order of Dalip Singh J., D/- 23.11.1937.
1938 L/79 & 80

* **Criminal P. C. (1898), S. 403 (4)** — Accused convicted under S. 211, Penal Code but acquitted in revision sought to be prosecuted again under S. 182, Penal Code, requisite sanction having been obtained — Case held to fall under sub-s. (4) of S. 403 — Fresh trial held not barred.

The 'competency' of a Court to try an offence does not merely mean the status or character of the former Court to try the offence with which the accused is subsequently charged but also includes within its purview cases, in which the Court, though otherwise qualified to try the case, could not have done so because certain conditions precedent for the exercise of its jurisdiction had not been fulfilled.
[P 626 C 1]

The accused was tried and convicted under S. 211, I. P. C., but was acquitted on a revision in High Court. It was subsequently sought to prosecute him again, on the same facts, under S. 182, I. P. C., the sanction required by S. 195, Criminal P. C., having been obtained :

Held that the case was governed by the exception laid down in sub-s. (4), of S. 403 and the bar of autrefois acquit did not apply to it: *A I R 1930 Lah 1055* ; *22 Bom 711* ; *A I R 1915 Bom 203* ; *A I R 1928 Bom 143* ; *A I R 1915 All 114* ; *A I R 1926 Pat 302* ; *A I R 1926 Cal 691* ; *A I R 1927 Sind 10* and *A I R 1937 Mad 301, Rel. on* ; *36 Mad 308, Not foll.*
[P 627 C 1]

Mohammad Monir, Asst. Govt. Advocate
— *for the Crown.*

Durga Das Khullar — *for Respondent.*

Young C. J. — In April 1936 the respondent Ram Rakha sent by post an application to the Superintendent of Police, Rawalpindi, complaining that one Lajpat Rai, who was employed as a Head Constable in that district, had improperly asked him to withdraw a criminal case which he (Ram Rakha) had instituted against some relations of Lajpat Rai and that he had threatened that if Ram Rakha failed to do so he would meet with dire consequences. The Superintendent of Police asked for an explanation from Lajpat Rai, who denied the allegation. Lajpat Rai then lodged a complaint under S. 211, I. P. C., against Ram Rakha in the Court of a Magistrate First Class, Rawalpindi. The Magistrate found Ram Rakha guilty of an offence under that section and convicted and sentenced him. The conviction was affirmed on appeal by the Sessions Judge, but on revision a learned Judge of this Court came to the conclusion that, on the facts proved, the case did not fall within S. 211, I. P. C., but that it probably came within S. 182, I. P. C., and the accused could not be convicted under that section as there was no complaint in writing by the Superintendent of Police or a public servant to whom he was subordinate. The learned Judge

accordingly set aside the conviction of Ram Rakha under S. 211, I. P. C., and acquitted him. The Superintendent of Police, Rawalpindi, has now filed a complaint against Ram Rakha on the same facts. Before the trying Magistrate, the accused raised the objection that he having been acquitted in the previous case could not be tried for another offence on the same facts. The trial Magistrate overruled the contention, holding that the case fell within the exception laid down in sub.s. (4), S. 403, Criminal P. C. The accused moved the Sessions Judge for revision of this order. The learned Judge disagreed with the trial Magistrate and being of the opinion that the objection was sound has submitted the case to this Court with the recommendation that the proceedings against the accused be quashed. The reference came up before Dalip Singh J. sitting in Single Bench, who in view of the conflict of decisions on the point, has referred it to a Division Bench. It is common ground, that the facts now alleged against the accused are the same on which he was formerly tried under S. 211, I. P. C. and was acquitted. The general rule that "a man may not be put twice in peril for the same offence" is embodied in S. 403, Criminal P. C., but to this rule the Legislature has made several exceptions. One of these is contained in sub.s. (4) which reads as follows:

A person acquitted or convicted of any offence constituted by any acts may notwithstanding such acquittal or conviction be subsequently charged with, and tried for any other offence constituted by the same acts which he may have committed, if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

The question for consideration is as to what exactly is meant by the "competency" of the Court to try an offence. Does it mean the status or character of the former Court to try the offence with which the accused is subsequently charged; or does it also include within its purview cases in which the Court, though otherwise qualified to try the case could not have done so because certain conditions precedent for the exercise of its jurisdiction had not been fulfilled. The wording of the sub-section is by no means as clear as it might have been but the preponderance of judicial authority in this Court as well as the other Courts in India is in favour of the latter view. Before discussing the rulings, reference is necessary to S. 195, Criminal P. C. the relevant portion of which runs as follows:

(1) No Court shall take cognizance: (a) of any offence punishable under Ss. 172 to 188, I. P. C. except on the complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate.

It will appear from the wording of this section that the cognizance by a Court of an offence punishable under S. 182, I. P. C. is barred except on a complaint in writing by the public servant concerned, etc. It follows from this that in the absence of such a complaint a Court is not "competent to try" an offence under S. 182 and therefore the case would fall within sub.s. (4) of S. 403. This was held by Harrison J. sitting in Single Bench, in 129 I C 224.¹ The same interpretation has been accepted in all the other High Courts: see 22 Bom 711,² 40 Bom 97,³ 52 Bom 257,⁴ 37 All 107,⁵ 5 Pat 452,⁶ 95 IC 79⁷ and 97 IC 417.⁸ In 36 Mad 308⁹ however a Division Bench of that Court expressed the opinion that S. 403 (4) referred to the character and status of the tribunal when it refers to competency to try an offence, and that a sanction under Sec. 195, Criminal P. C. is not a condition of the competency of the tribunal but only a condition precedent for the institution of these proceedings.

The authority of this case however has been shaken, if not altogether annihilated by a recent decision of a Full Bench of the same Court in A I R 1937 Mad 301,¹⁰ where it was held that a Court, which tries an offender on a complaint, which it is forbidden by the Code to entertain unless certain conditions are satisfied, acts without jurisdiction.

1. Chuhar v. Emperor, (1930) 17 A I R Lah 1055 = 1930 Cr C 1231 = 129 I C 224 = 32 Cr L J 253.
2. In re Samsuddin, (1898) 22 Bom 711.
3. Jivram Dankarji v. Emperor, (1915) 2 A I R Bom 203 = 31 I C 361 = 16 Cr L J 761 = 40 Bom 97 = 17 Bom L R 881.
4. Emperor v. Ambaji Dhakya, (1928) 15 A I R Bom 143 = 109 I C 481 = 29 Cr L J 545 = 52 Bom 257 = 30 Bom L R 380.
5. Emperor v. Jiwan, (1915) 2 A I R All 114 = 27 I C 208 = 16 Cr L J 144 = 37 All 107 = 18 A L J 4.
6. Mahomed Yasin v. Emperor, (1926) 13 A I R Pat 302 = 95 I C 929 = 27 Cr L J 849 = 5 Pat 452 = 7 P L T 383.
7. Sanitary Inspector, Howrah Municipality v. Bipin Behary Ghose, (1926) 13 A I R Cal 691 = 95 I C 79 = 27 Cr L J 751 = 43 C L J 110 = 30 C W N 382.
8. Fakir Mahomed v. Emperor, (1927) 14 A I R Sind 10 = 97 I C 417 = 27 Cr L J 1105 = 21 S L R 1.
9. Ganapathi Bhatta v. Emperor, (1913) 36 Mad 308 = 19 I C 310 = 24 M L J 463 = 14 Cr L J 214.
10. In re Muthu Moopan, (1937) 24 A I R Mad 301 = 167 I C 571 = 38 Cr L J 457 = I L R 1937 Mad 664 = (1937) 1 M L J 334 (F B).

After giving the case careful consideration, we are of opinion, that the bar of *autrefois acquit* does not apply to this case which is governed by the exception laid down in sub-s. (4) of S. 403, Criminal P. C. We hold therefore that the objection raised by the petitioner before the trying Magistrate was without force. We accordingly decline to accept the recommendation of the learned Sessions Judge. We wish however to express our considered opinion that the prosecution of the accused a second time on the same facts, though technically legal, savours of unnecessary harassment. The learned Assistant to the Advocate-General agreed that this was so, and stated that the only reason why the Crown had appeared to oppose the recommendation of the Sessions Judge for quashing the proceedings was that an authoritative decision on the interpretation of sub-s. (4) of Sec. 403, Criminal P. C. was necessary.

R.M./R.K.

*Order accordingly.***A. I. R. 1938 Lahore 627**

COLDSTREAM J.

Sheikh Mian Mohammad and another
— Petitioners.

v.

Municipal Committee, Lyallpur —
Respondent.

Criminal Revn. No. 1181 of 1937, Decided on 28th October 1937, reported by Addl. Sess. Judge, Lyallpur Division, D/- 30th April 1937.

Punjab Municipal Act (3 of 1911), S. 81—Proprietors of flour mill sending bags of flour through municipal terminal post with their servant M—M paying less terminal tax by misrepresenting weight of bags—Fraud discovered—Municipal Committee claiming deficiency in tax from proprietors and on their refusal, applying under S. 81 for recovery of money due by attachment and sale of property—Magistrate issuing warrant of attachment—Claim held to be *intra vires* of Municipal Committee—Magistrate's function held to be ministerial only.

The proprietors of a flour mill at L used to send bags of flour to the Railway Station L with their servant M. At the terminal post of L, Municipal Committee, M used to pay less terminal tax by misrepresenting the weight of the bags to the Municipal Officials who did not weigh the bags. The fraud was subsequently discovered and M was prosecuted and convicted. The Municipal Committee asked the proprietors of the mill, who were owners of the bags to pay up the deficiency in the terminal tax and on their refusal applied under S. 81 of the Municipal Act to a Magistrate for the

recovery of the money due by attachment and sale of the property of the proprietors. The Magistrate issued a warrant of attachment :

Held that as the goods taxed were ostensibly passed through the terminal tax post as belonging to and carried by the flour mill, the claim made was *intra vires* of the Municipal Committee, being for money payable on account of tax levied under the Municipal Act. The Magistrate's function was ministerial only, his power of inquiry being limited to finding whether the amount was claimable or not : *1 P R 1891 Cr, Rel. on.*

[P 629 C 1]

Muhammad Din Jan — *for Petitioners.*

Iqbal Singh — *for Respondent.*

Facts:—The facts of this case are as follows: The proprietors of Premier Flour Mills, Lyallpur, used to send bags of flour to the Railway Station Lyallpur per their servant Monawar Husain. It is alleged that at the terminal post of Lyallpur Municipal Committee, Monawar Hussain used to pay less terminal tax by misrepresenting the weights of the bags to the Municipal Officials posted at the terminal post who did not weigh the bags. The bags were actually weighed at the Railway Station Lyallpur. This went on for some time till Auditors compared the terminal tax on these bags and the weight of the bags entered in the books at the railway station. A deficiency of Rs. 825-8-6 in the payment of the terminal tax was noticed by the Auditors. Monawar Hussain was prosecuted and imprisoned. The Municipal Committee however asked the proprietors of the Premier Flour Mills, Lyallpur, who were the owners of the bags to pay up the deficiency. On their refusal the Municipal Committee applied under S. 81, Municipal Act to Magistrate, Third Class, Lyallpur, for recovery of the money due by attachment and sale of the property of the proprietors.

The Magistrate held that though the person who introduced the bags without paying full terminal tax, namely Monawar Hussain, was primarily responsible, yet under the spirit of the law the owner of the bags is also responsible, on the principle that the master has to suffer through the loss committed by a dishonest servant of his. He therefore held that the proprietors were liable and issued warrant of attachment against the proprietors and the proprietors have come up in revision to this Court.

The proceedings are forwarded for revision on the following grounds: The substantial question which has been raised by the counsel for the applicant is, that in the

case of a terminal tax the person who introduces the bags is liable to pay it and not the owner of the bags and in the case of deficient payment the former alone can be called upon to pay the deficiency and not the latter, and that the finding of the Magistrate is incorrect. This contention gets some support from 46 I C 848¹ and S. 78, Punjab Municipal Act. In 46 I C 848,¹ it is held, that any person introducing the goods within the limits of a Municipality, be he the owner or the servant, is liable to pay the terminal tax. S. 78, Punjab Municipal Act also fixes criminal liability on the person who actually introduces the goods. In the present case it is stated by the counsel for the respondent Municipal Committee that he did not contest the proposition that the proprietors paid the proper terminal tax to their servant Monawar Hussain but the latter did not pay it to the Municipal Officials and misappropriated it, and that the proprietors were not parties to the dishonesty of their servant. It was for this reason that the proprietors were not prosecuted under S. 78, Punjab Municipal Act, for abetting the introduction of goods without payment of tax. Had the Municipal Officials who were the toll-bar been vigilant, this dispute could not have arisen, for Monawar Hussain could not have introduced the bags without payment of full terminal tax. The scheme under which the goods are introduced itself shows that provided the Municipal Officials at the bar of terminal tax are doing their duties properly, the tax is and can be recovered at the spot and no question of recovering the deficiency arises. Therefore considering the scheme of the Act which is given in S. 78, Punjab Municipal Act, it appears to me that the person who actually accompanies the goods is responsible for paying the tax. In such cases the letter of the law and not the spirit of the law is to be seen. It is laid down at page 180 of Halsbury's Laws of England, Vol. 27 that:

The language of a statute imposing a tax must receive a strict construction. If the person sought to be taxed comes within the letter of the law, he must be taxed. On the other hand if the Crown seeking to recover the tax cannot bring the subject within the letter of the law, the subject is free however much within the spirit of the law a case might otherwise appear to be. There can be no equitable construction admissible in a taxing statute.

Thus the Magistrate was not justified in making the proprietors liable to terminal

tax on equitable grounds. It is urged on the other side that assuming that the proprietors are not liable to pay the tax, they cannot object to their liability before the Magistrate, as they failed to file an appeal against the decision of the Municipal Committee to recover the tax from them which they could under S. 84, Punjab Municipal Act. He says that under these circumstances S. 86, Punjab Municipal Act is a bar to hearing this objection. S. 86, Punjab Municipal Act lays down as follows:

No objection shall be taken to any valuation or assessment nor shall the liability of any person to be assessed or taxed be questioned in any other manner or by any other authority that is provided in this Act.

It is urged that the only way in which this objection of the liability of the proprietors to pay the tax could be taken was by means of an appeal and as this procedure has not been adopted, the applicant cannot raise this objection before the Magistrate and the Magistrate cannot go into the question whether the proprietors are liable or not. He says in effect that the Magistrate is bound to issue a warrant of attachment against the proprietors as if it was an executing Court, in a civil suit which could not go behind the decree and that he should obey the *ipse dixit* of the Municipal Committee which has held the proprietors to be liable for the sum. To this argument the retort is made by the applicant that if the Municipal Committee acts high-handedly the subject is not bound to file an appeal and he can raise objection either by instituting a civil suit or when the Magistrate wants to act against him in a summary way under S. 81, Punjab Municipal Act. Reference is made to 75 I C 737.² In that case the Municipal Committee was not the owner of the land for which it had levied tax upon the person possessing it. It was remarked in that case that the special procedure laid down by the Berar Municipal Law relates only to appeal against the assessment or levy of a tax under the law and did not provide a remedy which might be done in violation of that law. It was also remarked that S. 53, Berar Municipal Law did not oust the jurisdiction of the Civil Court to relieve one subject of the Crown against an illegality imposed upon him by any other subject. It was also mentioned that S. 53, Berar Municipal Law, is almost word for word the same as S. 86,

2. Municipal Committee Pind Dadan Khan v. Bhagwan Singh, (1924) 11 A I R Lah 619 = 75 I C 737.

1. Babu Ram v. Emperor, (1918) 5 A I R All 85 = 46 I C 848 = 19 Cr L J 832 = 16 A L J 632.

Punjab Municipal Act. It was further remarked as follows :

On the finding in the present case that the Municipal Committee is not the owner of the site in front of the shops tenanted by Bhagwan Singh, the said Bhagwan Singh was not liable to tax as he has been. The action of the Municipal Committee in levying the tax from him therefore gave him a cause of action in a Civil Court. I hold that the Civil Court has jurisdiction to try this case and that the failure on the part of Bhagwan Singh to take action under S. 84 of the Act is no bar to the suit, inasmuch as the tax was levied illegally.

In that case the Municipal Committee had no title to the rent on which the tax was imposed and therefore was committing an illegality which could be objected to before the Civil Court, without filing an appeal. In the present case the person proceeded against is not the person who is liable to pay the tax under the Act and the money demanded from him is not "claimable" from him under S. 81 of the Act under which he is being proceeded against. The process is being issued against a wrong person from whom the money cannot be claimed under the Act. The procedure of the Committee is therefore against the Act and I agree with the contention of the counsel for the applicant that he can raise the objection before the Magistrate that the money is not claimable from him. I forward the proceedings to the Hon'ble High Court with the recommendation that the order of the Magistrate issuing execution against the applicant under S. 81, Punjab Municipal Act be set aside.

Order.—The learned Sessions Judge has, it seems, lost sight of the important fact that the goods taxed were ostensibly passed through the terminal tax post as belonging to and carried by the Premier Flour Mills. This is proved by the documents to which the Magistrate has referred in his order. The claim made is *intra vires* of the Committee being for money payable on account of a tax levied under the Act, the Magistrate's function was ministerial only, his power of inquiry being limited to finding whether the amount was claimable or not. See in this connexion 1 P R 1891 Cr.³ There is no justification for interfering with the order passed. The recommendation is rejected and the revision petition is dismissed.

R.M./R.K.

Petition dismissed.

3. *Lagi v. Municipal Committee, Lahore, (1891)*
1 P R 1891 Cr.

A. I. R. 1938 Lahore 629

BLACKER J.

Sodhi Pindi Das and others — Convicts
Appellants.

v.

Emperor.

Criminal Appeal No. 336 of 1937, Decided on 17th June 1937, from order of Addl. District Magistrate, Jullundur, D/- 11th January 1937.

(a) Evidence Act (1872), Ss. 60 and 160 — Witness not stating orally what accused was alleged to have said — Witness not recollecting facts nor stating that he had reported facts correctly — Evidence of such witness is inadmissible.

Where no attempt is made by a witness to state orally before the Court, what the accused in the case was alleged to have said, nor does he state before the Court, that although he has no specific recollection of the facts themselves, he was sure that the facts were correctly reported by him in his report, the evidence of such witness is inadmissible in evidence : *A I R 1932 Lah 7, Rel. on.*

[P 630 C 1]

(b) Penal Code (1860), S. 124-A — Exhortation to hearers to join Communist or Bolshevik party is not seditious.

The speech which amounts to an exhortation to the hearers to join the Communist or Bolshevik party is not in itself seditious within the meaning of Section 124-A.

[P 630 C 2]

(c) Penal Code (1860), S. 124-A — Seditious slogans.

Shouting objectionable slogans in a meeting such as "destroy the dishonest Government" and "long live bloody revolution" is seditious within the meaning of S. 124-A.

[P 631 C 1]

Pindi Das in person.

Sham Lal — for Appellants.

Ratan Lal Chawla for Advocate-General
— *for the Crown.*

Judgment. — I will deal in this order with four appeals arising from convictions under S. 124-A, I. P. C., by the Additional District Magistrate, Jullundur. In all these cases the same preliminary objection has been raised by counsel for the appellants and that is that inadmissible evidence has been relied upon in the shape of the shorthand notes and the typed transcript of them made by the police reporter Arjan Singh. This objection has been made on the strength of a judgment of this Court in *A I R 1932 Lah 7*.¹ It was there pointed out that:

A witness who professes to prove something spoken by another is expected to repeat in the witness-box what the latter had actually stated. He can, of course, refresh his memory by referring to any writing made, or any notes taken down by him, at the time when the speech was made. He can

1. *Jagan Nath v. Emperor, A I R 1932 Lah 7 = 1932 Cr C 17 = 134 I C 486 = 32 Cr L J 1172.*

also use such writing or notes to corroborate his oral testimony. In some cases it is open to a witness merely to refer to a document and to say that it contains a correct statement of what happened in his presence; but in that case he must depose that he is unable to state from memory what happened as owing to a lapse of time and other circumstances he has forgotten it and further that he correctly recorded in the document what he had heard or witnessed. In such cases that document itself becomes primary evidence in the case.

The facts of that case appear to be practically the same as of this and here again no attempt was made by this witness to state orally before the Court what the accused in each case was alleged to have said nor did he state before the Court that, although he had no specific recollection of the facts themselves, he was sure that the facts were correctly recorded in the document. This evidence is therefore inadmissible in its present form. It is true that, under S. 167, Evidence Act, improper admission of evidence is not by itself a ground for a new trial or the reversal of the decision if the facts have been proved independently of that evidence, and it therefore has to be seen in each of these cases whether this is so.

But before doing so, I will merely refer to another objection raised in two of these appeals and that is that the appellant in each case was not confronted by the Magistrate with the particular passages which the Magistrate considered to be objectionable and asked to explain them. I am unable however to find that this is an illegality which vitiates the trial. The prosecution case in each trial was that the whole of the matter was seditious and the whole of the matter was put to the appellants. Although in his judgment the learned Magistrate has picked out one or two passages as typifying the spirit of the whole, his finding is clearly that the whole speech is objectionable under S. 124-A, I. P. C.

Turning now to the question of whether the offence has been proved by other evidence I would take each appeal in turn. The first appeal is that by Ahmad Din against his conviction and sentence of two years' rigorous imprisonment. In this case a number of respectable persons who were present at the meeting have been produced as witnesses and they do reproduce in their evidence portions of the speech practically verbatim. But I have very grave doubts whether this evidence can be considered reliable. It is rather significant that all these witnesses after a considerable lapse

of time have remembered exactly the same portion of the appellant's speech and not the rest of it, and that they have remembered it in what is, practically speaking, almost the same words. These feats of memory involve coincidences which seem to me to be too extraordinary to be accepted in a Court of law. Moreover, it should be noticed that, in the portion of the speech which they purport to have remembered, there appears a passage which, if the appellant did utter it, would definitely have been seditious, and that is an excitement to Indians to take advantage of the seizure by Italy of the Suez Canal, if that event ever happened, to fight against the Government for independence. Curiously enough this passage cannot be found in the transcript of the report by the Criminal Investigating Department reporter which is clearly a far more reliable account. It would be seen therefore that although there is other evidence to prove what this appellant said, it cannot be taken as reliable and the only basis for conviction would be the verbatim report of the speech taken down by the Criminal Investigating Department reporter. That being so, it seems to me that this trial and conviction must be set aside as based on inadmissible evidence.

The only question is whether or not I should direct a retrial. In this particular case I have read very carefully through the speech and I must admit that taken as a whole it does not appear to me to be seditious in intention. The speech amounts to an exhortation to his hearers to join the Communist or Bolshevik party and that in itself is not objectionable within the meaning of S. 124-A. It is however true that there are certain passages which have been referred to by the learned Magistrate in which the speaker in his excitement does appear to have gone a bit too far and to have made remarks calculated to bring the Government in India into contempt and hatred. But none of these appear to me to be very serious in their nature and I think that in any case this appellant would have been amply punished for them by the imprisonment that he has already undergone. Therefore in his case I do not think there should be a re-trial and I accept his appeal and acquit him.

The next appeal is that of one Abdul Aziz. Abdul Aziz is not alleged to have made any speech but to have shouted certain objectionable slogans. These slogans

were: (1) Destroy the Government. (2) Destroy the dishonest Government. (3) Long live the 'bloody revolution', and (4) Destroy the present Government.

Now, in this case the objection as to the evidence of Arjan Singh is immaterial, because the shouting of these slogans is clearly testified to by other respectable disinterested witnesses whose evidence there is no real reason to reject. There is however a certain amount of defence evidence of persons who attended the meeting and state that the appellant did not use these particular slogans and that all that he said was "*Inqilab zinda bad*" "*Mazdur Kisan conference zinda bad*". The learned Magistrate has pointed out that all these witnesses are interested in the appellant and that therefore no great reliance can be placed upon their evidence. It is true that these witnesses are all members of the same political party as the appellant and to that extent their evidence is probably prejudiced against the prosecution and biased in his favour. Some of these people are respectable persons and I do not think that they are deliberately attempting to deceive the Court. But it is fairly obvious that with the best intentions in the world these persons who are deposing several months after the event to shouts raised by the appellant in the excitement and hurly burly of a political meeting, when there is nothing to show that they went there definitely to observe and to note the exact words used, are not in a position to rebut those who did go there definitely as observers and noted exactly what was said and made a record of it at the time. I for one would not like to go in the witness-box several months after I had attended a meeting of this sort and swear that the accused did not use the expression "*khuni*" in referring to the revolution, or the word "*beiman*" in referring to Government. The most that I would be prepared to swear is that I could not remember having heard him use these particular words and I would have to admit that in the face of reliable evidence by other persons that he did use them, my recollection must be faulty. In fact it seems to me therefore that it is satisfactorily proved by the evidence on the record that this appellant did use these particular slogans and I have no doubt that two of them at any rate, namely "*Destroy the dishonest Government*" and "*long live bloody revolution*", are objectionable within the meaning of S. 124-A, I. P. C.

I see no reason to interfere with the sentence and I accordingly dismiss this appeal.

In the third case the appellant is one Ujagar Singh and the accusation against him is that he recited a seditious poem. The same preliminary objection arises in this case and I think must be sustained. Some attempt has been made by some of the other witnesses to quote words of his poem but these are the same witnesses who appeared in the first case and I doubt if it would be safe to rely on their recollection. The question therefore remains whether this appellant should be retried or not. I do not wish to prejudice any subsequent proceedings by giving any opinion as to the merits of this particular case and would therefore merely record an order that, on account of the admission of inadmissible evidence, the conviction and proceedings are set aside and a retrial is ordered. As the retrial will result in prolongation of the proceedings which is not the fault of the appellant I direct that the appellant be admitted to bail to the satisfaction of the District Magistrate.

The fourth appellant is one Sodhi Pindi Das. His case is practically identical with that of Ujagar Singh except that he has been convicted in respect of a speech and not for a poem. On full consideration of the case I pass the same order as in the case of Ujagar Singh, namely that, owing to the improper admission of inadmissible evidence, the proceedings and conviction are set aside and that the appellant be retried. For the same reasons I direct that he be released on bail to the satisfaction of the District Magistrate.

S.C./R.K.

Order accordingly.

A. I. R. 1938 Lahore 631

BLACKER J.

Gurbakhsh Singh and others

Convicts — Petitioners.

v.

Emperor.

Criminal Revn. No. 2 of 1937, Decided on 8th June 1937, from order of Addl. Sess. Judge, Ferozepore, D/- 21st December 1936.

(a) Criminal P. C. (1898), S. 342—Applicability—Court witness — S. 342 does not apply to witness called by Court—Accused need not be examined again after such witness.

Section 342 applies only to the prosecution case and not to the witnesses called by the Court. The

accused need not therefore be examined again after the examination of a witness called by the Court.
[P 633 C 1]

(b) Public Gambling Act (1867), S. 4 — Essentials for conviction—It is crime to be found in place where gambling is going on — No offence to gamble in public place till found doing gambling.

The only crime under the Public Gambling Act is being found in the place where gambling is going on and it is no offence to gamble in a public place as long as a person is not found doing it. The persons not found in the place where gambling was going on cannot therefore be convicted under S. 4 of the Act : 35 P R 1894 Cr, Foll.

[P 633 C 2]

R. P. Khosla — *for Petitioners.*

Manohar Lal Mehra for Advocate General — *for the Crown.*

Report. — The accused on conviction by Thakar Vikram Singh, exercising the powers of a Magistrate of the First Class, in the Ferozepore District, were sentenced, by order dated 20th October 1936, under S. 4, Gambling Act, to pay a fine of Rs. 15 each or in default to undergo rigorous imprisonment for one week. The facts of the case are as follows :

On the night between 1st and 2nd September 1936, the Superintendent of Police, Ferozepore, raided a building which he thought was being used as a public gambling house. In this raid three persons were actually found in the gambling house and were arrested. Six other men were arrested from the second storey of the same building. All these nine persons were sent up for trial before Thakar Vikram Singh, Additional District Magistrate, Ferozepore, for an offence under S. 4, Gambling Act. One of them Bishan Das was asked by the learned trial Magistrate to give evidence under S. 10, Gambling Act, and did so. He was acquitted while the other eight were convicted under S. 4 and ordered to pay a fine of Rs. 15 each, or in default to undergo rigorous imprisonment for one week each. The order is not appealable, and a petition for revision has therefore been filed against the order of the learned Magistrate.

It appears that there has been a material irregularity in the conduct of the trial. The accused persons should have been examined at the opening of the trial as this was a summons case. The learned Magistrate however did not examine any of the petitioners. In fact, I find from the record that he did not examine the accused persons at any stage of the trial. Only at one stage the statement of the counsel

appearing for them is recorded concerning the defence witnesses. It also appears that the learned trial Magistrate went to see the spot at the conclusion of the defence evidence. After the inspection of the spot he called one Chebe Khan, Police Constable, as a Court witness. After the evidence of this witness was recorded, the accused were never offered any opportunity to produce further evidence. The Magistrate merely remarked "the case is closed" and he then proceeded to deliver judgment at once. The learned Public Prosecutor admits before me that there has been more than one irregularity in this case. The whole trial stands vitiated. It therefore becomes necessary that the case should be referred to the High Court for revision.

The learned counsel for the petitioners has further urged before me that on the merits there should not be a retrial as far as five of the petitioners are concerned. These are Gulzara Singh, Bawa Ram Kishan, Mohan Lal, Tirath Ram and Om Parkash; and the argument has been that these persons were not found at the time of the raid in the gambling house, and therefore they cannot be said to have committed any offence. The learned counsel urges that it is not an offence under the law to gamble even in a public gambling house, and that the only punishable offence is to be found gambling in such a gambling house at the time of a raid by the police. Admittedly these five petitioners were not found in the gaming house. They were caught in the neighbourhood in circumstances from which the learned Magistrate inferred that they had been gambling in the gaming house. The learned counsel for the appellant relies on a decision of the Punjab Chief Court being 35 P R 1894 Cr.¹ It is a Single Bench decision, and in the course of it Roe J. says :

I am of opinion that under Ss. 4 to 6 the accused must actually be found in the house when the search is made. The Act nowhere makes the act of gambling even in a common gaming house itself an offence; the offence is being found there when the house is lawfully searched. If it were clearly proved, or admitted, that an accused person had been gambling constantly, or up to the very moment of the entry by the police, I do not see under what section he could be convicted, if he succeeded in effecting his escape before the police effected their entry.

To my mind, the view expressed in this decision seems startling, but no authority

1. Fazal Ahmad v. Empress, (1894) 35 P R 1894 Cr.

to a contrary proposition has been cited before me.

In these circumstances, I direct that the records of this case be forwarded to the High Court with the recommendation that the present convictions and sentences be set aside, and either a retrial of all the petitioners ordered, or in case the view expressed in 35 P R 1894 Cr¹ is accepted, a retrial of the three petitioners Gurbakhsh Singh, Jagan Nath and Karam Chand alone be ordered.

Note.—The fine register shows that the fines in question were realized by the Court concerned and credited into the treasury on 26th October 1936.

Order. — The learned Sessions Judge recommended that the proceedings in this case should be set aside on account of what he considers to be two material irregularities. The first is that the accused were not examined at the opening of the trial as is necessary in a summons case. I find however on referring to the summary trial register that the learned Sessions Judge appears to be under some misapprehension as regards this point as the summary register shows that they were examined at the outset of the trial. What appears to have misled the learned Sessions Judge is that the learned Magistrate adopted the course, which he need not have adopted in a summary trial, of recording the evidence of the witnesses on separate sheets of paper. It seems that the file of these separate sheets of paper must have appeared to the learned Sessions Judge to be the whole of the record which of course it is not. The second point on which the learned Sessions Judge recommends the trial to be upset is the omission of the learned Magistrate further to examine the petitioners after he had called a Court witness at the close of the trial. But the statute does not require the accused to be examined again after the examination of a Court witness and S. 342 only applies to the prosecution case and not to witnesses called by the Court. It has been held that if in fact no prejudice has been caused by the omission to examine the accused in such circumstances there is no irregularity at all in the trial. That is the case in this trial. The evidence of the Court witness Chebe Khan has added nothing whatever to the case of the prosecution and has not prejudiced the petitioners in any way. The case against them would have been exactly the same if Chebe Khan's evidence had never been

taken. There is therefore no ground to set aside the trial in this case.

But I am of opinion that the convictions of Mohan Lal, Ram Kishan, Tirath Ram and Om Parkash cannot be upheld. It is clear from the evidence that they were not found in the place where the gaming was going on within the meaning of S. 4, Public Gambling Act. The law in this matter has been very clearly stated by Roe J. in 35 P R 1894 Cr.¹ Whatever may or may not have been the intention of the Legislature in drafting S. 4, what they have said is that the only crime is being found in the place where gambling is going on and that under the Act it is no offence to gamble in a public place as long as you are not found doing it.

The case against Gulzara Singh is however slightly different. There is evidence which there is no reason to disbelieve that when the police party were approaching the chaubara in which the gambling was proved to be going on, a Sikh, who was afterwards identified by the same witness as Gulzara Singh, "peeped out of the chaubara over the parapet of the chaubara." If it could be satisfactorily proved that this means that he had just come out of the chaubara I think the conditions of S. 4 would have been fulfilled in his case. But the evidence is not very definite and clear on this point and the plan of the spot does not help. It is impossible therefore to determine the exact relation of the place where this Gulzara Singh was seen peeping out of the parapet of the chaubara to the place where the gambling was actually going on so as to enable the Court to decide whether at the time he was seen by the police he was or was not, practically speaking, in the place where the gambling was going on. He must, I think, be given the benefit of this doubt.

With regard then to three of the petitioners, Gurbakhsh Singh, Jagan Nath and Karam Chand, I see no reason to interfere and their petition is rejected. With regard to the other petitioners however I am of opinion that a conviction under S. 4, Public Gambling Act cannot be sustained and as far as they are concerned their petition is accepted and they are acquitted.

A.L./R.K.

Order accordingly.

A. I. R. 1938 Lahore 634

SKEMP J.

Ghulam Haider—Convict — Petitioner.

v.

Emperor.

Criminal Revn. No. 1500 of 1937, Decided on 25th January 1938, from order of Sess. Judge, Multan, D/- 9th July 1937.

(a) Penal Code (1860), S. 403 — Proof of receipt of money and mere failure to account not sufficient—Proof of conversion to his use is necessary.

Not only has the prosecution in a case of criminal misappropriation to prove that the accused received the money and has not accounted for it but also to prove that he converted it to his own use. Proof of receipt and failure to account is naturally a long way towards proof of misappropriation, but it is not the whole way: *A I R 1928 Lah 382; A I R 1934 Cal 425 and A I R 1934 Sind 22, Rel. on.* [P 635 C 1]

(b) Criminal Trial—Complicated case — Services of Public Prosecutor or special Public Prosecutor should be sought at trial itself.

In a complicated case the services of the Public Prosecutor, or if necessary, of a special Public Prosecutor should be requisitioned at the trial or to investigate the case and not merely at the stage of appeal. [P 635 C 2]

J. G. Sethi — *for Petitioner.*

R. C. Soni and Parma Nand, Public Prosecutor — *for the Crown.*

Order. — This is a petition by one Ghulam Haider for revision of a conviction under S. 408, I. P. C. and sentence of two years' rigorous imprisonment and fine. Ghulam Haider, petitioner, was the Assistant Manager of the Court of Wards, Dogar Kalasra, District Muzaffargarh. He was convicted by a Magistrate on three charges under S. 409, I. P. C., of criminal misappropriation of moneys belonging to that Court of Wards. On appeal the learned Sessions Judge acquitted him on two charges but maintained the principal charge only altering the conviction from under S. 409 to one under S. 408, I. P. C. The petitioner was charged with embezzling three sums: (1) Rs. 4.8.0, (2) Rs. 85.11.0 and (3) Rupees 810.6.6. He was acquitted by the learned Sessions Judge in respect of the first two heads of the charge on the ground that it was not proved that these amounts had come into his hands. As to the third the finding of the Courts below was that the petitioner had actually embezzled Rupees 551.13.3 out of the sum charged. The Court of Wards had dealings with a firm in Sanawan called Jassa Ram-Tilok Chand. The finding of the Courts below is that on 17th

October 1935 Ghulam Haider met a member of the firm named Kewal Ram by accident at Sanawan railway station. Kewal Ram had just received a large sum of money from a client out of which he paid Rs. 1740 to Ghulam Haider who gave him a receipt. Ghulam Haider however only entered in the book Rs. 1188.2.9 and failed to account for the balance. This was not specifically charged against the accused. The charge was based on the theory that the Assistant Manager had sold to the firm grain received from the tenants for Rupees 1998.9.3 but had only accounted for Rs. 1188.2.9 leaving a balance of Rs. 810.6.6 to be accounted for. The Sessions Judge held that the whole amount was not proved to have come into the hands of the accused but that this item of Rs. 1740 was so proved.

I agree with the Courts below that Rs. 1740 is proved to have been paid in cash to Ghulam Haider on 17th October 1935 by Kewal Ram. (His Lordship then examined the evidence and proceeded.) The Courts below have found that he has not accounted for the balance. Mr. J. G. Sethi who represented the accused argued that he had done so. His argument is that the Court of Wards had in the autumn of 1935 two sets of transactions with Jassa Ram-Tilok Chand. One was for a sum amounting to Rs. 2097.15.3; a half-share was of this firm and another half of a dealer named Rup Chand. The other transaction was that in question for Rs. 1998. Various entries in the Court of Wards' registers are referred to totalling to Rs. 2015.7.9 and it is said that these are payments on that account. But Tilok Chand as D. W. 1, admitted that in their firm's roznamha payments totalling Rs. 1334 were made to the accused and that no other amount was shown to have been paid to him by name. Now the argument of the defence is that out of the Rs. 1740 paid, Rupees 1188.2.9 were on account of the second transaction. In fact it is said to amount to Rs. 551.6.6 credited on 3rd August 1935. This consists of a total of Rs. 319.1.3 in register N and Rs. 262.6.9 in register O, a total of Rs. 581.8.0 less Rs. 30 odd credited in error. Register N is the general cash register of Malak Hamid Yar and register O is the general cash register of Malak Khair Mohammad.

Now these sums are totals of sums credited to various tenants. Mr. Sethi's explanation is that they represent the repayment

of takavi advances. He says that the estate made takavi advances to their tenants; the tenants repaid in grain and when it was sold, the amounts were credited to the various tenants' accounts. There is no evidence to this effect, but the coincidence of the figures is remarkable. I asked Mr. Sethi to prove his allegation that these sums had been credited to the previous account by producing the account between the firm Jassa Ram-Tilok Chand and the Court of Wards. It appears that neither the Court of Wards nor the firm maintains any such account book; at any rate there is no such book on the record and no evidence that such a book exists. The truth of the defence is therefore far from proved. But of course it is not necessary to prove the innocence of the accused; it is for the prosecution to prove his guilt. From this elementary proposition it follows that not only has the prosecution in a case of criminal misappropriation to prove that the accused received the money and has not accounted for it, but also to prove that he converted it to his own use. Proof of receipt and failure to account is naturally a long way towards proof of misappropriation, but it is not the whole way; for specific cases see the rulings reported in A I R 1928 Lah 382,¹ A I R 1933 Cal 800,² A I R 1934 Cal 425³ and A I R 1934 Sind 22.⁴ A I R 1934 Cal 425³ is the simplest case and the simplest exposition of the law.

Now in the present case there is no evidence as to the system of keeping accounts in this Dogar Kalasra Court of Wards. We have no information as to what registers were supposed to be kept or were actually kept. The prosecution and defence are agreed that the petitioner on 18th October accounted for Rs. 1188.2.9. I find that this consists of two items, one for Rupees 804.8.0 in register Ex. P N, Malak Hamid Yar's general cash register, the other for Rs. 383.10.9 in Ex. P O, Malak Khair Mohammad's general register. There is no evidence and it was not explained in argu-

ments before me why there are two general cash registers, and I can only guess that there are two minor brothers and a register for the share of each. Mr. Soni for the Crown urged that the prosecution could not prove a negative. He also relied on the answer of the accused already quoted, and said, what is indeed clear, that the accused could not have possibly received the balance of the Rs. 1740 on ruqas which he had returned. There is force in these arguments but the prosecution must prove its case. Now, it would generally be possible to prove misappropriation of money to the use of the accused by producing the books in which the receipt ought to be entered and showing that it is not there. In this case about the receipt of Rs. 1740 one would expect an entry, but there is not even that. There are unexplained entries in two different registers amounting to Rs. 1188.2.9. In the absence of clear accounts, I am not prepared to hold that the prosecution has proved the guilt of the accused beyond doubt. I give him the benefit of the doubt and acquit him. In my opinion this case shows that the system of maintaining accounts for this Court of Wards leaves a great deal to be desired. And in a complicated case of this kind, I think the services of the Public Prosecutor, or if necessary, of a special Public Prosecutor, should be requisitioned at the trial or to investigate the case and not merely at the stage of appeal. I repeat that there is no evidence in this case what registers were kept and what registers ought to be kept by the Court of Wards and what payments were entered in each. The handwriting of the Magistrate has added materially to the difficulty of deciding this petition.

K.S./R.K.

Petition allowed.

* A. I. R. 1938 Lahore 635

SKEMP J.

Kheman — Defendant — Appellant.

v.

Chhotu — Plaintiff — Respondent.

Second Appeal No. 123 of 1938, Decided on 28th April 1938, from decree of Senior Sub.Judge, Rohtak, D/- 10th November 1937.

* (a) Evidence Act (1872), S. 13—Plan filed in previous suit describing property as belonging to plaintiff's predecessor is inadmissible in evidence.

1. Pritchard v. Emperor, (1928) 15 A I R Lah 882=112 I C 850=80 Or L J 18.

2. Robert Stuart Wauchope v. Emperor, (1933) 20 A I R Cal 800=1933 Cr C 1375=146 I C 767=35 Or L J 156=61 Cal 168=53 C L J 405=88 O W N 187.

3. Bolai Chandra v. Bishnu Bejoy, (1934) 21 A I R Cal 425=1934 Cr C 537=148 I C 559=85 Or L J 715=88 O W N 474.

4. Bhikchand Gangaram v. Emperor, (1934) 21 A I R Sind 22=1934 Cr C 220=155 I C 439=28 S L R 84.

The Illustration to S. 13 shows that an instance claiming a right means something more than a mere statement of boundaries in a deed or in a plan. A distinction has been drawn between a claim and a statement of claim. A plan filed in a previous suit in which certain property was not then in dispute describing the property as of the plaintiff's predecessor is not an instance in which the right in dispute was claimed and hence is not admissible in evidence: *A I R 1925 Cal 684, Rel. on; Case law referred.* [P 636 C 2; P 637 C 2]

(b) Evidence Act (1872), S. 157 — Suit for possession of certain shop — G, a neighbour of plaintiff, giving evidence and in support of his testimony producing rent deeds executed in his favour and reciting that shop belonged to plaintiff—Deeds not signed by G—Deeds cannot be relied on as corroborative evidence of his testimony.

In a suit for possession of certain shop one G, who was a near neighbour of the plaintiff, gave evidence. He said that the shop in dispute belonged to the plaintiff and in support of his testimony produced some rent deeds executed in his favour, which in the recital of the boundaries gave the shop in dispute as the property of the plaintiff. G actually did not sign any one of the deeds:

Held that G could not refer to deeds to which he was not a party, i. e. to statements which he did not make as corroborative evidence under Section 157. [P 637 C 2]

Yeshpal Gandhi for Faqir Chand Mital
— for Appellant.

Shamair Chand and Parkash Chand —
for Respondent.

Judgment.—Chhotu, a Mahajan of village Gorar in Rohtak District, brought a suit on 14th October 1935 for possession of a shop, on the allegations that the shop was his ancestral property and that the defendant Khema, a Jat, had entered into forcible possession in the absence of the plaintiff in August 1934. The defendant denied that the property belonged to Chhotu or that he had taken forcible possession. He further pleaded that the plaintiff was a Gharibdasi sadhu with no interest in worldly affairs and incapable of suing. The learned trial Judge dismissed the suit, but the appeal was accepted by the Senior Subordinate Judge of Rohtak, who granted the plaintiff a decree. The defendant has come here in second appeal. The trial Judge found that the plaintiff, although a Gharibdasi sadhu, was very much alive to worldly affairs and that he was capable of suing. The plaintiff relied on a plan Ex. P. 2 filed by his predecessors-in-interest in a suit of the year 1875, in which this property, which was not then in dispute, was described as the property of the plaintiff's grandfather Sukh Lal. The trial Judge excluded this plan from evidence,

first, because in his opinion, the identity of the present shop with that shown in the plan was not proved and, secondly, because in any event the plan, which was filed in a suit against Brahmins, i. e. strangers, was not admissible against Khema. The plaintiff also relied on three recent rent deeds executed in favour of Gudan Mal, Mahajan, a near neighbour, which in reciting the boundaries of Gudan Mal's property set forth the shop in dispute as belonging to Chhotu. The learned trial Judge excluded these rent deeds also. He found that the oral evidence was of an ordinary type, insufficient to prove the plaintiff's ownership; and finding both issues of ownership and possession within 12 years against the plaintiff, he dismissed the suit. The learned Senior Subordinate Judge on appeal held that the plan of 1875 was admissible and even attached some weight to the recent rent deeds. He accepted the appeal and decreed the suit as aforesaid.

Before me it is not contested that the finding that the shop now in dispute is the same as that shown in Ex. P. 2, the plan of 1875, as belonging to Sukh Lal, is a finding of fact by which I am bound. The points of law argued are that (1) the plan and (2) the rent deeds are inadmissible in evidence. As to the plan, S. 83, Evidence Act lays down that maps or plans made for the purposes of any cause must be proved to be accurate; and apparently this would govern Exhibit P. 2. Mr. Shamair Chand for the respondent, however, relies on S. 13, Evidence Act and says that the shop now in dispute shown as the property of Sukh Lal in the plan is an instance in which the right in dispute was claimed. In my judgment this is not so. The Illustration to S. 13 shows that an instance claiming a right means something more than a mere statement of boundaries in a deed or in a plan. A distinction has been drawn between a claim and a statement of claim: see *A I R 1925 Cal 684*,¹ a Division Bench ruling:

The word 'claim' denotes a demand or assertion in relation to a thing or attribute as against or from some person or persons, showing the existence of a right to it in the claimant. A bare statement may or may not be a claim according to the attending circumstances in which it is made. It may amount to a claim or be a mere statement of claim.

In that case it was held that a statement in a pattah that the land to the west

1. *Radha Krishna v. Sarbeswar Nag*, (1925) 12 A I R Cal 684=86 I C 674=29 O W N 469.

of the land demised belonged to the executant was not a "claim" but a mere recital. Apparently that ruling would govern this case. A I R 1927 Cal 1,² a Full Bench ruling, is also in point. See also 49 I C 951,³ another Division Bench judgment of the Calcutta High Court, in which Sander-son C. J. delivering the judgment of the Bench, held that an old map prepared on behalf of one of the parties to a litigation was a private map and no evidence against the other party to the litigation. 8 Lah 651⁴ was referred to by both parties. In that case a Bench presided over by the Hon'ble Sir Shadi Lal held that certain deeds of sale concerning plots adjacent to the land in suit, reciting that the latter was the plaintiff's property, the executants being strangers to the suit, could not be relied upon because the executants of the deed were neither produced as witnesses nor proved to be dead. That does not really help as far as Ex. P. 2 is concerned. Reference was also made to 37 P L R 454,⁵ a judgment pronounced by me on behalf of a Division Bench of this Court, which said that recital of boundaries of adjacent properties in old deeds, though not conclusive, could be taken into account. This expression of opinion was unnecessary for the decision, which rested on other evidence, and I now think that it is wrong. Mr. Shamair Chand for the respondent also referred to a ruling of 1922 of the Madras High Court, reported in 70 I C 389,⁶ which relied on a mortgage deed executed in the year 1874. The judgment said :

They (the lower Courts) held on the first point that the assertion of title as owner found in Ex. 1, and also implied by that transaction of mortgage itself, is admissible under S. 13, Evidence Act, and on the second point that the statement which forms the recital in Ex. 1 as to how the title was acquired, is also admissible under S. 32, Cl. (7), Evidence Act.

With all respect, the judgment is not very clear. I am inclined to think, in view of the authorities quoted above, that the recital of title did not amount to a claim, but that the transaction of mortgage itself was admissible under S. 13. This case

therefore does not carry us any further. The result of this argument is that, in my opinion, the plan Ex. P. 2 showing Sukh Lal as in possession is inadmissible in evidence. Mr. Shamair Chand admitted that if the plan had been a recent one, it would not be admissible unless the person preparing it appeared as a witness and swore to his knowledge of the facts and the correctness of the plan. This being so, I do not see why a document should be admitted merely on account of its age. It is quite true that the plaintiffs in 1875 had no apparent motive for saying anything, which was not correct, about the property now in dispute; but it did not matter for the purposes of that suit whether the description of the shop as Sukh Lal's was right or wrong; and the present defendant's predecessors-in-interest had no opportunity of contesting the statement. A better guarantee than this is required before letting in evidence which cannot be tested by cross-examination.

The position as to the rent deeds is simpler. They were executed by three different persons in favour of Gudan Mal Mahajan, a near neighbour of the plaintiff. Gudan Mal gave evidence. He said that the shop in dispute belonged to the plaintiff and in support of his testimony produced the three rent deeds executed in his favour, which in the recital of the boundaries gave the shop in dispute as the property of Chhotu. These three deeds were executed respectively in the years 1929, 1933 and 1934. Gudan Mal actually did not sign any one of the three deeds, and it is therefore urged that he could not rely on them under S. 157 as corroboration of his testimony. The executants of the two earlier deeds were not called. The executant of the third was a school master who had come to the village for the first time on 30th June 1934, his deed being executed on 18th July 1934. He said that he had no knowledge of the boundaries, that he stated what he was told but that all the villagers said that the shop belonged to Chhotu. This is mere hearsay. As to Gudan Mal, I think he cannot refer to deeds to which he was not a party, i. e. to statements which he did not make, as corroborative evidence under S. 157. If a point be stretched and it be said that Gudan was practically a party to the deeds, the position simply is that Gudan Mal stated in Court in 1935 that the shop belonged to Chhotu and that he had previously said so

2. Brojendra Kishore Roy v. Mohin Chandra, (1927) 14 A I R Cal 1=99 I C 189=31 C W N 82 (F B).

3. Shashi Bhusan v. Nawab of Murshidabad, (1919) 6 A I R Cal 231=49 I C 951.

4. Lajpat Rai v. Faiz Ahmad, (1927) 14 A I R Lah 448=103 I C 889=8 Lah 651=29 P L R 74.

5. Lal Shah v. Nathu Shah, (1934) 37 P L R 454.

6. Nallasiva Mudaliar v. Ravan Bibi, (1921) 8 A I R Mad 383=70 I C 389.

three times, the earliest date being 1929. In my opinion these rent deeds also are inadmissible. The conclusion of the learned Senior Subordinate Judge of Rohtak was therefore vitiated by inadmissible evidence. Following 8 Lah 651,⁴ I set aside his judgment and decree and direct that he should come to a fresh finding excluding the inadmissible evidence. He should also come to a finding as to Issue 2 as regards possession. Costs of this hearing are to follow the event. The learned counsel for the parties have been told that their clients are to appear in the Court of the Senior Subordinate Judge, Rohtak, on 30th May 1938 to obtain a date for the re-argument of the appeal.

D.S./R.K.

Decree set aside.

* A. I. R. 1938 Lahore 638

ADDISON AG. C. J. AND DIN
MOHAMMAD J.

Prabhu Mal—Defendant—Appellant.

v.

*Chandan, Plaintiff and another,
Defendant—Respondents.*

Letters Patent Appeal No. 69 of 1938, Decided on 23rd May 1938, from decree of Abdul Rashid J., reported in *A I R 1938 Lah 512*.

* (a) Punjab Redemption of Mortgages Act (2 of 1913), S. 12—Order of dismissal as contemplated in S. 12—Suit must be brought within one year: 40 P L R 245=*A I R 1938 Lah 512, Reversed.*

Under S. 12, a party against whom an order of dismissal is made under any of the sections of the Act enumerated there, is bound to institute a suit to establish his rights in respect of the mortgage within one year under Art. 14, Lim. Act and if he fails to do so, his right is lost for ever: 40 P L R 245=*A I R 1938 Lah 512, Reversed; A I R 1925 Lah 385 and A I R 1934 Lah 384, Rel. on.*

[P 689 C 1 ; P 640 C 2]

(b) Punjab Redemption of Mortgages Act (2 of 1913), S. 12—Disposal of petition without touching merits is contemplated by the Act.

The law contemplates the disposal of petitions under the Redemption of Mortgages Act on grounds other than those which touch the merits of the petition and it empowers the Collector to dispose of those petitions on those grounds. For a Collector therefore to dismiss an application on grounds other than merits is not to refuse jurisdiction inasmuch as this is a manner of exercising jurisdiction permitted by the Act: *A I R 1929 Lah 513, Dissent.*

[P 640 C 1]

(c) Interpretation of Statutes—Courts should

interpret plain words of law and apply it rather than enter into equity or logic of it.

Sitting as a Court of law, Judges are concerned neither with the equitable side of the legislation nor with the logic of it. They have to interpret law in its plain sense and to apply it so interpreted to the facts of any case that arises without reference to logic or equity.

[P 640 C 1]

(d) Punjab Redemption of Mortgages Act (2 of 1913), S. 12—Orders against party under Ss. 6 to 11—He is person aggrieved.

Any person against whom any order is made under Ss. 6 to 11 is a person aggrieved within the meaning of S. 12: *A I R 1929 Lah 513, Rel. on; (1880) 14 Ch D 458, Ref.*

[P 640 C 2]

Achhru Ram — for Appellant.

Shamair Chand — for Respondent

(Plaintiff).

Din Mohammad J.—This appeal has arisen in the following circumstances: One Shadi, mortgaged his land with possession to one Prabhu on 30th May 1901 and the mutation relating to that transaction was sanctioned on 24th November 1903. In September 1927, Chandan, one of the legal representatives of Shadi, made an application under S. 4, Redemption of Mortgages Act (2 of 1913). The mortgagee resisted the application principally on the ground that the mortgagor's rights had been extinguished and that he, the mortgagee, was not the complete owner of the land. The Assistant Collector while remarking that the objection made by the mortgagee appeared to him to be sound, dismissed the application on the ground that he could not enter into a discussion of a complicated matter in those summary proceedings and directed the petitioner to seek his remedy in regular Courts. No further action was taken by the representatives of the mortgagor until 6th December 1935 when the present suit for redemption was instituted. The mortgagee contended inter alia that inasmuch as no suit had been instituted within one year of the order of the Assistant Collector dismissing the application under the Redemption of Mortgages Act, the suit was barred under Art. 14, Lim. Act. The trial Court however did not give effect to this plea and made a decree in terms of the relief prayed for. On appeal, the Senior Subordinate Judge also agreed with the trial Court. Thereupon, a further appeal was presented to this Court, which came for hearing before Abdul Rashid J. He too upheld the decision of the Courts below on the question of limitation and dismissed the appeal. Hence this Letters Patent appeal.

Counsel for the appellant contends that under Sec. 12, Redemption of Mortgages Act, a party against whom an order of dismissal is made under any of the sections of the Act enumerated there, is bound to institute a suit to establish his rights in respect of the mortgage within one year under Art. 14, Lim. Act, and if he fails to do so, his right is lost for ever. Counsel for the respondent, on the other hand, urges that S. 12 contemplates such orders only as in any manner prejudicially affect the right of any party in relation to the mortgage in dispute and that those orders which do not touch the merits of the case do not come within the purview of S. 12. Certain authorities have been relied upon in connexion with the contentions raised on either side and before we formulate our conclusion, it will be necessary to review them at some length. In 6 Lah 206,¹ the predecessor-in-interest of the plaintiff had made an application to the Collector for the redemption of a mortgage under the Redemption of Mortgages Act and his application had been dismissed on the ground that the claim was barred by limitation. On a subsequent suit being brought by the plaintiff for redemption more than one year after the date of this order, it was contended by the mortgagee that the suit was barred by time under Art. 14, Lim. Act. The contention was repelled by both the trial Court and the lower Appellate Court, but was allowed by a single Judge of this Court. Thereupon, a Letters Patent appeal was presented, which came for hearing before Sir Shadi Lal C. J. and LeRossignol J. the main ground of attack being that Art. 14, Lim. Act, had no reference to such orders as were passed under the Redemption of Mortgages Act. The learned Judges came to the conclusion that the real nature of the suit contemplated by the Legislature in S. 12, Redemption of Mortgages Act was a suit to set aside the Collector's order and that consequently if a suit was not brought within one year of that order, it was out of time.

In A I R 1929 Lah 513,² Sir Shadi Lal C. J. and Broadway J. held that the rejection of an application by a Collector under S. 9 without considering the merits of the dispute and after recording the objections

raised by the defendants on the ground that the dispute cannot be settled summarily, practically amounted to denial of jurisdiction and inasmuch as in order to enable the plaintiff to succeed in his suit for redemption, it was by no means necessary to set aside that order, he was not bound to bring a suit within one year of the said order. They however remarked that a party against whom such an order was made was a party aggrieved within the meaning of S. 12 of the Act. Counsel for the appellant has criticized this judgment on the ground that it places a very narrow interpretation on the wording of S. 12 of the Act and that in so doing it unnecessarily curtails the scope of that section. On giving due consideration to the arguments advanced on either side and to the reasoning employed by the learned Judges responsible for that judgment, we consider with all respect that that case has not been correctly decided. S. 12 is worded as follows :

Any party aggrieved by an order made under Ss. 6, 7, 8, 9, 10 or 11 of this Act may institute a suit to establish his rights in respect of the mortgage, but subject to the result of such suit, if any, the order shall be conclusive.

The relevant portion of S. 6 lays down that :

Where the mortgagee appears and the petitioner does not appear when the petition is called on for hearing, the Collector shall make an order that the petition be dismissed unless the mortgagee admits the claim. . . .

It is obvious that an order made under S. 6, if the mortgagee refuses to admit the claim of the petitioner, is that of a bare dismissal without reference to the merits of the case, but still it is an effective order under S. 12 and the dismissal will be conclusive if it is not set aside as contemplated by S. 12. If it is once held that a party against whom an order is made is a party aggrieved, even though the order is not on the merits, it is impossible to draw a distinction between those orders which go to the detriment of the party concerned on the merits and those that do not. The plain language of S. 12 does not admit of any such distinction being drawn and it is well settled that the function of the Courts is to administer the law as they find it and not to introduce into the clear provisions of the Legislature words which do not exist there. In other words, their function is to judge and not to legislate. And in these circumstances, it is difficult to follow the reason-

1. Kaura v. Ramchand, (1925) 12 A I R Lah 385 = 88 I C 945 = 6 Lah 206 = 26 P L R 383.

2. Asa Ram v. Darba Mal, (1929) 16 A I R Lah 513 = 121 I C 379 = 30 P L R 440.

ing on which the decision in A I R 1929 Lah 513² is based. Moreover, S. 9 contemplates objections on grounds other than the amount of the deposit and empowers the Collector either to dismiss the petition in those circumstances or to hold a summary enquiry regarding the objection raised by the mortgagee. S. 10 lays down *inter alia* that if on enquiry regarding any objection so raised by the mortgagee the Collector is of opinion that there is a sufficient cause for not proceeding further with the petition, he shall dismiss the petition. It will be obvious that the law contemplates the disposal of petitions under the Redemption of Mortgages Act on grounds other than those which touch the merits of the petition and it empowers the Collector to dispose of those petitions on those grounds. For a Collector therefore to dismiss an application on grounds other than the merits is not to refuse jurisdiction inasmuch as this is a manner of exercising jurisdiction permitted by the Act and it is denial of jurisdiction which is the main ground on which A I R 1929 Lah 513² appears to have proceeded.

It may be that the interpretation which is sought to be placed by that judgment on S. 12 is more reasonable or more equitable but sitting as a Court of law we are concerned neither with the equitable side of the legislation nor with the logic of it. We have, as remarked before, to interpret it in its plain sense and to apply the law so interpreted to the facts of any case that arises without reference to logic or equity. In 15 Lah 389,³ a Full Bench of this Court reaffirmed the principle enunciated in 6 Lah 206.¹ Both these cases were sought to be distinguished by the respondent's counsel on the ground that there a decision had been given by the Collector on the merits but, as explained above, that circumstance is immaterial. Counsel for the respondent has further contended that the construction put upon the term 'aggrieved' by the Letters Patent Bench in A I R 1929 Lah 513² is open to objection and has drawn our attention to a quotation from (1880) 14 Ch D 458⁴ which is to the following effect:

It is said that any person aggrieved by any order of the Court is entitled to appeal. But the

words 'person aggrieved' do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something.

This may be so, but it cannot be urged that in the dismissal of the petition in the present case the plaintiff did not suffer a legal grievance or that the Assistant Collector did not wrongfully refuse to adjudicate upon the merits of the petition or wrongfully deprive the petitioner of the chance of obtaining the redemption of the land in summary proceedings. Even on this authority, therefore, we consider in respectful agreement with the learned Judges who decided A I R 1929 Lah 513² that any person against whom any order is made under Ss. 6 to 11, Redemption of Mortgages Act is a person aggrieved within the meaning of S. 12. We may with advantage quote here the pertinent observations made by LeRossignol J. in 6 Lah 206¹ at p. 216:

It has also been objected that this interpretation operates to reduce the normal period of limitation; but when a dispute has been established we do not think that that in itself is an unfortunate circumstance. However that may be, an individual who takes advantage of a summary procedure must suffer its disadvantages as well as enjoy its benefits.

We are consequently of opinion that having failed to bring a suit within one year of the order of the Assistant Collector dated 26th September 1928, the petitioner lost his right to bring a regular suit under Art. 14, Limitation Act and that his suit instituted in 1935 was hopelessly time-barred. On these grounds we allow this appeal, set aside the order of the learned Judge of this Court as well as the orders of the Courts below and dismiss the suit. In the peculiar circumstances of the case however we leave the parties to bear their own costs throughout.

B.D./R.K.

Appeal allowed.

3. Gangu v. Mahanraj Ohand, (1934) 21 A I R Lah 384=149 IC 661=15 Lah 389=36 P L R 397 (F B).

4. Ex parte Sidebottam, (1880) 14 Ch D 458=49 L J Bk 41=42 L T 783=28 W R 715.

A. I. R. 1938 Lahore 641

SKEMP J.

Dr. Nazar Mohammad — Petitioner.

v.

Harnam Singh and another —

Respondents.

Criminal Revn. No. 1777 of 1936, Decided on 3rd March 1937, from order of Sess. Judge, Jhelum, D/- 27th November 1936.

(a) Criminal P. C. (1898), S. 476—Notice of inquiry to person alleged to have committed offence is not necessary.

In an inquiry under S. 476 it is not necessary for the Court to issue a notice to the person alleged to have committed the offence. *Case law referred.* [P 641 C 2]

(b) Criminal P. C. (1898), Ss. 195 (3) and 476 — *H* applying to District Magistrate for taking action against *M* for giving false medical certificate to *N* in criminal complaint by *N* against *H* in Court of Naib Tahsildar—Matter referred to Additional District Magistrate for disposal—Additional District Magistrate ordering complaint to be made against *M*—Complaint held lodged without jurisdiction.

H made an application to a District Magistrate that action should be taken under Ss. 193 and 467, I. P. C., against *M* for having given a false medical certificate to one *N* who had instituted a criminal complaint against *H* in the Court of Naib Tahsildar. The matter was referred to the Additional District Magistrate for disposal and he ordered a complaint to be made against *M* and the Sessions Judge on appeal maintained the order :

Held that the complaint was lodged without jurisdiction. The expression "Court to which appeals ordinarily lie" in S. 195 (3) meant in the present case the Court of the District Magistrate and not the Additional District Magistrate. If the District Magistrate had directed the Additional Magistrate to make an enquiry and report to him and had then adopted that report and made the complaint himself, the procedure would have been quite legal: 30 Cal 394; 26 Mad 656; A I R 1920 Lah 479 and A I R 1929 Cal 172, *Foll.*

[P 642 C 2]

Ghulam Mohy-ud-Din and Abdul Aziz Khan — *for Petitioner.*

D. N. Aggarwal — *for Harnam Singh.*
Manohar Lal Mehra for Govt. Advocate
— *for the Crown.*

Judgment. — The following facts have led up to this revision: One Nathu brought a criminal complaint against Harnam Singh in the Court of a Naib Tahsildar after obtaining a medical certificate of injuries from Dr. Nazar Mohammad, Sub-Assistant Surgeon. Harnam Singh himself went to the same doctor and obtained a medical certificate of injuries which was admittedly false. He is said to have gone to another doctor and also to the Civil Surgeon

and obtained certificates from them that he had no injuries. Nathu's complaint was then dismissed in default. Harnam Singh then applied in the Court of the District Magistrate, Jhelum, that action should be taken under Ss. 193 and 467, Penal Code, against Nathu and Dr. Nazar Mohammad and the matter was referred to the Additional District Magistrate for disposal. The Additional District Magistrate Lala Mangat Rai ordered the complaint to be made against Dr. Nazar Mohammad only under Ss. 193 and 465, Penal Code. On appeal the learned Sessions Judge maintained the order under S. 193 but held there was no case under Sec. 465. Dr. Nazar Mohammad has come here on revision through Mr. Ghulam Mohy-ud-Din.

The first point argued is that the enquiry made by Lala Mangat Rai is bad because no notice was given to Dr. Nazar Mohammad. In support of this Mr. Ghulam Mohy-ud-Din referred to four rulings, A I R 1927 Lah 173,¹ A I R 1923 Mad 228,² 59 I C 655³ and 77 I C 888,⁴ all Single Bench judgments. They are to the effect that while the statute (S. 476, Criminal P. C.) does not require any preliminary enquiry, if an enquiry is made notice should be given to the person accused; and some of them say that he should be given an opportunity for cross-examining the witnesses. On the other hand, the Crown cited 58 Cal 215⁵ and A I R 1935 Oudh 113,⁶ which are to the effect that no notice in such an enquiry is necessary.

I am somewhat strongly of opinion that notice is not necessary. S. 476 says that if the Court thinks that an enquiry should be made into any offence referred to under S. 195, such Court may, after such preliminary enquiry if any, as it thinks necessary, record a finding and make a complaint.

If no enquiry at all is required by law, it is anomalous, that, if the Court then made

1. Amar Nath v. Emperor, (1927) 14 A I R Lah 173=99 I C 1027=28 Cr L J 227.

2. In re Venkata Subbiah, (1923) 10 A I R Mad 228=69 I C 440=23 Cr L J 712=44 M L J 74.

3. Lokpal Singh v. Emperor, (1921) 8 A I R All 98=59 I C 655=22 Cr L J 143=19 A L J 56.

4. Imam Ali v. Emperor, (1924) 11 A I R All 435=77 I C 888=25 Cr L J 488.

5. H. C. Ganti v. F. L. Harcourt, (1931) 18 A I R Cal 436=1931 Cr C 588=132 I C 93=32 Cr L J 826=58 Cal 215.

6. Sajjad Husain v. Emperor, (1935) 22 A I R Oudh 113=153 I C 346=1935 Cr C 203=36 Cr L J 319=10 Luck 503=1935 O W N 28.

an enquiry, it should be necessary to issue a notice to the respondent.

The second point is that the Additional District Magistrate, who after holding the preliminary enquiry made the complaint, had no jurisdiction to do so. S. 476, Criminal P. C. empowers a Court to make a complaint in writing in reference to an offence "which appears to have been committed in or in relation to a proceeding in that Court." S. 476-A extends the power conferred on such Court to the Court

to which such former Court is subordinate within the meaning of S. 195, sub-s. (3), where the former Court has not made a complaint.

Section 195 sub-s. (3) says:

For the purposes of this Section a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the appealable decrees or sentences of such former Court. . . .

Provided that (a) where appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate.

This point was taken before the learned Sessions Judge who remarked that appeals from orders of the second or third class Magistrates were ordinarily heard by the Additional District Magistrate and overruled it. The point is whether 'ordinarily heard by' means the same as 'ordinarily lie.' Section 10, Criminal P. C., provides for the appointment of the District Magistrate and of an Additional District Magistrate. S. 407 (1) provides that any person convicted by a Magistrate of the second or third class . . . may appeal to the District Magistrate. S. 407 (2) lays down:

The District Magistrate may direct that any appeal under this Section, or any class of such appeals, shall be heard by any Magistrate of the First Class Subordinate to him and empowered by the Local Government to hear such appeals, and thereupon such appeal or class of appeals may be presented to such subordinate Magistrate.

In 30 Cal 394⁷ it was held that the Court of the Joint Magistrate was not that to which appeals ordinarily lay; but the Court to which appeals ordinarily lay was that of the District Magistrate. The Joint Magistrate only heard appeals under the special powers conferred on him by the District Magistrate under S. 407 (2) and the existence of that power does not constitute the Joint Magistrate the Court to which appeals ordinarily lie under S. 195, Cl. (7) of the Code of 1908.

This was followed in 26 Mad 656,⁸ Benson J. dissenting. He said:

The language of S. 407 is not, it is true, very happy, but when all appeals of a certain class may be, and in practice are, presented to a certain Court, and must be heard by that Court, I do not think it is a great strain on the language to hold that such appeals may be said ordinarily to lie to such Court.

30 Cal 394⁷ was also followed in a Single Bench judgment of this Court: 68 I C 412.⁹ In A I R 1929 Cal 172,¹⁰ another Division Bench followed 30 Cal 394.⁷ Mukerji J. said that the law had not been changed with the redrafting of S. 195 in the Code of 1923 and that the previous decisions had been followed by almost all the superior Courts. Graham J. said:

The words "Court to which appeals ordinarily lie" in S. 195 (3), Criminal P. O., seem to be not free from doubt.

But on the whole he concurred in the judgment. Following these judgments and the wording of the Code itself, I am of opinion that "Courts to which appeals ordinarily lie" means in the present case the Court of the District Magistrate and not the Additional District Magistrate. The complaint was therefore lodged without jurisdiction. If the District Magistrate had directed the Additional District Magistrate to make an enquiry and report to him and had then adopted that report and made the complaint himself, the procedure would have been quite legal. The present revision must be accepted and the complaint of Lala Mangat Rai, Additional District Magistrate, Jhelum, set aside.

R.M./R.K. *Complaint set aside.*

8. *Eroma Variar v. Emperor*, (1903) 26 Mad 656 = 2 Weir 202 (F B).
9. *Mt. Jivani v. Emperor*, (1920) 7 A I R Lah 479 = 68 I C 412.
10. *Mohim Chandra v. Emperor*, (1929) 16 A I R Cal 172 = 116 I C 638 = 30 Cr L J 658 = 56 Cal 824 = 49 O L J 342 = 33 O W N 285.

A. I. R. 1938 Lahore 642

BECKETT J.

Chuni Lal and another — Plaintiffs —
Appellants.

v.

Beant Singh and others — Defendants —
Respondents.

Second Appeal No. 400 of 1937, Decided on 10th May 1938, from decree of Senior Sub-Judge, Gurdaspur, D/- 8th January 1937.

7. *Sadhu Lall v. Ram Churn Pasi*, (1903) 30 Cal 394 = 7 O W N 114.

(a) Custom (Punjab)—Village abadi — Non-proprietor having house in abadi—Non-proprietors live with license — Terms of license though not put into writing are always to be taken as implied—Non-proprietor cannot transfer site of houses — Such custom should be termed 'usages' — Presumption in favour of proprietary body can be rebutted—Strong evidence is necessary.

In the Punjab villages, it is a matter of presumption that abadi dah is a common property of the proprietary body until partition has taken place; and when an outsider is allowed to settle permanently in the village and build a house in the abadi dah, it is further to be presumed that he does so by license from the proprietors. It is improbable that the terms of this license are ever put into words, but they are known to the parties concerned and are to be implied from local usage, much in the same way as certain terms will be read into any other transfer of property, unless there is evidence to the contrary. When a non-proprietor is granted a site for building in a village, one of these implied terms is that he may not transfer it, though it will be allowed to descend to his own family. The addition of such a term to the grant may be called a local custom; but it would probably be better to refer such customs as "usages" in order to distinguish them from customs which are governed by S. 5, Punjab Laws Act. It is a question of fact whether such a restriction on transfer is to be taken as an implied term when a site is granted to a non-proprietor in any particular village. Generally, it will be presumed that the proprietary body intends the grant to be subject to a restriction on transfer and that this condition has been accepted by any non-proprietor accepting the grant. The presumption may be rebutted in a variety of ways. It may be shown that the course of dealings between proprietors and non-proprietors over a long term of years has been such as to indicate that no restriction on transfer is implied when a grant is made. It is quite possible that the growth of a village or its absorption into a large town may lead the proprietary body to acquiesce in a system which allows the free transfer of residential sites. However, very strong evidence will be needed to show that the proprietors of a village have surrendered their privileges. It is a presumption of law that each man must be expected to act in a manner most favourable to his own interests, and instances intended to show the surrender of these privileges must exclude the possibility of any other construction. [P 644 C 2; P 645 C 1]

(b) Custom (Punjab) — Bulewal village in Batala Tahsil—Abadi—Non-proprietors cannot alienate site of houses.

The grant of residential sites to non-proprietors in village Bulewal has throughout been made in the form of a license which does not permit transfer without the consent of the proprietary body. [P 645 C 2]

Durga Das — for Appellants.

C. L. Aggarwal — for Respondents.

Judgment.—This is a suit relating to the rights of persons who occupy houses in an ordinary Punjab village but do not belong to the proprietary body. Two such persons from village Bulewal in the Batala

Tahsil of the Gurdaspur District are seeking a declaration to the effect that their village has grown to such an extent that it should more properly be called a town and that the non-proprietors residing therein have accordingly acquired full rights of ownership over both their houses and the sites which they occupy, with complete power to alienate them as they please. The suit has been brought against the proprietors of the village; and as these proprietors are taking steps towards the partition of the abadi deh, there is a further prayer that they may be restrained from doing so. A number of documents were produced to show that the houses of non-proprietors in the village have from time to time been transferred as though their occupiers had the right to alienate. The nature of these documents will be examined later. For the moment, it is sufficient to say that they were not sufficient to convince the trial Court that the non-proprietors had any customary right of alienating their residences in the abadi deh. It was further held that the plaintiffs had failed to prove that the present size of Bulewal justifies the name of a town. The Senior Subordinate Judge, on first appeal, came to the same conclusion. He also examined the general aspect of the question and expressed the opinion that there could hardly be a custom which would entitle one person to alienate property belonging to another. The decree of the trial Court dismissing the suit was accordingly confirmed. Although he was doubtful whether there was any matter involved which could properly be called a custom, the Senior Subordinate Judge granted the plaintiffs the usual certificate to enable them to come up in second appeal.

There are a large number of recorded decisions relating to the rights of non-proprietors in the villages of Northern India, some of which may possibly seem to suggest that the customary rights of villagers are liable to change as the villages grow into towns; and it is evident that these decisions have influenced the way in which the plaintiffs have framed and presented their claim. Since any suggestion of change is contrary to the generally accepted ideas as to the essential nature of "custom," the remarks of the lower Appellate Court with regard to the use of this word raise a question which needs some preliminary examination. In cases of this kind, the word "custom" is generally used with re-

reference to Ss. 5 and 6, Punjab Laws Act, 1872, which run as follows:

5. In questions regarding succession, special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions, or any religious usage or institution, the rule of decision shall be—

(a) Any custom applicable to the parties concerned, which is not contrary to justice, equity, or good conscience, and has not been by this or any other enactment altered or abolished, and has not been declared to be void by any competent authority.

(b) The Mahomedan law in cases where the parties are Mahomedans, and the Hindu law, in cases where the parties are Hindus, except in so far as such law has been altered or abolished by Legislative enactment, or is opposed to the provisions of this Act, or has been modified by any such custom as is above referred to.

6. In cases not otherwise specially provided for, the Judges shall decide according to justice, equity, and good conscience.

When we are dealing with the right of a non-proprietor to sell the house which he occupies without obtaining the consent of the proprietary body, it would be difficult to bring the case under S. 5, and it would have to be decided under S. 6. S. 6 is, however, subject to S. 7, which deals with the application of custom in another way. This Section runs thus:

7. All local customs and mercantile usages shall be regarded as valid, unless they are contrary to justice, equity or good conscience, or have, before the passing of this Act, been declared to be void by any competent authority.

There are, in fact, two classes of customs which may govern the disposal of property in a Punjab village. In the first place, there are certain rules having the force of law, such as the rules of succession, which cannot ordinarily be changed by the will of the parties concerned, and most rules of this kind are covered by S. 5. In the second place, we have another distinct set of principles, which are not so much rules of the kind which regulate such subjects as succession or marriage, but are more akin to trade usages. These customs or usages are described in Pollock and Mulla's Indian Contract Act at p. 63, Edn. 6, in a passage which may be here quoted:

But there is a class of cases, of considerable importance in England, where the parties are presumed to have contracted with tacit reference to some usage well known in the district or in the trade, and whatever is prescribed by that usage becomes an additional term of the contract, if not contrary to the general law or excluded by express agreement. Such terms are certainly implied, as resulting not from the words used, but from a general interpretation of the transaction with reference to the usual understanding of persons entering on like transactions in like circumstan-

ces. . . . The ground on which usages of this kind are enforced is not that they have any intrinsic authority, but that the parties are deemed to have contracted with reference to them. They need not, accordingly, be ancient or universal. It is enough that they are in fact generally observed by persons in the circumstances and condition of the parties.

It seems to be this class of local customs to which reference is made in S. 7, Punjab Laws Act, in which it is to be observed that such customs are coupled with mercantile usage. In the Punjab villages, it is a matter of presumption that the *abadi deh* is a common property of the proprietary body until partition has taken place: and when an outsider is allowed to settle permanently in the village and build a house in the *abadi deh*, it is further to be presumed that he does so by license from the proprietors. It is improbable that the terms of this license are ever put into words, but they are known to the parties concerned and are to be implied from local usage much in the same way as certain terms will be read into any other transfer of property, unless there is evidence to the contrary. When a non-proprietor is granted a site for building in a village, one of these implied terms is that he may not transfer it, though it will be allowed to descend to his own family. The addition of such a term to the grant may be called a local custom; but it would probably be better to refer such customs as "usages" in order to distinguish them from customs which are governed by S. 5, Punjab Laws Act. It is a question of fact whether such a restriction on transfer is to be taken as an implied term when a site is granted to a non-proprietor in any particular village. Generally, it will be presumed that the proprietary body intends the grant to be subject to a restriction on transfer and that this condition has been accepted by any non-proprietor accepting the grant. The presumption may be rebutted in a variety of ways. It may be shown that the course of dealings between proprietors and non-proprietors over a long term of years has been such as to indicate that no restriction on transfer is implied when a grant is made. It is quite possible that the growth of a village or its absorption into a large town may lead the proprietary body to acquiesce in a system which allows the free transfer of residential sites. As observed in the passage quoted above, usages of this kind are not immutable. I agree however with the learned Subordinate Judge that very strong evidence will be needed to

show that the proprietors of a village have surrendered their privileges. It is a presumption of law that each man must be expected to act in a manner most favourable to his own interests, and instances intended to show the surrender of these privileges must exclude the possibility of any other construction.

When instances in the present case are examined, I do not think that they bear out the proposition that grants to non-proprietors in village Bulewal must be taken as having been made without the usual reservation against transfer. The only instances which occurred before the present century are those relating to court sales. There are seven such instances, of which four belong to the present century, and in most of these instances the property was bought in by one of the village proprietors. With regard to court sales it is to be observed that these are enforced transfers, so they do not necessarily throw any light on the terms of the original grant, and it is only the subsequent conduct of the proprietors which is relevant. If the house of a non-proprietor is put to sale and is bought in by one of the proprietors, no question arises of allowing a stranger to come into the village. In these circumstances, it would hardly be worth while for the proprietary body to bring a suit for a declaration that the site is not liable to transfer. There is only one instance of purchase by a non-proprietor at a court sale before 1933; and since it is evident that efforts have been made to find every possible instance of transfer, the fact which emerges most prominently is that no non-proprietor appears to have thought of transferring his residence of his own accord until recent years.

The next series of instances are those relating to mortgages none of which are earlier than 1910. The effect of the mortgage of 1910 was to let a proprietor in possession. There are two mortgages of 1914 and one of 1915, which purport to be mortgages with possession but which were apparently intended to leave the original occupier in possession as a lessee. The other mortgages are of 1926 and later. Here again there are no earlier instances of any transfers which would let a stranger into the village; there is only one instance before 1926 which would result in an ostensible change of possession, and even this would only pass the possession to a proprietor. The instances of a voluntary transfer of possession otherwise than by

mortgage are extremely few. There are two instances of gift in 1907 and 1914. Both of these are gifts to near relatives, one of whom had previously been a proprietor of the house himself. Since it is the practice for these houses to descend to collaterals, there is nothing in such gifts which would necessarily call for action on the part of the proprietors. There are three instances of outright sale, but these occurred in 1934 and 1935. From examination of these instances, which appear at first sight to be numerous, it will be found that there is only one instance of transfer of possession other than transfer to a proprietor or near relative until quite recent years; and of the transfers to proprietors, all except one were the result of court sales. There does not appear to have been any attempt on the part of the non-proprietors to assert an unrestricted right of disposal until 1934. Since there are over 200 resident non-proprietors in the village, the paucity of true instances tends to strengthen the presumption against an unrestricted power of disposal rather than the reverse.

There is one other matter which requires consideration. Evidence has been given to show that a number of pucca houses have been built by non-proprietors in the village and it is argued that they would not have done so unless they had full rights of ownership in the sites below. Although I am aware that there are conflicting views on this point, I do not myself think that this argument has a very great weight. It is well known that the partition of an abadi is of rare occurrence, and the possession of a non-proprietor is not likely to be disturbed so long as the family lasts. Unless he has any intention of transferring his business elsewhere, it does not seem likely that the remote possibility of a partition would deter him from making the best possible provision within his means for the accommodation of himself and his family. For these reasons, I am of opinion that the plaintiffs have failed to rebut the presumption that the grant of residential sites to non-proprietors in village Bulewal has throughout been made in the form of a license which does not permit transfer without the consent of the proprietary body, and that they have also failed to prove that the members of the proprietary body have surrendered the proprietary right which would enable them to claim partition of the abadi. The decree of the trial

Court is accordingly confirmed and the appeal dismissed with costs. Counsel for the plaintiffs has asked for the grant of a certificate to enable him to present a Letters Patent Appeal. This prayer is granted.

B.D./R.K.

Appeal dismissed.

A. I. R. 1938 Lahore 646

ADDISON AND DIN MOHAMMAD JJ.

Allah Din and another — Defendants
— Appellants.

v.

Prabh Dayal, Plaintiff and others,
Defendants — Respondents.

Second Appeal No. 1037 of 1937, Decided on 1st February 1938, from decree of Dist. Judge, Jhelum, D/- 31st May 1937.

(a) Punjab Pre-emption Act (1 of 1913), S. 15 (b) — S. 15 (b) confers right of pre-emption upon whole line of heirs of vendor and not merely on nearest heir at the time of sale—Priority of right is to be determined according to order of succession.

The effect of S. 15 (b), Pre-emption Act, is to confer the right of pre-emption in respect of agricultural land upon the whole line of heirs of the vendor and not merely on the nearest heir at the time of the sale, but the priority of the right between claimants is to be determined according to the order of succession. [P 646 C 2]

Where a widow sells property belonging to her husband, her husband's collateral is an heir and is entitled to pre-empt under S. 15 (b) in absence of nearer heirs : *A I R 1922 P C 139, Rel. on.*

[P 646 C 2]

(b) Punjab Pre-emption Act (1 of 1913), S. 15 (b) — Whether legatees under will are heirs during lifetime of testator (*Quære.*)

It is doubtful whether legatees under a will are heirs during the lifetime of the testator within the meaning of the Pre-emption Act. [P 646 C 2]

Malik Barkat Ali—for Appellants.

Achhru Ram — for Respondent

(Plaintiff).

Addison J. — Sardarni Lachhmi Devi sold some land to Allah Din and Sher Mohammad. A collateral of her husband, Prabh Dial, sued to pre-empt the sale. His suit has been decreed and the appeal of the vendees to the District Judge has been dismissed. Against this decision this second appeal has been admitted to a hearing. The defence of the vendees was that the alienor had executed a will, dated 17-8-1935, bequeathing her estate to two nephews, and that her husband's collateral could not therefore be said to be an heir entitled to pre-empt. In the first place, a will

can be revoked at any moment and the widow is still alive, so that it is doubtful whether the legatees can be said to be heirs at present within the meaning of the Pre-emption Act. In the second place, it is clear from the Act that all classes of heirs are entitled to pre-empt though a nearer class would have precedence over a more distant class. The appropriate Section is S. 15 (b) which runs :

The right of pre-emption in respect of agricultural land shall vest

where the sale is of a share out of joint land or property, and is not made by all the co-sharers jointly

firstly, in the lineal descendants of the vendor in order of succession ;

secondly, in the co-sharers, if any, who are agnates in order of succession ;

thirdly, in the persons, not included under *firstly* or *secondly* above, in order of succession, who but for such sale would be entitled, on the death of the vendor, to inherit the land or property sold ;

fourthly, in the cosharers.

No one sued to pre-empt claiming under *firstly*, *secondly* or *fourthly*. The plaintiff comes under *thirdly*, as it is not disputed that he is a person entitled to inherit in the absence of nearer heirs. If it is assumed that the legatees under the will are heirs, it seems to us that the collaterals of the husband would still come in under S. 15 (b), *thirdly*, because the right is given to all classes in order of succession who but for such sale would be entitled to inherit the land or property sold. It was laid down by their Lordships of the Privy Council in 3 Lah 48¹ under the old Act that the effect of the then Section was to confer the right of pre-emption in respect of agricultural land upon the whole line of heirs of the vendor, and not merely on the nearest heir at the time of the sale, but that the priority of right between claimants is to be determined according to the order of succession. This ruling applies to the present case and admittedly the husband's collateral is an heir and would therefore come under Sec. 15 (b) *thirdly*. The legatees did not sue to pre-empt so that there is no competition between the plaintiff and them. For the reasons given we dismiss this appeal with costs.

R.M./R.K.

Appeal dismissed.

1. Sabz Ali Khan v. Khair Mahomed Khan, (1922) 9 A I R P C 139=67 I C 264=3 Lah 48=49 I A 74 (P O).

* A. I. R. 1938 Lahore 647

BECKETT J.

*Beli Ram and another — Plaintiffs—
Appellants.*

v.

*Dasondha Singh and others, Plain-
tiffs and others, Defendants —*

Respondents.

Second Appeal No. 1373 of 1937, Deci-
ded on 6th May 1938, from decree of Dist.
Judge, Hoshiarpur, D/- 20th May 1937.

* Court-fees Act (1870), S. 7 (iv) (c) — Suit
falling under S. 7 (iv) (c) — Plaintiff failing to
fix value of suit for purposes of court-fee but
separately valuing his suit for jurisdictional
purposes at certain sum — Amount so fixed for
jurisdictional purpose should be taken as value
of relief for purpose of court-fee.

The assessment of court-fees on a suit falling
under any of the clauses of S. 7 (iv) depends on
the amount shown in the plaint or memorandum
of appeal, as the case may be, as the value of the
suit for purposes of court-fee; but this in turn
must depend upon a figure to be fixed by the
plaintiff himself. If the plaintiff fails to fix such
a figure expressly for court-fee purposes on the
erroneous supposition that the suit is not covered
by S. 7 (iv) (c) and separately values his suit for
jurisdictional purposes at a certain figure, he
should be taken as having valued the relief sought
by him at this amount. He should not be taken
as having failed to value his relief within the
meaning of the Section and so should not be
required to fix the value of the relief for the first
time. The plaintiff cannot have the benefit of a
higher valuation for selecting a superior forum for
the hearing of his case and pay a court-fee on a
lower valuation: *A I R 1927 Lah 499 and A I R*
1932 Lah 132, Foll.; A I R 1933 Lah 246, Rel.
on; A I R 1927 Lah 890 and 140 I C 73, Not
fol. [P 647 C 2; P 648 C 1, 2]

N. C. Pandit — *for Appellants.*Barkat Ali — *for Respondents.*

Judgment. — This appeal was admitted
to a hearing but it was noted in the order
of admission that the question of court-fee
will be argued at the hearing. The suit is
one for a declaration that the plaintiffs
have a right of grazing over 1620 kanals
of village land and for an injunction to
restrain the defendants from cultivating
part of this land which they entered into
possession. The decision of the lower Appel-
late Court is to the effect that the plaintiffs
had a right of grazing over less than one
third of the area claimed; and the defen-
dants were restrained from making any
further encroachments on this limited area.
The suit is clearly one to obtain a declara-
tory decree with consequential relief, fal-
ling under S. 7 (iv) (c), Court-fees Act, 1870.
It might also be treated as falling under
Cl. (e) which covers suits for a right to

some benefit arising out of land, but this
would not make any practical difference.
In either case, court-fee must be paid ad
valorem according to the amount at which
the relief sought is valued in the plaint or
memorandum of appeal, and the plaintiff
is required to state the amount at which
he valued the relief sought by him. When
the plaint was presented to the trial Court
however, the plaintiffs attempted to sepa-
rate the prayer for a declaratory decree as
if this were a matter in respect of which
they were entitled to sue on a fixed court-
fee of Rs. 10, without determining the
value of this relief for purposes of stamp
duty. For the purposes of jurisdiction, they
placed the value of the relief sought by
means of a declaratory decree at Rs. 1000
and the value of the injunction at Rs. 50,
making the value of the suit Rs. 1050 in all.

When the present memorandum of ap-
peal was presented the same method of
valuation was adopted. The value of the
declaratory decree for purposes of court-
fee was said to be undetermined for pur-
poses of calculating stamp duty but the
jurisdictional value of the suit was again
placed at Rs. 1050. It was brought to the
notice of the counsel for the appellants
(who are also plaintiffs) that the suit was
one falling under S. 7 (iv) (c), Court-fees
Act, and they were required to make up
the deficiency in court-fees. Instead of
doing this, counsel for the appellants pro-
ceeded to alter the memorandum so as to
fix the value of the appeal for purposes
of court-fee at a single sum of Rs. 180. At
the same time the value for purposes of
jurisdiction was fixed at the same amount.
The memorandum was then again present-
ed, after the period of limitation for an
appeal had expired.

The question now to be decided may be
shortly stated. The assessment of court-fees
on a suit falling under any of the clauses
of S. 7 (iv) depends on the amount shown
in the plaint or memorandum of appeal, as
the case may be, as the value of the suit
for purposes of court-fee; but this in turn
must depend upon a figure to be fixed by
the plaintiff himself. If the plaintiff fails
to fix such a figure expressly for court-fee
purposes on the erroneous supposition that
the suit is not covered by S. 7 (iv) (c) and
separately values his suit for jurisdictional
purposes at a certain figure, should he be
taken as having valued the relief sought
by him at this amount, or should he be
taken as having failed to value his relief

within the meaning of the Section and so be required to fix the value of the relief for the first time? There are two decisions of this Court bearing upon the question. In 9 Lah 366¹ the plaintiff sought relief relating to the estate of a deceased person, and valued his suit for jurisdictional purposes at Rs. 16,000, this being the value of the property involved, but failed to pay the court-fee which would be necessary if this figure had been taken as the value of relief sought for purposes of court-fee. It was held that the plaintiff had merely fixed the value of the property concerned and it was never present in his mind that he was fixing the value of the relief sought at the same time. He was accordingly allowed an opportunity of fixing this value for the first time. One of the grounds given for this decision was that, while a plaintiff fixing the value of the relief sought for the purposes of court-fee fixes the value of the suit for purposes of jurisdiction at the same time, there was no authority for the proposition that, by fixing the value of the suit for jurisdictional purposes only, he thereby fixes the value of the relief sought for purposes of court-fee.

A somewhat different decision is given in 13 Lah 391.² In this case the plaintiffs sued for a declaration that they were not bound by certain mortgages with consequential relief, and valued the suit at Rs. 5100 for purposes of jurisdiction. It was found that the court-fee would not be sufficient if this sum were taken as the value of the relief sought and their counsel asked that the plaint might be returned to them in order to enable them to fix their own value, as had been done in the case just mentioned. This claim was refused on the strength of the decision in 8 Lah 531.³ It is to be observed that the judgment was pronounced by the same Judge who had given the decision in 9 Lah 366¹ whose attention was drawn to his earlier judgment. He observed that the facts were considerably different and he did not consider that the earlier authority was to the point in the later case. It was not however made clear in what circumstances the rule of decision laid down in 9 Lah 366¹ would

be applicable and there have since been divergent decisions on the point. In 140 I C 73⁴ the rule in 9 Lah 366¹ was applied, and this rule was taken as a direct consequence of the Full Bench decision in 111 P R 1913.⁵ On the other hand the rule in 13 Lah 391² has since been followed in a number of cases which are given in 38 P L R 923.⁶

In the present case I feel myself bound to follow the rule laid down in 13 Lah 391² for several reasons. In the first place, it seems to me that the trend of decisions in this Court is in favour of applying the latter rule rather than the former. In the second place, there may in certain exceptional circumstances be some reason for holding that the plaintiffs have no intention of fixing the value of the relief sought; but the same argument can hardly apply in a case of this kind when the plaintiffs are fixing only the value of a limited right in property. In the third place, as laid down in 13 Lah 788,⁷ the plaintiffs cannot have the benefit of a higher valuation for selecting a superior forum for the hearing of their case and pay a court-fee on a lower valuation. As the result of fixing the value of their relief at Rs. 1050, the plaintiffs have already had the benefit of securing that their case should be heard by a Court above the lowest grade. For these reasons I hold that the memorandum of appeal must be stamped ad valorem on the figure of Rs. 1050. The plaintiffs are given a fortnight in which to make up the deficiency.

D.S./R.K.

Order accordingly.

4. Ghulam Haider v. Bishambar Das, (1932) 140 I C 73.
5. Baru v. Laohhman, (1914) 1 A I R Lah 214 = 22 I C 503 = 23 P L R 1914 = 111 P R 1913 (F B).
6. Muhammad Hayat Khan v. Jaspat Rai-Babu Ram, (1936) 23 A I R Lah 703 = 165 I C 670 = 38 P L R 923.
7. Jhanda Singh v. Gulab Mal Bhagwan Das, (1933) 20 A I R Lah 246 = 137 I C 240 = 13 Lah 788 = 33 P L R 488.

A. I. R. 1938 Lahore 648

BHIDE AND BECKETT JJ.

Iqbal Singh and others — Plaintiffs — Appellants.

v.

Mahindar Singh and others —

Defendants — Respondents.

First Appeal No. 286 of 1936, Decided on 3rd June 1938, from decrees of Sub-Judge, First Class, Amritsar, D/- 6th April 1936.

1. Bura Mal v. Tulsi Ram, (1927) 14 A I R Lah 890 = 107 I C 609 = 9 Lah 366 = 29 P L R 27.

2. Sri Kishen Das v. Sat Narain, (1932) 19 A I R Lah 182 = 135 I C 499 = 13 Lah 391 = 32 P L R 729.

3. Hakim Rai v. Ishar Das Gorkh Rai, (1927) 14 A I R Lah 499 = 102 I C 46 = 8 Lah 531 = 29 P L R 602.

(a) Custom (Punjab)—Alienation—Ancestral land — To support alienation necessity must exist at the time of alienation.

Even a male proprietor is not entitled to encumber ancestral property for his future requirements; the necessity to support an alienation of ancestral property must exist at the time of the alienation : *A I R 1920 Lah 271 and A I R 1923 Lah 307, Rel. on.* [P 652 C 1]

(b) Custom (Punjab)—Alienation—Ancestral land—Just debt—Meaning explained—Amounts borrowed by big zamindar, having social position and large income, for purchase of costly clothes and ornaments cannot be considered as reckless expenditure so as to exclude amounts from category of just debts.

Just debt means a debt which is actually due and which is not immoral, illegal or opposed to public policy. It also means a debt not contracted as an act of reckless extravagance or of wanton waste or with the intention of destroying the interest of the reversioners. It need not be one incurred for a necessary purpose; but if a non-necessary debt is unreasonably large compared to the means and station in life of the proprietor, it cannot come under the definition of a just debt. Similarly if a number of comparatively small loans for non-necessary purposes are contracted within an unreasonably short period, they collectively may amount to extravagance, judged by the tests previously mentioned, and may be excluded from the category of just debts. What is unreasonable or extravagant must depend upon the circumstances of each particular case and must be decided by the Court on fair and rational grounds : *65 P R 1900 (F B), Foll.* [P 652 C 1]

Amounts borrowed by a big zamindar with a large income and living in a style suited to his social status, for costly clothes and ornaments cannot be considered to be a very unreasonable expenditure so as to exclude the debts from the category of "just" debts. [P 653 C 1]

(c) Custom (Punjab)—Alienation — Antecedent debt—Debts incurred after agreement of sale and later included in consideration for that sale are not antecedent debts.

An "antecedent debt" means a debt which is not only antecedent in time, but also antecedent in fact, i. e. it must be truly independent of the transaction impeached. In other words, the two transactions must be dissociated in time as well as fact. Debts which were incurred after agreement relating to the sale was entered into and which were later on included in the consideration for that sale cannot be properly held to be "antecedent debts" : *A I R 1924 P C 50, Rel. on.* [P 654 C 1]

(d) Custom (Punjab)—Alienation—Necessity—Purchase of ornaments.

The purchase of ornaments to replace those which had been stolen cannot be considered to be valid necessity for the sale of "ancestral" land. [P 654 C 1]

(e) Custom (Punjab) — Alienation — Good management.

It cannot obviously be considered to be an act of good management to sell property worth Rupees 20,500 when there is necessity for a loan of about Rs. 6000 only : *A I R 1938 P C 77, Disting.* [P 654 C 2]

(f) Custom (Punjab)—Alienation—Mere fact that part of property sold was house property situated within city limits is not sufficient to take it out of customary restriction on sale of ancestral property.

Where the vendor is admittedly governed by custom with regard to alienation of ancestral property, the mere fact that part of the property sold was house-property situated within the city limits would not be sufficient to take it out of the customary restrictions on sale of "ancestral" properties : *55 P R 1908; A I R 1938 Lah 107 and A I R 1934 Lah 81, Expl.* [P 655 C 1]

(g) Custom (Punjab)—Alienation — Alienation by father—Declaratory suit by son challenging alienation — Mere fact that son lives with father does not make suit collusive.

Where a son brings a declaratory suit challenging the alienation of ancestral land by father, the mere fact that the plaintiff being the son of the vendor was living with him is not sufficient to justify the suit being dismissed as collusive : *A I R 1927 Lah 264 and A I R 1927 Lah 46, Rel. on.* [P 655 C 2]

(h) Custom (Punjab)—Alienation — Declaratory suit challenging sale of ancestral property —Such suit cannot be collusive between plaintiff, whether minor or major, and vendor defendant.

"Collusion" in judicial proceedings has been defined as "a secret agreement between two persons that the one should institute a suit against the other, in order to obtain the decision of a judicial tribunal for a sinister purpose." In a declaratory suit challenging the sale by father of ancestral property, the vendor is merely a pro forma defendant and no question of collusion with the defendant against whom relief is claimed really arises as it does, e. g. in suits for divorce, etc. Again when such a suit is instituted on behalf of a minor, there cannot obviously be any collusion on the part of the plaintiff in the above sense, as a minor is legally incapable of entering into any agreement. Even when the plaintiff is a major, the above definition would not apply, as the object of the declaratory decree is to protect the interest of the plaintiff and the other reversioners, and not those of the vendor; and this purpose cannot be considered to be "sinister." [P 656 C 1]

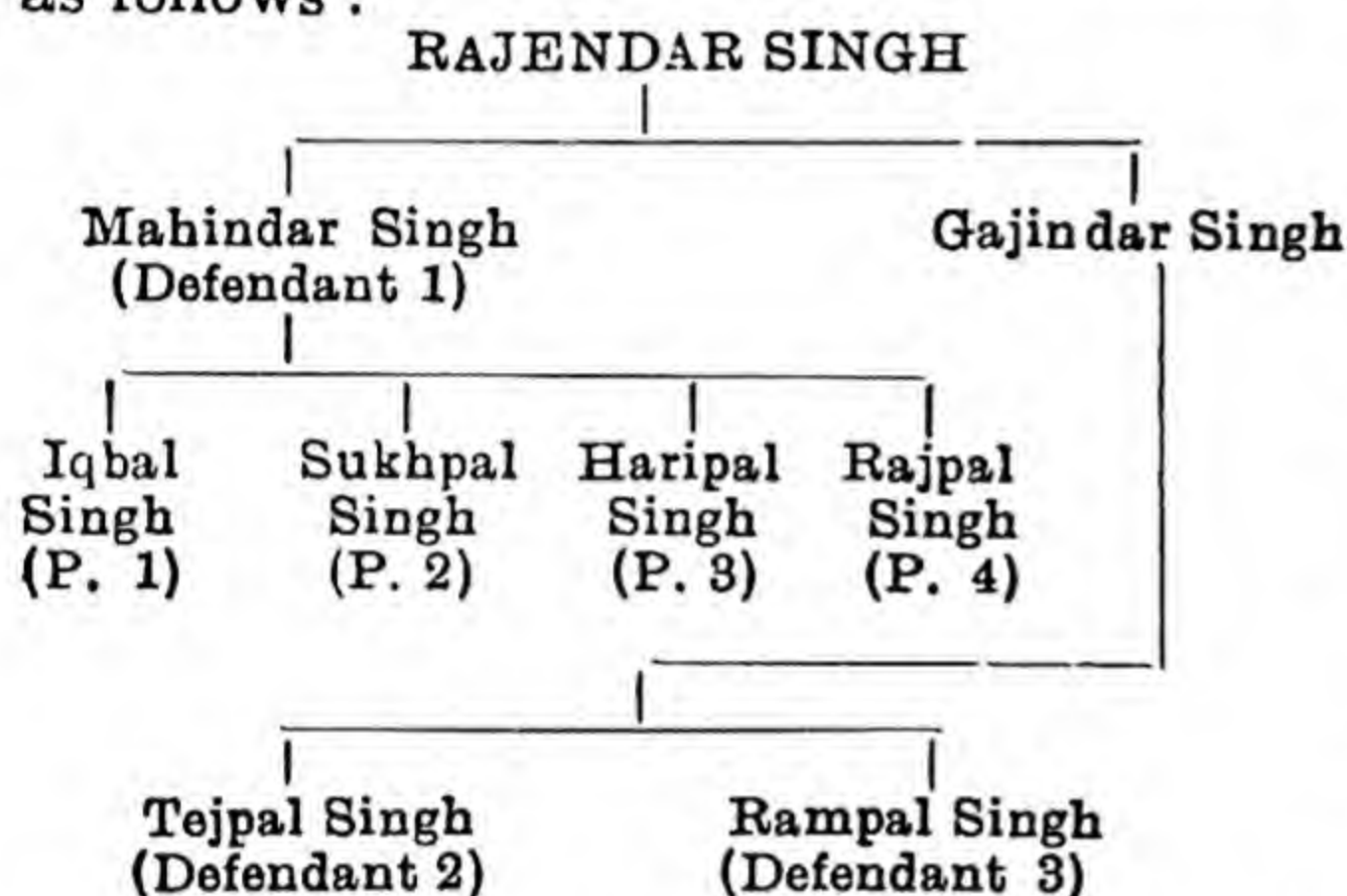
(i) Custom (Punjab)—Alienation—Ancestral property—Necessity—Alienee need only prove that antecedent debts discharged were due — Even outsider alienee is not protected if he knows true nature of debts and acts in bad faith.

The law requiring an alienee to prove necessity for alienation of ancestral property is well-known, and if an alienee fails to take the obvious precaution of ascertaining necessity for an alienation of ancestral property and getting it duly recorded at the proper place and time, he must take the consequences. Normally it is sufficient for the alienee to prove that the antecedent debts discharged were due, and it is unnecessary for him to show that the debts were incurred for "necessity" : *65 P R 1900, Rel. on.* [P 656 C 2 ; P 657 C 1]

Even an alienee who is an outsider will not be protected, if he is aware of the true nature of the debts discharged by the alienation and acts in bad faith : *65 P R 1900, Rel. on.* [P 658 C 1]

M. C. Mahajan, S. C. Manchanda and Prem Chand Pandit—for Appellants.
Dev Raj Sawhney and Madan Mohan, and Amar Singh and Ajit Singh—for Respondents 4-A and 4-B and 5 to 12, respectively.

Bhide J. — This appeal arises out of a declaratory suit to challenge alienations of ancestral property by Sardar Mahindar Singh, father of the plaintiffs, and their deceased uncle Gajindar Singh. The suit has been dismissed by the Court below on the finding that the alienations in question were effected for valid necessity and consideration. From this decision the plaintiffs have appealed. The pedigree table showing the relationship of the parties concerned is as follows :



The four alienations in dispute were effected from the years 1921 to 1926. At the time the plaintiffs were minors. The suit was instituted on 31st July 1932 when Iqbal Singh, one of the plaintiffs, had attained majority, the others being still minors. The details of the various alienations may be briefly stated as follows :

I. Sale of 22 kanals and a bungalow for Rs. 20,500 on 29th November 1921 by Mahindar Singh, defendant 1, in favour of Salig Ram, proprietor of the firm Ram Narain-Jai Gopal (father of defendants 4-A and 4-B).

II. Sale of 25 kanals 2 marlas for Rs. 8130 dated 17th May 1923 by Mahindar Singh, defendant 1, and his brother Gajindar Singh, in favour of Jhanda Singh, Santa Singh, Kishen Singh and Kesar Singh. (Defendants 7 to 10).

III. Sale of 25 kanals 4 marlas for Rs. 8820 by defendant 1 and his brother Gajindar Singh in favour of Ganda Singh and Prem Singh (defendants 6 and 5).

IV. Mortgage deed in respect of 42 kanals 14 marlas for Rs. 8000 dated 29th

May 1926 in favour of Salig Ram, proprietor of the Firm Ram Narain-Jai Gopal mentioned above (father of defendants 4-A and 4-B).

The plaintiffs' case was that their father Mahindar Singh and uncle Gajindar Singh had inherited large property and had absolutely no necessity to sell or mortgage the ancestral property ; that they were both men of immoral character and had recklessly wasted the property, and that in the circumstances the alienations in dispute were not binding on them. The alienees on the other hand contended that the sales and the mortgage were effected mostly in lieu of just antecedent debts and were binding on the plaintiffs. Before proceeding with the discussion of the case, it will be convenient to deal with a preliminary matter which was raised by the learned counsel for the plaintiffs-appellants. It was urged that the learned Judge of the trial Court had refused to examine the appellant Iqbal Singh and his father Mahindar Singh, when the appellants wanted to produce them as their witnesses, although they were present in Court on 15th January 1936, and this refusal to record their evidence has greatly prejudiced the case of the appellants. It appears however from the record of the case that Mahindar Singh was never cited as a witness by the plaintiffs in their list of witnesses, and in fact on 16th January 1934 their pleader distinctly stated that Mahindar Singh was not a witness of the plaintiffs. So far as Iqbal Singh is concerned, he should have really appeared as his own witness at least at the conclusion of his case and had ample opportunity to do so. On 16th January 1934, the Court ordered Iqbal Singh to appear in Court and give his evidence on the next date ; but Iqbal Singh failed to appear on the next date. The case was later on transferred to another Court, and on the 16th November 1935 the Court adjourned the case to 14th December 1935 for evidence and arguments. Iqbal Singh had again an opportunity of appearing and giving evidence in Court on that date, but he failed to do so and no explanation is forthcoming as to why he did not appear on that date. As already stated, Mahindar Singh was never cited as a witness, but even if he was to be produced as a witness in rebuttal, the plaintiffs had the opportunity to do so on 14th January 1935. They did not however summon him as a witness nor produce him for examination

on that date. The learned counsel for the plaintiffs had again no explanation to offer as to why Mahindar Singh was not summoned as a witness if he was to be produced in rebuttal.

It is true that on 15th January 1936 the plaintiffs did produce Mahindar Singh and Iqbal Singh for examination, but objection was taken to their being examined at that stage and the Court upheld that objection and proceeded to hear the arguments. In view of all the circumstances stated above, it cannot be said that the trial Court was wrong in refusing to examine the appellant Iqbal Singh or his father Mahindar Singh. Both these witnesses could have been produced at a much earlier stage and the plaintiffs were given ample opportunity for the purpose. But as they failed to avail themselves of the opportunity, I see no reason for remanding the case for recording the evidence of these two persons and for redecision as requested by the learned counsel for the appellants.

Coming now to the merits of the various alienations in dispute, it may be stated at

1. 5000-0-0	Credited by the vendee in his account books and utilized by the vendor for his requirements subsequently as follows :					
	(a) Purchase of ornaments	...	...	...	...	2118-13-0
	(b) Cloth	...	...	...	...	170- 3-3
	(c) Building purposes	...	...	...	...	360-11-6
	(d) Land	...	...	...	...	310- 0-0
	(e) Cash	...	...	...	...	2959-11-9
					Total	2040- 4-3
						5000- 0-0

2. 13,361-5-6 Paid to the vendee in payment of the balance due to him on a prior account beginning from the year 1912 to the date of the sale.
3. 1638-10-6 Paid in cash before the Registrar.
4. 500- 0-0 Paid in advance.

20,500-0-0

The learned Judge of the trial Court has himself held that no necessity was proved for items 3 and 4. As regards item 1, he found that necessity was proved for Rs. 2959-11-9 out of the first item of Rs. 5000, but that no necessity was proved for the balance of Rs. 2040-4-3 out of it which was paid in cash to the vendor. As regards the second item, he held that the debts which were discharged thereby were spread over a long period, namely from 1912 to 1921 and that it included a sum of Rs. 7674-15-3 by way of interest. The balance of Rs. 5686-6-3 spread over a period of 9 years only meant a debt of Rs. 600 per annum, which the learned Judge considered was not unreasonable. He was of opinion

the outset that it was admitted that the appellants' father Mahindar Singh and his brother Gajindar Singh owned about 400 bighas of land in the Amritsar and Hoshiarpur Districts. The property was at first under the Court of Wards but was released about the year 1908 when Mahindar Singh attained majority. The property was then apparently unencumbered. There is no definite evidence on the record to show what the income of the property was at the time, but witnesses have variously estimated the income from Rs. 8000 to 18,000. Zahur-ud-Din, D. W. 7, who was admittedly a Mukhtar of Sardar Mahindar Singh for some time estimated the income of Sardar Mahindar Singh and Gajindar Singh at about Rs. 8000 per year, although he said that the income dwindled down to Rs. 6000 per year after 1923. It may therefore safely be taken that the alienors had ample income for their ordinary requirements. The first alienation in dispute was effected in the year 1921 for a sum of Rs. 20,500 and the various items forming the consideration were as follows :

further that there was no reliable evidence on the record to prove that the vendors were men of immoral character or extravagant, and he therefore held that this item of Rs. 13,361-5-6 being in discharge of just and antecedent debts, constituted valid necessity for the sale of ancestral land. According to the finding of the learned Judge, no necessity was proved for Rs. 4178-14-9, but this was only about one-fifth of the consideration and consequently the learned Judge thought that the absence of proof of necessity for this small portion out of the consideration did not justify the sale being set aside.

The learned counsel for the appellants has contended that the learned Judge of

the trial Court was clearly wrong in holding that any necessity was proved for the first item of Rs. 5000, as it was simply credited to the vendor for being used in the future. This contention appears to be correct because even a male proprietor is not entitled to encumber ancestral property for his future requirements; the necessity to support an alienation of ancestral property must exist at the time of the alienation (146 P R 1919;¹ 75 I C 680²). It will thus appear that there is no proof of necessity at all for items 1, 3 and 4 aggregating to Rs. 7138-10-6, i.e. a little over one-third of the consideration. The main question for consideration in respect of this sale therefore is whether payment of the item of Rs. 13,361-5-6 can be said to be valid necessity. The learned counsel for the appellants have urged that the so-called antecedent debts were incurred not during the period of 9 years, as held by the trial Court, but mostly during a period of two years preceding this sale, and that the debts were incurred without any apparent necessity and in such rapid succession that they must be held to be outside the category of 'just debts' as defined in the Full Bench ruling reported in 65 P R 1900.³ The definition of 'just debt' as given in that ruling is to the following effect :

Just debt means a debt which is actually due and which is not immoral, illegal or opposed to public policy. It also means a debt not contracted as an act of reckless extravagance or of wanton waste or with the intention of destroying the interests of the reversioners. It need not be one incurred for a necessary purpose but if a non-necessary debt is unreasonably large compared to the means and station in life of the proprietor, it cannot come under the definition of a just debt. Similarly if a number of comparatively small loans for non-necessary purposes are contracted within an unreasonably short period, they collectively may amount to extravagance judged by the tests previously mentioned, and may be excluded from the category of just debts. . . . What is unreasonable or extravagant must depend upon the circumstances of each particular case, and must be decided by the Court on fair and rational grounds.

We have therefore to consider whether the debts included in item 2 would fall within the description of 'just debts' as given above. The learned Judge of the

trial Court has given in a convenient tabular form the nature of these debts incurred from year to year from 1912 to 1921: vide pp. 107-108, Vol. I of the printed record. It will appear from this statement that from the years 1912 to 1919, although large amounts were being borrowed, large repayments were also being made as a rule, and that in several years the amounts paid exceeded the amounts borrowed. From the account at p. 100 of Vol. II of the printed record, it would appear that a balance of Rs. 7000 was struck by Mahindar Singh in favour of the vendee on 13th February 1918, but a payment of Rs. 7000 was made shortly afterwards, i. e. on 25th May 1918, with the result that the balance due on that date was only about Rs. 3000. In 1919, although a sum of Rs. 11,821-15-9 was borrowed, the repayments amounted to Rs. 14,225. In 1920 however, the repayments amounted to Rs. 581-10-6 only as against a loan of Rs. 5050 taken during the year; and in 1921 again, the repayments amounted to only Rs. 3700 as against a loan of Rs. 8614-1-6. It will thus appear that it was only during the years 1920 to 1921 that the repayments fell far short of the amount borrowed. But the general nature of the dealings during the period was more or less the same as during the preceding years. Mahindar Singh had been drawing upon the firm as though they were his bankers, from time to time, and according to his requirements and also depositing sums with them according to his convenience. The creditor had no reason to suppose at the time that Mahindar Singh was living beyond his means or was incurring debts in a reckless manner without being able to pay. It must be remembered that Mahindar Singh occupied a good position in life. He was, it appears, educated at the Chiefs' College at Lahore. He owned a large estate and his income according to plaintiffs' own case was Rs. 10,000 or more. He was a friend of the Raja of Suket and also a Wazir in that State from 1910 to 1918. He therefore naturally lived in a style befitting his position in life. The mere fact that his income was large would not necessarily place him beyond the necessity of borrowing money. For it is common knowledge that agriculturists are often in need of ready cash before they are able to dispose of the produce of their land at a suitable price.

The plaintiffs had alleged in their plaint that Mahindar Singh was a drunkard and

1. Gahl Singh v. Surjan Singh, (1920) 7 A I R Lah 271=54 I O 955=146 P R 1919=87 P L R 1920.

2. Wali Mahomed v. Fateh Khan, (1923) 10 A I R Lah 307=75 I O 680.

3. Devi Ditta v. Saudagar Singh, (1900) 65 P R 1900=322 P L R 1900 (F B).

a profligate, but there is not much evidence on the record to support the allegation. Not only have the defendants' witnesses given him a good character, but one of the plaintiffs' own witnesses Bansi Ram patwari (who is apparently disinterested) deposes that he bears a good character. Some of the plaintiffs' witnesses have deposed that Sardar Mahindar Singh is given to drinking, but there is no evidence to show that he has been spending large sums of money on liquor. One Hujro, a kanjar from Lahore deposed that Mahindar Singh used to visit his niece, a prostitute at Lahore, during a period of about four years prior to the death of the Raja of Suket — which appears to have taken place about the year 1918. This witness however admits Mahindar Singh ceased to have anything to do with this prostitute after the death of the Raja. Mahindar Singh is a married man with four children and evidence like this coming from a witness of the type of Hujro must be taken with great caution; but taking it for what it may be worth, it does not help the appellants, as their learned counsel has confined his attack to the debts incurred by Sardar Mahindar Singh during a period of two years prior to the first sale. That sale took place on 29th November 1921, and consequently the debts incurred during the preceding period of two years cannot be said to have any connexion with Mahindar Singh's alleged visits to the prostitute prior to 1918.

The learned counsel for the appellants rightly did not place much reliance on the charge of immorality brought by the plaintiffs against their father, but he strenuously contended that in view of the nature and frequency of the debts incurred by Sardar Mahindar Singh during 1919-1921, these should be held to be outside the category of 'just debts' as defined in 65 P R 1900.³ As regards this point, I have already pointed out that the general nature of the account between the parties to this sale during 1919-1921 was more or less the same as that during the preceding seven or eight years. The learned counsel has taken us through the account and urged that several of the items for costly clothes and ornaments show reckless extravagance; but as already pointed out Mahindar Singh was a big zamindar with a large income and had to live in a style suited to his social status. The amounts borrowed for ornaments were moreover not altogether lost, for the ornaments remained with the

family. It was urged that it was unnecessary for Mahindar Singh to spend on building a bungalow at Amritsar. But in view of his position, I do not think this can be considered to be a very unreasonable expenditure. At any rate, it cannot, I think, be held to amount to 'reckless extravagance' or 'wanton waste.' Taking the account as a whole, I am not prepared to hold in the circumstances of this case that the amounts borrowed during 1919-1921 were singly or collectively so out of proportion to the status, means and requirements of Sardar Mahindar Singh as to justify these debts being held to be outside the category of 'just debts'. I may note here that it was alleged on behalf of the plaintiffs that Mahindar Singh had made other alienations and wasted practically the whole of his property; but no evidence in the shape of mutations, sale-deeds, etc. were produced in support of the allegation, as might easily be done if the allegation were true. In the circumstances, mere oral statements of witnesses cannot be accepted on this point. The probability is that the alienations, if any, took place after the period covered by the present suit.

There is however force in the contention of the learned counsel for the appellants that the debts which were incurred after 10th September 1921, when the agreement relating to the first sale was entered into (vide Ex. D-1) and which were later on included in the consideration for that sale, cannot be properly held to be 'antecedent debts'. It appears from the account at pp. 178-179, Vol. 2 of the printed record that the following items were borrowed after the date of the agreement:

- (1) 28-9-1921 Rs. 5000-0-0 Purpose not given.
- (2) 29-10-1921 Rs. 510-0-0 For payment to Ibrahim.
- (3) 15-11-1921 Rs. 1430-1-0 For certain ornaments.
- (4) 27-11-1921 Rs. 100-0-0 Purpose not given.
- (5) 28-11-1921 Rs. 205-0-0 On account of 'paper'.

The balance due to the creditor on 10th September 1921, when the agreement of sale was entered into was apparently about Rs. 4747-4-0 (see account at p. 108, Vol. 2); but by the date of the sale, with the items borrowed in the intervening period and interest amounting to about Rs. 1300, the balance swelled to Rs. 13,361-5-6 and this was the sum included as an 'antecedent'

debt in the sale transaction. It has been pointed out by their Lordships of the Privy Council in 46 All 95,⁴ that an 'antecedent debt' means a debt which is not only antecedent in time, but also antecedent in fact, i. e. it must be truly independent of the transaction impeached. In other words, the two transactions must be dissociated in time as well as fact. Applying this test, the debts incurred after the agreement of sale cannot, I think, properly be held to be independent of the sale transaction. It is significant that no purpose is given for the largest item of Rs. 5000 borrowed after the 10th September as well as for another item of Rs. 100. As regards the item of Rs. 510, it is not stated who Ibrahim was and why Rs. 510 were to be paid to him. The item of Rs. 1430-1-0 was taken only a fortnight before the sale, for ornaments. The item of Rs. 205 is said to have been for 'paper.' This was probably for the stamp required for the sale deed and may therefore be allowed. But considering the nature of the other items, there seems little doubt that they were merely intended to swell the consideration for the sale and nothing more. In the circumstances, these items cannot, in my opinion, be treated as an 'antecedent debt,' but must be placed on the same footing as though they formed part of the actual consideration for the sale. So treated, it seems to me that all of them excepting No. 5 must be held to be without necessity. In the case of items Nos. (1) and (4), there is no mention of any necessity at all as pointed out above, while the necessity mentioned in the case of item (2) is unintelligible. As regards item No. 3, I do not think purchase of ornaments can be considered to be a valid necessity for the sale of 'ancestral' land. It was urged that jewellery worth Rs. 7000 had been stolen from Sardar Mahindar Singh's bungalow prior to the sale, and it had to be replaced. But this could not be considered to be a matter of urgency, especially in view of the fact that during the period from 1912 to 1919 alone, Sardar Mahindar Singh had purchased jewellery worth over Rs. 15,000. This purchase could therefore be easily postponed till funds were available without encumbering ancestral land. The vendor himself probably realized this, for although there is reference to the 'necessity' of replacing ornaments in the agreement of

sale Ex. D.1, this 'necessity' was not mentioned in the sale deed itself. I am therefore of the opinion, that the items referred to above, viz. Nos. 1, 2, 3 and 4, amounting to Rs. 7040-1-0, must be held to be without necessity. As a result of the above findings it would appear that out of the consideration of Rs. 20,500 no necessity has been established for the following items, viz.:

- (1) Rs. 500- 0-0 Earnest money
- (2) Rs. 5000. 0-0 Left in deposit with the vendee.
- (3) Rs. 1638-10-6 Paid before the Sub-Registrar.
- (4) Rs. 7040- 1-0 Out of the item of Rs. 13,361-5-6—due to the vendee on book account.

Rs. 14,178-11-6. Total

In other words, no necessity has been proved for about two-thirds of the consideration. Consequently, it must be held that the sale of the land was clearly unnecessary; for, the balance of about Rs. 6000 which has been proved to be for necessity could have been easily raised by a mortgage of the portion of this or some other property. This finding also disposes of the contention of the learned counsel for the vendee respondents that the sale was an act of good management and should be upheld as such. It cannot obviously be considered to be an act of good management to sell property worth Rs. 20,500 when there is necessity for a loan of about Rs. 6000 only. The learned counsel for the appellant referred in this connexion to a recent decision of their Lordships of the Privy Council reported in A I R 1938 P C 77,⁵ but the facts of that case were entirely different and have no bearing on the circumstances of this case.

I shall now proceed to discuss certain other grounds on which the learned counsel for the respondents attempted to support the decision of the trial Court. It was urged that the property which was sold by the deed dated 29th November 1921 is 'house-property' situated in Amritsar City and therefore the vendor had a free power of disposal over it. It appears that this plea was raised in para. 6 of the vendee's written statement, but was not put in issue and it does not appear to have been pressed or even referred to at any stage of the trial. The learned counsel for the respondents urged that it was the duty of the Court to put the matter in issue; but the

4. Brij Narain Rai v. Mangla Prasad, (1924) 11 A I R P C 50=77 I C 689=51 I A 129=46 All 95 (P C).

5. Atma Ram v. Sadhu Singh, (1938) 25 A I R P C 77=172 I O 1004 (P C).

parties were represented by counsel, and when the point was never pressed subsequently, it is reasonable to infer that it was abandoned. There seems to be also no force in it on merits. The mere fact that part of the property sold was house property situated within the city limits of Amritsar would not be sufficient to take it out of the customary restrictions on sale of 'ancestral' property. The learned counsel for the respondent referred to 55 P R 1908,⁶ A I R 1938 Lah 107⁷ and 15 Lah 236⁸ in support of his contention, but these rulings do not seem to assist him. The first two were cases in which the vendors, though originally members of agricultural tribes, had altogether drifted away from agriculture, taken to other avocations and settled in towns and were therefore found to be not governed by agricultural custom. This is not the case here. Mahindar Singh is not only a member of a well-known agricultural tribe (Jat), but his main source of livelihood has been agriculture. In 15 Lah 236⁸ there are some remarks which support to some extent the contention of the learned counsel for the respondent; but the remarks are in the nature of obiter dicta, as it was also found in that case that the alienation in dispute was made for a necessary purpose and was therefore valid. In the present instance, the vendor Mahinder Singh is admittedly governed by custom with regard to alienation of the other ancestral property. It would therefore be very anomalous indeed if the mere inclusion of land within the limits of a town or the erection of a building thereon were sufficient to take it out of the scope of the restrictions imposed by custom on alienation of ancestral property. In 15 Lah 715,⁹ it was pointed out by the same learned Judge who decided 15 Lah 236,⁸ that one and the same person cannot be subject to different rules as regards alienation of ancestral property varying with the locality where the property is situated: (see p. 720 bottom).

It was next urged that 2 kanals 18

marlas out of the property sold (viz. Khasra No. 3872) at any rate is non-ancestral, as the same was purchased by Mahindar Singh himself (vide Ex. D.49 at p. 63, Vol. 2 of the printed record). This contention seems to be correct and the point was apparently not even disputed in arguments in the Court below. The plaintiffs are therefore not entitled to contest the alienation of this portion of the land sold. The price of this land was only Rs. 750, and the exclusion of this small area will not affect the question of the validity of the sale in this case.

The next point urged by the learned counsel for the respondents was that the suit was collusive and should therefore be thrown out on this ground alone. It was pointed out in this connexion that the plaintiffs were living with the vendor Mahinder Singh, and attention was also invited particularly to the statement of Kashi Ram, agent of Mahindar Singh, who deposed that the suit was collusive and Mahindar Singh was financing the litigation. Reliance was placed in this connexion on 5 Lah 389¹⁰ and some other rulings in which the view taken therein was followed. The evidence of Kashi Ram is not very satisfactory, and in the absence of any clear documentary evidence such as was available in 5 Lah 389,¹⁰ I do not think it would be safe to accept Kashi Ram's statement as conclusive on the point. He has apparently taken some land on mortgage or otherwise from Mahindar Singh and he is probably interested in supporting the position taken up by the vendees in this case. As regards plaintiffs residing with Mahindar Singh, this is natural as they are his sons. In 100 I C 911¹¹ and 98 I C 865¹² it was held that the mere fact that plaintiffs, being the sons of the vendor, were living with him was not sufficient to justify the suit being dismissed as collusive. Attention was next invited to the statement of the plaintiffs' pleader dated 15th January 1936 (see p. 81, Vol. 1 of the printed record), in which he referred to Mahindar Singh as one of his 'clients'. This may be a mere slip, but even if it is taken to be an indication of

6. Mahommed Hayat Khan v. Sandhe Khan, (1908) 55 P R 1908=105 P W R 1908.

7. Feroze Din v. Hassan Din, (1938) 25 A I R Lah 107=171 I C 498.

8. Balwant Singh v. Sardari Kesar Kaur, (1934) 21 A I R Lah 81=151 I C 905 = 15 Lah 236 86 P L R 430.

9. Iqbal Singh v. Jasmer Singh, (1934) 21 A I R Lah 296 = 153 I C 862 = 15 Lah 715 = 35 P L R 215.

10. Dad v. Lal, (1925) 12 A I R Lah 24=82 I C 626=5 Lah 389.

11. Harnam Singh v. Ram Ditta, (1927) 14 A I R Lah 264=100 I C 911.

12. Harnam Singh v. Jagir Singh, (1927) 14 A I R Lah 46=98 I C 865.

Mahindar Singh's helping the plaintiffs in this litigation, I doubt if that could be considered to be a sufficient ground for non-suiting the plaintiffs in a case of this kind on the ground of 'collusion'. 'Collusion' in judicial proceedings has been defined as 'a secret agreement between two persons that the one should institute a suit against the other in order to obtain the decision of a judicial tribunal for a sinister purpose' (see Wharton's Law Lexicon). In the first place, the vendor is merely a pro forma defendant in cases of this kind and no question of collusion with the defendant against whom relief is claimed really arises as it does, e. g. in suits for divorce, etc. Again, when a suit of the present type is instituted on behalf of a minor, as it frequently is, there cannot obviously be any collusion on the part of the plaintiff in the above sense, as a minor is legally incapable of entering into any agreement. Even when the plaintiff is a major, the above definition would not seem to apply, as the object of the declaratory decree is to protect the interests of the plaintiff and the other reversioners, and not those of the vendor, and this purpose cannot be considered to be 'sinister'. A declaratory decree in a case of this type has effect only after the death of the vendor and cannot therefore benefit the vendor himself. It is therefore difficult to see how a case of this type can be held to be 'collusive' in the above sense. In any case, I consider that it is not clearly established that the present suit is being conducted by Mahindar Singh himself at his own expense and that the plaintiffs are mere 'figure-heads'. It may be pointed out in this connexion that Iqbal Singh, the major plaintiff, who is suing on behalf of himself and his minor brothers, is employed in the army in an Indian State and has presumably resources of his own.

Lastly, it was contended by the learned counsel for the appellants that the suit was instituted nearly 12 years after the sale, and in view of the lapse of time strict proof of necessity should not be insisted on. In the present case, however, the suit was filed soon after one of the plaintiffs came of age and it cannot be said that the plaintiffs who were minors at the time of the sale are to blame in any way for the delay. Secondly, it does not appear that the respondents have been really prejudiced in any way. The question of necessity for the sale has been decided above, mostly on the basis of the recitals in the sale deed and in

the accounts produced by the respondent-vendees themselves. These recitals have been generally accepted and it is only where necessity is not mentioned at all, or where the necessity mentioned cannot be held to be valid according to law, that items have been disallowed. It is significant that, while necessity is given in the case of certain items in the sale deed or in the accounts, it is not given at all in the case of others. It may, therefore, fairly be presumed that no inquiry as to necessity was made in the case of these items for which no necessity was specified. The law requiring an alienee to prove necessity for alienation of ancestral property is well-known in this province and if an alienee fails to take the obvious precaution of ascertaining necessity for an alienation of ancestral property and getting it duly recorded at the proper place and time, he must take the consequences.

I now come to the next two sales, which were both effected on the same date, viz. 17th May 1923 by Mahindar Singh and his brother Gajinder Singh. Each of these sales comprised an area of about 25 kanals of nahri land in Sultanwind near Amritsar and the consideration was more or less the same—the consideration for one sale (in favour of Ganda Singh and Prem Singh) being R. 8820 and for the other (in favour of Jhanda Singh, etc.) being Rs. 8130. A scrutiny of the debts included in these sale transactions shows that in the former sale only the debts of Mahindar Singh were included, while in the latter those of his brother Gajinder Singh alone were included. Strictly speaking, each brother could only alienate his own share for his own debts. But the brothers seem to have treated the transactions as though the land sold in discharge of the debts of Mahindar Singh belonged to him and that sold in discharge of the debts of Gajinder Singh belonged to him. The land had to be sold jointly as it apparently stood in the name of the two brothers, but in view of the facts stated above, it would be only equitable to treat the two sales as separate transactions on behalf of the two brothers, as though the land had been partitioned between them by a mutual agreement and then sold.

I shall first take the sale for Rs. 8820 in favour of Prem Singh and Ganda Singh which covered the debts of Mahindar Singh. The items included in this sale were as follows :

- (1) Rs. 500 Earnest money.
- (2) Rs. 1020 Paid before the Sub-Registrar for household expenses.
- (3) Rs. 1500 Paid to Kashi Ram in discharge of a pronote in his favour.
- (4) Rs. 3000 Paid to the firm Ram Narain Jai Gopal on account of a book debt.
- (5) Rs. 2000 Paid to Dilbagh Rai on account of a book debt.
- (6) Rs. 800 Paid to Dwarka Das on account of a book debt.

No necessity was proved for item 1, and the necessity mentioned for item 2, viz. 'household expenses' is vague and has to be taken with caution, when, as in the present instance, the transaction discloses extravagance. The remaining debts were paid to other creditors. According to the rule laid down in 65 P R 1900,³ normally it is sufficient for the alienee to prove that the antecedent debts discharged were due and it is unnecessary for him to show that the debts were incurred for 'necessity.' The learned counsel for the appellant has however urged that these debts were incurred by Mahindar Singh in a spirit of reckless extravagance, that the alienees must have been aware of this fact and therefore these debts should not be treated as 'just antecedent debts.'

In my opinion there is force in the above contention as regards this sale. I have treated the first sale on a different footing, for Mahindar Singh had dealings for many years with the firm Ram Narain Jai Gopal, and had been treating them practically as his bankers and his 'credits' usually equalled and at times even exceeded the 'debits' till a short time before that sale. The sale of 1921 was moreover admittedly the first alienation of property effected by Mahindar Singh. Till then, as Mahindar Singh was making large repayments, the alienee had no reason to think that he was living beyond his means. The situation was however different by the time the second sale was effected. This second sale was effected within a year and a half only after the first sale. The first sale was for a large sum of Rs. 20,500 and even leaving out of account the antecedent debt of about Rs. 13,000 due to the vendee, the vendor had secured thereby an extra sum of about Rs. 7000 for which there was no actual necessity. Mahindar Singh enjoyed a large income from his land and, in view of this income and the cash of Rs. 7000 obtained by the first sale, there should have been no necessity at all for him to

borrow any money during the period between the first and the second sale. The vendees of the second sale were residents of Amritsar, where Mahindar Singh frequently resided and he was known to them. They could not therefore have been unaware of the first sale. There were besides, other facts which should have at once aroused their suspicion. For example, one of the debts discharged by the second sale was one for Rs. 1500 due to Kashi Ram on account of a pronote dated 4th April 1923. Now Kashi Ram was a servant in the employ of Mahindar Singh and this debt should have at once aroused the suspicion of the vendees; for there could hardly be any necessity for a man in the position of Mahindar Singh to go to the length of borrowing Rs. 1500 from one of his own servants for the betrothal of his own son as recited in the pronote. The pronote was moreover said to have been executed only about a month and a half before the sale. This item suggests that the vendees were not acting in good faith. It seems very likely that this debt was purely fictitious and the vendees deliberately required Mahindar Singh to give it the colour of an antecedent debt due to a third person in order to protect themselves.

The other items of debts included in the sale should also have put the vendees on their guard. For, the biggest item of Rs. 3000 was a debt due to the firm Ram Narain Jai Gopal, the vendee of the first sale. A scrutiny of the account of this firm, on the basis of which the above amount was claimed, would have at once shown that it included several items, pointing unmistakably to extravagance. For example, during this short period of about eighteen months covered by the accounts, the following amounts were spent on ornaments :

	Rs.	a.	p.	
12-1-1922	215	0	0	See pp. 180-188 Vol. 2 of the printed record.
15-1-1922	685	0	3	
23-1-1922	990	0	0	
25-1-1922	115	3	6	
16-4-1923	2277	7	9	
17-4-1923	341	1	0	
18-4-1923	80	14	0	
23-4-1923	28	4	0	
23-4-1923	572	9	9	
	5005	8	3	

Some of the ornaments are said to have been required for the 'shagan' (betrothal) of one of the sons of Mahindar Singh; but

even making allowance for this fact, the amount borrowed during this short period for ornaments was clearly excessive. The rapidity with which the debts were taken in April just before the sale is also very suspicious and suggests that these were deliberately borrowed in advance, with a view to give them the colour of antecedent debts. The next item included in the sale is a sum of Rs. 2000 due to Dilbagh Rai. The account produced by Dilbagh Rai began with an item of Rs. 4000 borrowed on 17th May 1917 for the marriage of Bibi Gurbachan Kaur, a niece of Mahindar Singh. It does not appear why Mahindar Singh should have borrowed Rs. 4000 for the marriage of a niece. Next we have two items of Rs. 2000 each borrowed on 5th August 1920 and 18th October 1922 only a few months before the sale. Lastly there is the item of Rs. 800 said to have been paid to Dwarka Das. The account of this firm has been produced, but has not been even properly proved. Tara Chand (D. W. 10) who produced the account admitted that he had no personal knowledge of these accounts and consequently even the existence of this debt cannot be said to be proved. As a result of the above findings, it seems to me that the debts included in this sale cannot be held to constitute valid necessity. One of the debts is not even proved. As regards the others, the circumstances show that the promissory note of Rs. 1500 in favour of Kashi Ram was probably fictitious and was merely a device to give this part of the consideration colour of an antecedent debt. The accounts relating to the other two debts were of such a nature that the vendees could not have failed to discover — if they had examined them carefully and if they were acting in good faith — that Mahindar Singh was incurring debts in a recklessly extravagant manner. As held in 65 P R 1900³ even an alienee who is an outsider will not be protected, if he is aware of the true nature of the debts discharged by the alienation and acts in bad faith. In view of all the facts stated above, I hold that the debts discharged by this sale were not 'just' debts and the vendees do not appear to have acted in good faith in discharging them. I would accordingly grant the plaintiffs the decree prayed for in respect of this sale. (His Lordship then considered the third sale and lastly the mortgage and after discussing the various items included therein proceeded further.) As a

result of the above findings, I would accept the appeal in part and grant a declaration to the plaintiffs (i) that the sale dated 29th November 1921 in favour of the firm Ram Narain Jai Gopal (excluding khasra No. 3872) shall not affect their reversionary rights, but that they will not be entitled to obtain possession of the rest of the property included in this sale, without payment of a sum of Rupees 6321-4-6 which has been proved to be for valid necessity, and (ii) that the sale dated 17th May 1923, in favour of Prem Singh and Ganda Singh shall also not affect their reversionary rights. In other respects I would dismiss the appeal. In view of all the circumstances, I would grant the plaintiffs full costs in respect of the sale in favour of Prem Singh and Ganda Singh as against these defendants, and 2/3rd costs against defendants 4-A and 4-B in respect of the first sale dated 29th November 1921. I would further order the plaintiffs to pay costs of defendants Santa Singh, Kesar Singh, Jhanda Singh and Kishan Singh in respect of the sale in their favour, and to defendants 4-A and 4-B in respect of the mortgage dated 29th May 1926.

Beckett J.—I agree.

D.S./R.K. *Appeal accepted in part.*

A. I. R. 1938 Lahore 658

YOUNG C. J. AND TEK CHAND J.

Lala Mulk Raj Bhalla — Appellant.

v.

Official Liquidator of the Peoples Bank of Northern India, Ltd. Lahore — Respondent.

Letters Patent Appeal No. 47 of 1938, Decided on 24th March 1938, against order of Monroe J., in Civil Original Case No. 37 of 1935, Decided on 17th February 1938.

(a) Companies Act (1913), S. 235—Application under S. 235 is in nature of plaint and proceedings under S. 235 are judicial proceedings—Provisions of Civil Procedure Code are however inapplicable to petition under S. 235 (Per Monroe J.)

An application under S. 235, Companies Act is in the nature of a plaint and the proceedings under S. 235 are judicial proceedings; but the provisions of the Code of Civil Procedure are inapplicable to a petition under S. 235, because express provisions for its contents and the formalities connected with it are provided for by the Companies Act and the rules made thereunder: 17 All 238, Dissent; [P 669 O 2] Case law discussed.

(b) Civil P. C. (1908)—Applicability of provisions of Code (Per Monroe J.)

A provision of the Code of Civil Procedure cannot be made applicable to proceedings under an

Act if that provision is inconsistent with the procedure prescribed by the Act. [P 663 C 1]

(c) Companies Act (1913), S. 235—Petition by liquidator under S. 235 to High Court—Petition is not bad because liquidator does not state specific amount claimed—Liquidator must however bring all facts on which claim is based to notice of Court (Per *Monroe J.*).

A liquidator presenting a petition under S. 235 to the High Court is not required by the rules framed under S. 235 to state a specific amount claimed from the person or persons against whom the petition is made and his application cannot be considered bad in law because he omits to do so. The liquidator must bring the facts on which his claim is based to the notice of the Court and the amount of compensation is to be assessed not by the liquidator but by the Court after a consideration of the whole circumstances: *Case law discussed.* [P 664 C 2; P 665 C 1]

(d) Companies Act (1913), S. 235—Petition under S. 235 to High Court—Name of certain persons added subsequently but documents relating to them filed later on—Date of application against these persons is date on which documents are filed (Per *Monroe J.*).

Where in a petition under S. 235 to the High Court, the names of certain persons are added subsequently but documents relating to them which taken together fulfil the requirements of the rule framed under S. 235 are not filed at that time but later, the date of the application against the added defendants is the date on which the documents are filed. [P 665 C 1]

(e) Companies Act (1913), Ss. 202, 235—Petition under S. 235 presented to High Court against certain persons—High Court holding petition maintainable—Order of High Court is appealable under S. 202 (Per *Young C. J.* and *Tek Chand J.*).

Section 202 is very wide in its terms and covers appeals against any order in the matter of the winding up of a company, provided such order finally decides a dispute between the parties or deprives the appellant of a substantial and important right and is not a mere formal and interlocutory order. The last part of S. 202 which lays down that 'appeal will be heard in the same manner' etc., merely regulates the procedure to be followed in the presentation and hearing of such appeals. [P 668 C 1]

Where a petition under S. 235 is presented to the High Court against certain persons and the High Court passes an order holding the application to be maintainable, its order is not of a merely formal or ministerial character but finally decides points between the parties relating to substantial and important rights. Such an order is appealable under S. 202 and a party aggrieved by the order is entitled to appeal to a Division Bench of the High Court under Cl. 10 of the Letters Patent: *A I R 1929 Lah 707, Foll.*; *A I R 1915 Lah 109*; *A I R 1917 Lah 391*; *A I R 1926 Lah 246 and 30 Mad 22, Rel. on*; *A I R 1916 All 341, Disting.* [P 669 C 2]

(f) Companies Act (1913), S. 235—Petition under S. 235 presented to High Court—Particulars on which claim is based or sums sought to be recovered not mentioned—Petition not accompanied by affidavit—Proceedings are not rendered defective by reason of these defects (Per *Young C. J.* and *Tek Chand J.*).

It is not necessary in a petition presented to the High Court under S. 235 to fully and adequately set out the particulars on which the claim is based. Neither S. 235 nor the rules framed thereunder require that the sum claimed by the liquidator from a director or officer of the company should be specifically stated in the petition. So also the rules framed under S. 235 do not require that an affidavit supporting the facts mentioned in the petition should be filed along with the petition or that if it is not filed, it cannot be received at a later stage. Where therefore a petition under S. 235 does not state the sum sought to be recovered from the persons against whom the petition is presented and is not supported by affidavit, the absence of these do not render the proceedings defective. [P 669 C 2; P 670 C 1]

(g) Companies Act (1913), S. 235—Proceedings under S. 235 started in High Court against certain persons—Matters alleged against some of them entirely different from those alleged against others—Claims against all cannot be tried jointly on principles underlying O. 2, R. 6, Civil P. C. (Per *Young C. J.* and *Tek Chand J.*)

Where in the proceedings under S. 235, Companies Act, instituted in the High Court against certain persons, the matters alleged against some of such persons are entirely different from those which are subject matter of the investigation against others, the claims against all cannot be tried jointly on principles underlying O. 2, R. 6, Civil P. C., there being no real common unity between them. [P 671 C 1]

Lala Badri Das and Ratan Lal Chawla —
for Appellant.

Bhagwati Shankar, Official Liquidator,
P. L. Bannerji, Ram Lal Anand II,
Lakhshman Sarup, Bhagwat Dayal,
Data Ram and Bhagirath Lal — for
Respondent.

CIVIL ORIGINAL CASE NO. 37 OF 1935.

MONROE J.—In this application instituted by the Official Liquidator of the Peoples Bank of Northern India, Ltd. (in Liquidation) under S. 235, Companies Act, three preliminary issues have been settled and discussed:

1. Is the petition under S. 235, Companies Act, in the nature of a plaint and must it be in accordance with the provisions of the Code of Civil Procedure?
2. Do the petitions which have been filed, collectively or individually, constitute a valid plaint or statement of claim?
3. Is one joint trial of the claims against all the respondents joined in the petition permissible in law, the allegations against each of them being distinct and based on separate acts of misfeasance?

It is necessary, in the first place, to examine the documents which have been filed. On 1st July 1935, a document entitled "application under S. 235, Companies Act," was presented to the Court, and leave to file this application was given. This is the application now before the Court. It is

the basis of the whole proceedings. In this application, the Official Liquidator is named as applicant and thirty-five persons are named as defendants. Of these defendants, thirty-one had been Directors of the Peoples Bank of Northern India, Limited, (which I shall hereafter call the Bank), one had been Manager of the Bank, one Investment Officer and two were firms of auditors, who had been auditors of the Bank. At a later stage I shall discuss this document in greater detail: it is sufficient now to state that it alleges against certain of the directors fraud and negligence in their duty to the Bank, against the remaining directors negligence in their duty to the Bank, against the officers breach of trust and collusion with the directors and against the auditors negligence in the performance of their duties and collusion with the directors. There is annexed to the application a schedule (Sch. B) showing the amount of the indebtedness of the directors and of the firms and companies in which they were interested after 31st December 1934. Appended to the application is a note signed by the Official Liquidator in which it is stated that he has been unable to make a full investigation by reason of want of time; he was appointed on 22nd May 1935, and he seeks leave to furnish further better particulars after further investigation; he further stated that his application was made without a complete investigation in order to avoid a plea of limitation. I may here say that, in my opinion, this note can have no effect on the legal aspects of the case: the Official Liquidator is entitled to expedite the initiation of proceedings for the purpose of avoiding a plea of limitation. If he fails to do so, owing to circumstances over which he has no control, it is his misfortune, but he can only prevent time from running against him by instituting proper proceedings before the expiry of the period of limitation.

On 9th October 1935, a document was presented to the Court by the Official Liquidator which was entitled "Application under O. 6, R. 17 and S. 151, Civil P. C." praying that certain amendments be allowed to be made in Sch. B. The object was to supply the omissions and to make the figures correct to 1st July 1935. On 9th October also the application was allowed to stand until particulars had been prepared. On 16th July 1936, a document entitled "Application on behalf of the Official

Liquidator under O. 1, R. 10, Civil P. C." was presented to the Court, praying that the names of the defendants who had died should be struck out, that the names of certain additional persons should be added as defendants and for authority to present further and better particulars during the vacation. On 3rd September a further document was presented: it set out a series of particulars being filed in pursuance of the order of 16th July 1936 and prayed that notices under S. 235, Companies Act might issue for 2nd October 1936: this application was adjourned from time to time and a further document was presented on 22nd April 1937 asking for amendments in the particulars, for the striking out of the names of certain defendants and for the issue of notice of the petition as amended on the thirty-nine persons named, who are now the respondents before the Court. Notice was issued accordingly and copies of the application of 1st July 1935 with the amended particulars were served on the respondents. I do not think that it is necessary to examine the various sets of particulars in detail; they have not been discussed in detail in the arguments, but there are one or two points which I must mention. So far as the respondents' names in the application of 1st July are concerned, they contain further particulars of the statements in the application: it may be that they also contain in certain cases new charges, as for example, in the case of Sir Abdul Hamid in relation to advances made to contractors of Kapurthala State on State guarantee. It was argued that this charge was not covered by the statements in the original application. It is not necessary now to examine this question; it is sufficient to distinguish charges made by the original application and charges not included in it but contained only in the particulars. I may note that the original application, except in the striking out or the adding of names of respondents has not been formally amended.

Issue 1—Section 235 (1), Companies Act requires as a condition for its operation that it should appear that the respondent, being a past or present director or officer of the company, has misapplied or retained or become liable or accountable for any money of the company or been guilty of any misfeasance or breach of trust in relation to the company. The condition being fulfilled, there must be an application by the liquidator or any creditor or contribu-

tory; the Court may then examine into the conduct of the respondent. Relief is by an order to restore or repay the money or property, or to contribute such sum to the assets of the company by way of compensation in respect of the misfeasance or breach of trust as the Court thinks fit. Some light is thrown on the nature of the application to be made by the liquidator by sub-s. (3), "The Indian Limitation Act, 1908, shall apply to an application under this Section as if such application was a suit." The Section relates to procedure only: it provides an alternative method for enforcing the liabilities which might have been enforced by a suit. The method of procedure has been described as summary, but an examination of some of the cases which have been tried under the corresponding Section of the various English Acts shows that frequently misfeasance proceedings follow the normal course of an action for fraud or breach of trust and the application of the word "summary" indicates little but that the proceedings in England are instituted by summons and not by suit or petition—a detail of practice. The essential distinction is that the Court has a discretion in assessing the amount of the compensation and is not in every case, as a Court hearing a suit would be, to give a decree for the whole loss suffered. The Section provides a convenient method by which in the course of winding up a company the same Court deals with all the internal affairs of the Company.

Though a procedure Section, the Section does not go into details of procedure, which must be sought for elsewhere. The contention for the respondents is that the Civil Procedure Code applies by virtue of the provisions of S. 141. The opposing contention is that S. 141 does not apply the provisions of the Code to an application such as this and that the application is not a plaint and is not required to be in any particular form. S. 141 is as follows:

The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.

A proceeding in a misfeasance application is a proceeding in a Court of civil jurisdiction and the provisions of the Code have been applied to proceedings under the Companies Acts. In 27 Bom 415¹ it was held that a petition under the Companies

Memorandum of Association Act, 1895, is a proceeding within the Section, and in 1 Lah 187² to an application to set aside an ex parte payment order made under the Companies Act of 1886, the provisions of O. 9, R. 13 were applied by virtue of this Section. That the Section applies to proceedings under the Companies Act never appears to have been doubted. Only one case involving the construction of the Section has gone as far as the Privy Council. In 22 I A 44³ the question at issue was, whether S. 647 of the old Code (equivalent to S. 141) made applicable to execution proceedings the procedure laid down in regard to suits: the only passage in the judgment of their Lordships which throws any light on the question now raised is as follows:

Their Lordships think that the proceedings spoken of in S. 647 include original matters in the nature of suits such as proceedings in probate, guardianship and so forth and do not include execution.

Their Lordships' view disposes, I think, of one of Mr. Bannerji's arguments: that the application under S. 235 is not a suit and therefore no plaint is required. The question is not whether the proceeding is a suit but whether it is an original matter in the nature of a suit. The only difficulty which presents itself in applying their Lordships' dictum is in the use of the word 'original'. An application under Sec. 235 is not in one sense an original matter: it is a matter arising in the course of the winding up and the document which originates the winding up proceedings is the petition. This aspect of the question was not before their Lordships. I do not think that it can be inferred from the use of the word 'original' that, for example, matters in the nature of a suit arising in winding up proceedings are to be excluded from the scope of S. 141. The phrase 'original matters' is used as opposed to 'execution proceedings': the distinction was a necessary one for the purpose of deciding the controversy in the case before their Lordships. Even though the application under S. 235 arises in the course of winding up proceedings, the application originates the claim for misfeasance, a matter in the nature of a suit; it is by virtue of the application that the respondents are in a proper case to be made answerable; as

2. Hindustan Bank Ltd. v. Mehraj Din, (1920) 7 A I R Lah 51=55 I O 820=1 Lah 187 = 169 P L R 1920.

3. Thakur Prasad v. Fakirullah, (1895) 17 A I 106=22 I A 44=6 Sar 526 (P O).

1. Bombay Burma Trading Co. v. Dorabji, (1903) 27 Bom 415=5 Bom L R 848.

I have already pointed out the proceedings by application in the winding up are an alternative to proceedings by a regular suit. Mr. Bannerji relied on two cases which are not in conflict with this view, 54 All 1067⁴ and 55 All 912⁵ at p. 927; these cases make it clear that an application by a liquidator under S. 235 or S. 186 is not a suit: that does not imply that they are not matters in the nature of a suit. To support the general proposition that the Code of Civil Procedure is not applicable to misfeasance proceedings, Mr. Bannerji cited 17 All 238⁶ in which it was held that an order under S. 214, Companies Act 1882, (equivalent of S. 235) was not a decree or order having the force of a decree. In the course of his judgment Burkit J. said:—

It is at least doubtful whether the result of proceedings can be considered to be an order, i. e. as defined by the Code of Civil Procedure. The proceedings leading up to such an order, if it be an order, are not in the strict and technical sense judicial proceedings at all. No procedure is imposed at any stage, no person would be formally cited, no plaint need be filed; no party has a right to prove his case in such a way as he chooses. The whole power is in the Court, which may examine into the conduct of the person complained of, and after such examination may compel repayment or contribution by way of compensation. The word 'compel' seems to contemplate an order entirely distinct from an order adjudicating on the rights of the parties. It presupposes, not a formal adjudication but simply a conviction in the mind of the Court that such order as it is going to make is just. The Act contemplates no order by way of formal adjudication upon the matter of right. That which it authorizes is a compulsory, that is to say an execution, order.

With great respect, I dissent from almost every proposition contained in this passage. I venture to assert that since this Section was passed in 1862 as S. 165, Companies Act, 1862, proceedings taken under it have been judicial proceedings — and the authority for this assertion is to be found in almost every reported case. Proceedings under the Section have in England been governed by rules, made under the authority of various Acts in force from time to time. The rule in force at the date of the judgment cited was R. 78 in the Rules of 1890; in the Rules of 1909 the Rule was No. 68; and in the present Code of 1929 the Rule is No. 66. The rules now in force are

the most easily available and I draw attention to the following requirements made by them:

The application shall be made by summons. The summons shall state that the nature of the declaration or order for which application is made and the ground of the application, and unless otherwise ordered, shall be served in the manner in which an Originating Summons is required by the rules of the Supreme Court to be served.

On the return of the summons, the Court may give such directions, as it shall think fit, as to whether points of claim and defence are to be delivered, as to the taking of evidence wholly or in part by affidavit or orally, and the cross-examination either before the Judge on the hearing in Court or in Chambers of any deponents to affidavits in support of or in opposition to the application.

In addition to the special rules to which I have referred, there is a general rule (No. 224) which directs that where no other provision is made by the Act or rules, the practice, procedure and regulations shall be in accordance with the rules of the Supreme Court. Such rules as these, are wholly inapplicable to any but judicial proceedings, and it may be stated that not only are the proceedings under a misfeasance summons judicial but are conducted in a manner almost identical with the ordinary judicial proceedings of the Chancery Division. The rules made by this Court under the powers conferred by Sec. 246, Companies Act, 1913 concerning the mode of proceedings to be had for winding up a company contain like provisions. I refer to this rule here in support of my view that the proceedings under S. 235 were considered to be judicial proceedings by the framers of the rule, the Judges of the Court, some of whom were engaged in administering the Companies Acts. It is unnecessary to pursue this question further. There can be no doubt that the proceedings under S. 235 are judicial. It is agreed by counsel for both the Official Liquidator and for the respondents that the winding up rules of this Court apply to the application which is now before me. I have already referred to R. 77, which requires that the application should contain the particulars on which the claim is based and that a copy of the application with the grounds thereof should be served on every person against whom an order is sought, and further that when the application is made by the Official Liquidator, he may make a report to the Court stating any facts and information on which he proceeds, which are verified by affidavit or derived from sworn evidence in the proceedings.

4. Hans Raj v. Dehra Dun Mussoorie Electric Tramway Co. Ltd., (1933) 20 A I R P C 63 = 142 I O 7 = 60 I A 13 = 54 All 1067 (P C).

5. Shiam Lal v. U. P. Oil Mills Co. Ltd., (1933) 20 A I R All 789 = 145 I O 893 = 55 All 912 = 1933 A L J 1203 (F B).

6. Reference under S. 28 of Act 7 of 1870, (1895) 17 All 238 = 1895 A W N 56.

The requirement of the rule in respect of a supporting affidavit differs where the application is made by any other person than the Official Liquidator; in such a case the application shall be supported by affidavit to be filed by him. R. 95 provides that the general practice of the Court shall in cases not provided for by the Companies Act or these rules, and so far as the same is not inconsistent with the said Act or these rules, apply to all proceedings for winding up of a company in any Court. The rules being made under the authority of the Act have the force of law. The position then is that by virtue of S. 141, Civil P. C., the procedure provided in the Code must be followed in the present proceedings as far as it can be made applicable. This would be so even in the absence of R. 95 or a similar rule. R. 95 makes it clear that the general practice of the Court, which is determined by the Civil Procedure Code, is to apply in cases not provided for by the rules: and that the rules are not intended to override the provisions of S. 141. In each case i. e. in S. 141 and in the rules, there is a restriction on the application of the procedure provided for in the Code: in S. 141 the restrictive words are "so far as it can be made applicable"; in R. 95 the words are "so far as the same is not inconsistent with the said Act or these rules". In each case the effect of the restrictive words is the same: a provision of the Civil Procedure Code cannot be made applicable to proceedings under an Act, if that provision is inconsistent with the procedure prescribed by the Act.

It was contended for the respondents that the rules applicable to a plaint in a regular suit must be applied to the Official Liquidator's application. This contention ignores the restriction. When the Companies Act and the rules made under it prescribe what an application is to contain, and the formalities to be observed in making an application, the rules which prescribe the corresponding requisites for a plaint in a regular suit cannot be applied; but inasmuch as an application under S. 235 preferred in accordance with the rules and a plaint both initiate proceedings of a similar kind, it is clear that there is ample scope for the operation of S. 141 to these proceedings. This is well illustrated by the Official Liquidator's application to amend his original application by adding additional parties, which was purported to be made

under the provisions of O. 1, R. 10, Civil P. C. On Issue 1 therefore I find that an application under S. 235, Companies Act is in the nature of a plaint but that the provisions of the Civil Procedure Code are inapplicable to it, because express provision for its contents and the formalities connected with it are provided for by the Companies Act and the rules made thereunder.

Issue 2.—Do the petitions which have been filed collectively or individually constitute a valid plaint or statement of claim? This issue with Issues 1 and 3 was framed at the instance of the respondents. The wording of this issue anticipated a complete affirmative to Issue 1. But an additional contention for the respondents was that even if the provisions of the Civil Procedure Code relating to plaints did not apply, there was, nevertheless, no valid application under S. 235 before the Court. The validity of the application will have to be considered separately in the case of the respondents who were named in the application and in the case of the respondents named in the application of 16th July 1936, whose names were added to the list of respondents by an order of the same day. So far as the first class of respondents is concerned, the question is whether the allegations in the application against them are sufficient. I have not to consider the case against the auditors. Since the hearing began, a compromise has been effected between the Official Liquidator and the auditors. The Official Liquidator has withdrawn all charges of fraud against them. It appears from the record that the allegations of the Official Liquidator relate to the acts, not of any member of the firm of Messrs. Billimoria and Company but of one of their employees who was in charge of a branch of their business in Lahore and who was engaged in the audit of the Bank's accounts. Messrs. Billimoria and Company have recognized their responsibility for the negligence of their employee and having made a settlement, have disappeared from the case. The cases against the Patiala State Bank and S. Salig Ram Hoon, the Managing Director of that Bank, have also been settled.

In spite of exhaustive research, few cases have been found in which the necessary contents of an application under S. 235 have been discussed. Both Indian and English cases which deal with the averments necessary where fraud is alleged have been

cited, and also one English case, (1892) 3 Ch 577⁷ and one Indian case, 19 Bom 88,⁸ in which the contents of a misfeasance summons were discussed. In (1880) 5 A C 685⁹ Lord Selbourne said :

With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations however strong may be the words in which they are stated are insufficient even to amount to an averment of fraud of which any Court ought to take notice. And here I find nothing but perfectly general and vague allegations of fraud. No single material fact is condescended upon, in a manner which would enable any Court to understand what it was that was alleged to be fraudulent.

In that case there was only a general statement that the appellant had by fraud and misrepresentation been induced to enter the society. In 15 I A 119¹⁰ the passage set out above was quoted and Lord Watson continued:

In the present case it is unnecessary to criticize the plaint minutely. Strike out the words 'fraud,' 'deceit,' 'illegal' and 'fraudulent acts,' 'machinations' and so forth of which there is great superfluity and what remains? Nothing, except an allegation of certain facts which might be unattended with any fraudulent or illegal purpose or character.

In 64 I A 143¹¹ an objection was taken before the Judicial Committee that fraud had not been alleged in a petition for winding up but only in an affidavit in support of the petition. Their Lordships refused at that stage to consider the objection, but said:

The allegations were made in the affidavit evidence and the whole matter was clearly fought in the High Court on those lines and apparently without any objection being taken, which, had it been taken, would no doubt have led to the necessary amendments being made in the petition.

From this last case no help is to be gained on the question of how much must be averred. In (1892) 3 Ch 577⁷ the liquidator took out a misfeasance summons against certain directors of the company applying for a declaration that the directors were liable to repay two sums of the company's money which had been paid by them to a third party. The summons stated

no ground of liability nor any reason why the payments made were to be considered improper. It was stated in argument by counsel that the directors had been guilty of "a breach of trust in relation to the company." In his judgment, Vaughan Williams J., after referring to Palmer's Company Precedents and Emden's Winding up Practice, said:

It does not seem to me that the summons in the case before me sufficiently defines the grounds upon which the liquidator says the directors ought to be ordered to pay the money claimed. It does not go on to say on what grounds it is suggested that the payments made by the directors were wrongful or acts of misfeasance for which the directors are responsible.

He concluded his discussion of the point by saying:

For the sake of future practice, I point out that the summons even with the affidavit leaves one too much in the dark as to what is charged against the directors.

In 19 Bom 88⁸ at p. 95 though the form of the petition was not directly in issue, the learned Judge expressed the opinion that where it is sought to make an officer of a company liable for the misapplication of the funds of the company or for misfeasance or breach of trust in relation to its affairs, the sum sought to be recovered should be definitely stated in the summons, and the grounds upon which the application is based should be fully and adequately set out in an affidavit or affidavits. (I may note that there is a difference in the procedure of the High Court at Bombay and this Court but it does not affect the principle). This opinion was expressed in view of the assertion "if all the matters are allowed to be disclosed on affidavits, the principal object of the enquiry would be frustrated." It must be noted that, notwithstanding the opinion so expressed, the learned Judge accepted the petition and referred it to Chambers. The rule does not require that a specific sum should be claimed by the Official Liquidator, and the terms of S. 235 in reference to misfeasance or breach of trust authorize the Court to compel the respondent to contribute such sum as the Court thinks just. This is the relief sought in the present case; the Liquidator must bring the facts on which his claim is based to the notice of the Court; the amount of the compensation is to be assessed, not by the Liquidator but by the Court, after a consideration of the whole circumstances. If the Liquidator is not required to state a specific amount, his

7. In re New Mashonaland Exploration Co. (1892) 3 Ch 577=61 L J Ch 617=67 L T 90=41 W R 75.

8. Jehangir v. Karani & Co., (1895) 19 Bom 88.

9. Wallingford v. Mutual Society, (1880) 5 A C 685=50 L J Q B 49=43 L T 259=29 W R 81.

10. Gunga Narain Gupta v. Tiluckram Chowdhury, (1888) 15 Cal 538=15 I A 119=5 Sar 168 (P C).

11. Bharat Dharma Syndicate Ltd. v. Harish Ohandra, (1937) 24 A I R P C 146=168 I C 620=64 I A 143=I L R (1937) All 566=31 S L R 806 (P C).

application cannot be considered bad in law because he omits to do so.

Ignoring vituperative epithets, I think that definite charges are made against the defendants named in the application — charges of a very grave character. It is asserted that almost the major portion of the assets of the Bank amounting to two crores of rupees had, in the course of six years, been transferred by the directors, defendants 1 to 17, to their own pockets: the assets were then almost entirely represented by loans due by the directors or their businesses and were incapable of being realized even to such an extent as to avoid default by the Bank; these loans were made without authority, were ultra vires and either unsecured or inadequately secured and the directors connived at the making of the advances in this way. The remaining defendant-directors are charged with neglect of duty in that, having taken on themselves to resuscitate the Bank, they failed to make any effort to recover the assets. The two officers of the Bank, defendants, are charged with having aided and abetted the directors in taking unauthorized loans. The allegations seem to me to be ample to justify an examination into the conduct of these directors and officers. I hold that the application of 1st July 1935 complied with the rules and is a good application as against the persons named as defendants. On 16th July 1936 the names of further defendants were added, but no charges were made against them; the application at that date as against them was defective; in the documents filed on 22nd April 1937 charges were made against them and all the documents were served on them. The contention of counsel for the Official Liquidator was that the application even in the case of these added defendants was the document of 1st July 1935. But they were not parties to the proceedings at that date; they became parties on 16th July 1936; even then, so far as they were concerned, there was, in my opinion, no such application as contemplated by S. 235, especially in view of sub-s. (3), to say nothing of the rules. It was not till 22nd April 1937 that documents, which taken together fulfilled the requirements of the rules, were filed. I hold that the date of the application against these added defendants was 22nd April 1937.

Issue 3. — The contention by counsel for the auditors on this issue was that the

cases against some of the other defendants arise out of the activities of branches of the Bank, with which the auditors were not concerned and that the case of the auditors should not be mixed up with entirely different matters. Counsel for Mr. Hoon and the Patiala State Bank said that the evidence and case against one director is not that against another. No other counsel addressed arguments to me on this point, but I assume that all the counsel adopted the arguments of Mr. Coltman and Sir Tej Bahadur Sapru. To these contentions, Mr. Banerjee's reply was that there is a common unity in the connexion with the company—the application is restricted to the affairs of the company—the whole enquiry relates to the affairs of Harkishen Lal—the evidence is one connected whole—under the wording of S. 235, a joinder of parties without any restriction is permissible; the arguments on this point, except that for the auditors, have not given me much assistance; and as the auditors are no longer parties, I have not to consider their case.

Mr. Bannerjee cited in support of his argument two English cases, (1883) 22 Ch D 714¹² and (1897) 1 Ch 796.¹³ But though in both these cases the objections were overruled, the discussions indicate that an objection on the ground of multifariousness is, if established, a good objection. The contention that restriction to the affairs of the company is sufficient to avoid a charge of multifariousness is too wide. There might in some cases be separate and distinct charges against individual directors or groups of directors and it might be oppressive that in one trial such separate charges should be examined. The practice of this Court is to be found in the Civil Procedure Code from which, I think, it appears that there should not be a trial against several defendants unless relief is claimed in respect of or arising out of the same transaction or series of transactions and the right to it is alleged to exist against the defendants whether jointly, severally or in the alternative. It was conceded by Mr. Bannerjee in argument that though no provision of the Civil Procedure Code applied, it was a permissible argument that the rules contained in the Code to avoid embarrassment in this respect may be taken as rules of

12. In re Mutual Society, (1883) 22 Ch D 714 = 52 L J Ch 621 = 48 L T 651 = 31 W R 872.

13. In re Wragg Ltd., (1897) 1 Ch 796 = 66 L J Ch 419 = 76 L T 397 = 45 W R 557.

natural justice. As the nature of the claim against the various defendants has not been discussed further than I have indicated, I find it difficult to arrive at a conclusion on this question. As the case now stands, no good ground of objection has been shown against the joinder of the defendants who are named as parties in the application of 1st July 1935. Other defendants who participated in the acts alleged in that application are in the same position.

But in the cases of Sham Mohan Seth, branch manager at Lakhimpur Kheri, B. L. Mehra, branch manager at Lucknow, the group, Bankey Behari Lal, Rup Chand, Haji Mohammad Halim, Amolak Ram Hoon and Mahadev Parshad Tandan, Chairman, Directors and Manager of the branch at Cawnpore, there is no common connexion between them or connexion with the acts of the directors, except that the acts of misfeasance alleged against them were committed in the interests of Harkishen Lal ; the directors of the Bank, so far as I can ascertain, were not parties to these acts of misfeasance, which are unconnected with the series of transactions mentioned in the application. Whether I am right in applying the rule taken from the Code or not, I have no doubt that it would be oppressive to deal with these several heads of claim in one trial. I have now to consider the consequences of this multifariousness. If this was a regular suit and all these claims had been joined, O. 2, R. 8 would apply, and the petitioner would be required to elect between the several claims ; there would be no difficulty in applying this rule to an application under S. 235, no inconsistency or conflict in doing so with the rules under the Companies Act. In the present case there are two documents entitled "application under S. 235," the first dated 1st July 1935, the second dated 22nd April 1937. The additional defendants include both persons who are defendants in respect of the charges contained in 1st July 1935 and also the three sets of defendants to whom I have referred and who are unconcerned with the charges in that application. I see no reason for not applying O. 2, R. 8 to the second application. The petitioner must elect with which of the four separate cases he will proceed, i. e. whether he will proceed with the claim set out in the first application or the claim against Sham Mohan Seth, or the claim against B. L. Mehra, or the claim against

the Chairman, Directors and Manager of the branch at Cawnpore.

LETTERS PATENT APPEAL No. 47 OF 1938

Tek Chand J. — This judgment will dispose of three appeals, which have been preferred separately by (1) Lala Mulk Raj Bhalla, (2) Pt. Shiv Kishen Kaul and (3) Lala Raghu Nath Sahai against the order of Monroe J., dated 17th February 1938, deciding certain preliminary issues in proceedings under S. 235, Companies Act, pending against the three appellants and a number of other directors and officers of the Peoples Bank of Northern India, Limited (in liquidation). The Peoples Bank of Northern India was incorporated as a joint stock company under the Indian Companies Act in January 1925 and commenced business in April 1925. It suspended payment on 29th September 1931, and on 22nd December 1931 a scheme for its "resuscitation" was sanctioned under S. 153 of the Act. Subsequently, the company was ordered to be compulsorily wound up on 25th May 1935, and an Official Liquidator appointed. On 1st July 1935, the Official Liquidator presented a petition under S. 235, Companies Act against 35 persons praying that the Court may examine into their conduct and compel them, or such of them as may be liable, to repay or restore moneys or properties lost to the company, or to contribute such sum or sums to its assets by way of compensation as may be just. Two of the present appellants, Lala Mulk Raj Bhalla and Pt. Shiv Kishen Kaul, were among the defendants named in this petition ; appellant 3 Lala Raghu Nath Sahai was not mentioned in it. On 16th July 1936, the Official Liquidator filed an application under O. 1, R. 10, Civil P. C., stating (inter alia) that further investigation into the affairs of the Bank had disclosed the liability of certain other directors and officers of the Bank, and praying that their names "be added" as defendants in the misfeasance proceedings. One of these persons was Lala Raghu Nath Sahai, who was for some time manager of the branch of the Bank at Ferozepore and had subsequently worked in the head office at Lahore. This application did not mention any charges against him, nor did it specify the grounds on which it was sought to make him liable. On 3rd September 1936, the liquidator filed another document containing "better particulars of misfeasance" against the various directors

and officers of the company mentioned in the original petition of 1st July 1935 and the application of 16th July 1936. This document was accompanied by several schedules containing details of the "acts of misfeasance" alleged to have been committed by each defendant, and the sums for which it was sought to make him liable. On 22nd April 1937, the liquidator filed another application, withdrawing the case against 17 of the persons named in the previous applications, and "amending and amplifying the particulars" against the remaining 39 defendants. Copies of the original petition and the subsequent applications and schedules aforesaid were accordingly served on these defendants, including the three appellants. In answer to this claim, the defendants filed the lengthy written statements denying their liability and raising numerous pleas of fact and law. On these pleadings, the learned Judge framed 52 issues. At the commencement of the trial, arguments were heard on the following three preliminary issues :

(1) Is the petition under S. 235, Companies Act in the nature of a plaint and must it be in accordance with the provisions of the Civil Procedure Code ?

(2) Do the petitions which have been filed, collectively or individually, constitute a valid plaint or statement of claim ?

(3) Is one joint trial of the claims against all the respondents joined in the petition permissible in law, the allegations against each of them being distinct and based on separate acts of misfeasance?

The learned Judge passed a detailed order on 17th February 1938 deciding these issues. On Issue 1 he held that the petition under S. 235, Companies Act is "in the nature of a plaint," but that the provisions of the Civil Procedure Code are inapplicable to it, because express provisions for its contents and the formalities connected with it are provided for by the Companies Act and the rules made thereunder. On Issue 2 the finding was that the petition of 1st July 1935 complied with the rules framed for the presentation of such application under the Companies Act and is a good petition as against the persons named therein as defendants. As regards the defendants, whose names were added on the liquidator's application of 16th July 1937, the learned Judge held that the application was defective as it did not make any charges against them ; and as the charges against them were mentioned for the first time in the documents filed on 22nd April 1937, the date of the

application against these added defendants must be taken to be 22nd April 1937. As regards the plea of multifariousness to which Issue 3 related, it was held that no good ground of objection has been shown against the joinder of the defendants who were named as parties in the application of 1st July 1935 and all other defendants who had participated in the acts alleged in that application. This plea was however upheld so far as the cases of the seven other defendants are concerned, and the liquidator was directed to make his election under O. 2, R. 8, Civil P. C. From this order the present appeals have been lodged by the three appellants under S. 202, Companies Act and Cl. 10, Letters Patent.

At the commencement of the hearing before us, a preliminary objection was raised by the counsel for the Official Liquidator that the order of the learned Judge deciding the aforesaid issues was not a "judgment" within the meaning of Cl. 10, Letters Patent and was therefore not open to appeal. It was contended that S. 202, Companies Act did not confer a substantive right of appeal against orders passed in the matter of winding up of a company; it merely stated that the law as regards appeals from orders passed in the matter of the winding up of a company was co-extensive with that relating to appeals from orders passed by the Court in the exercise of its ordinary jurisdiction. The contention, in other words, was that, if a company is being wound up by the District Court, only such orders passed by it in the course of the winding up were appealable, as are covered by S. 104 or O. 43, R. 1, Civil P. C.; and, if the company is being wound up by a Judge of this Court, an appeal would lie to a Division Bench if the order passed by him amounted to a "judgment" within the meaning of Cl. 10 of Letters Patent; but if a particular order is not covered by these provisions of the Civil Procedure Code or the Letters Patent, it is not appealable. This objection is completely disposed of by the decision of a Full Bench of three Judges of this Court in 10 Lah 806.¹⁴ In that case, in the course of proceedings for the winding up of a company before the District Judge, Lahore, an order had been passed by him permitting amendment of the petition under S. 235, Companies Act, against certain directors by adding a new

14. *Sansar Chand v. Punjab Industrial Bank Ltd*^{*} Lahore, (1929) 16 A I R Lah 707=117 I C 895=10 Lah 806=30 P L R 525 (F B).

ground of liability after the expiry of the period of limitation, and from that order the directors had appealed to the High Court under S. 202, Companies Act. On an objection raised by the liquidator that the order was not appealable as it did not fall within S. 104, Civil P. C., it was held by the Full Bench that a party aggrieved from an order passed in the course of liquidation proceedings by the District Judge, in exercise of his jurisdiction under the Companies Act, is entitled under S. 202 to appeal to the High Court, irrespective of the provisions of the Civil Procedure Code which restrict the right of appeal to specified orders, S. 202 being wide enough to cover appeals against any order made in the matter of the winding up of a company, provided such an order finally decides the dispute between the parties or deprives the appellant of a substantial and important right, and is not a mere formal or interlocutory order.

This decision completely meets the objection raised in this case before us. It was however contended that the law had not been correctly laid down by the Full Bench, and we were asked to have the matter reconsidered by a larger Bench. We have listened to interesting and able arguments by counsel for both sides; but after giving the matter careful consideration, we find ourselves in respectful agreement with the conclusion reached in the case cited. Sec. 202, Companies Act, reads as follows:

Re-hearings of, and appeals from, any order or decision made, or given, in the matter of the winding up of a company by the Court may be had in the same manner, and subject to the same conditions in, and subject to which, appeals may be had from any order or decision of the same Court in cases within its ordinary jurisdiction.

It will be observed that the Section is very wide in its terms and permits appeals "from any order or decision made, or given, in the matter of the winding up," and we see no reason to limit its operation in the manner suggested by the respondent's learned counsel. We have no doubt that the last part of the Section, which lays down that

appeals will be had in the same manner and subject to the same conditions in, and subject to which, appeals may be had from any order or decision of the same Court in cases within its ordinary jurisdiction,

merely regulates the procedure to be followed in the presentation and hearing of such appeals, that is to say, the necessary copies to be filed, the period of limitation within which the appeal is to be presented,

the manner in which service is to be effected, the order in which parties are to be heard and so forth. Any other interpretation is not warranted by the plain wording of the Section, and, if accepted, will lead to startling results. It will have the effect of practically shutting out appeals from all orders passed by a District Court, in cases in which the winding up proceedings are going on before it, for very few of such orders would fall within S. 104 or O. 43 of the Code, which alone permit appeals against orders passed by a Subordinate Court in the exercise of its original jurisdiction. This obviously could not have been the intention of the Legislature, especially when we bear in mind that S. 169 of the Act of 1882 (which was replaced by S. 202 in the Act of 1913) was enacted at a time when the Court of the District Judge was the only Court under the Companies Act, outside the Presidency towns.

So far as the Punjab Courts are concerned, the view ultimately adopted by the Full Bench in 10 Lah 806¹⁴ had been followed in a long course of decisions. In 40 P R 1915,¹⁵ an order by a District Judge directing the public examination of certain directors of the company was held to be appealable under S. 169, Companies Act of 1882, though the order was not appealable under the Civil Procedure Code. Similarly, in 13 P R 1917¹⁶ it was held that an appeal lay from an order passed by the District Judge under S. 171, Companies Act, granting leave to a share-holder to proceed with his suit for declaration that he was not a share-holder of a company. It is admitted that such an order, being purely interlocutory and not covered by S. 104 or O. 43, Civil P. C., was not appealable under any provision of the law, except under S. 169, Companies Act of 1882. Again, in 96 I C 755¹⁷ an order of a District Judge refusing to allow inspection of notes of examination under S. 196, Companies Act of 1913 was held appealable under S. 202 of the Act. The same view appears to have been taken in most of the other Courts. In 30 Mad 22¹⁸ it was held that the right of appeal

15. *Harkishen Lal v. Saraswati Ram*, (1915) 2 A I R Lah 109=28 I C 286=40 P R 1915=77 P L R 1915.

16. *Amritsar National Banking Co. Ltd. v. Mohan Lal*, (1917) 4 A I R Lah 391=37 I C 791=13 P R 1917=29 P L R 1917.

17. *De Souza v. S. B. Billimoria*, (1926) 13 A I R Lah 246=96 I C 755=26 P L R 432.

18. *Kesavaloo Naidu v. Murugappa Mudali*, (1907) 30 Mad 22=16 M L J 537.

conferred by S. 169, Companies Act of 1882

extends to all orders or decisions made or given in the matter of the winding up of a company, whether the winding up is compulsory, voluntary or under supervision.

The only decision, which Mr. Peary Lal Bannerji for the respondent cited in support of his contention is 38 All 537.¹⁹ The facts of that case however were entirely different. There, the Additional District Judge of Lahore, in whose Court a company was being wound up, had passed a payment order against a contributory, which was enforceable in the same manner as a decree. The Liquidator had taken out execution of the order and had it transferred to the Court of the District Judge, Agra, where certain immovable property alleged to belong to the contributory, was attached. A third person objected to the attachment under O. 21, R. 58, Civil P. C., on the ground that the attached property belonged to him. This objection was dismissed by the District Judge, Agra, under O. 21, R. 63. An appeal against this order was preferred by the judgment-debtor in the High Court, Allahabad, purporting to be under S. 169, Companies Act of 1882. At the hearing of the appeal an objection was raised that the appeal was incompetent. In upholding the objection, the learned Judges observed that S. 169, Companies Act, merely provides for a right of appeal in the case of orders which would have been appealable had they been passed by the Court in the exercise of its ordinary jurisdiction. This brings us back again to the provisions of the Code of Civil Procedure which regulates cases in which appeals from orders in Civil Courts lie. It appears to us quite clear therefore that the right of appeal under the provisions of S. 169 of the old Companies Act is co-extensive with the right of appeal conferred by the Court and, as we have already mentioned, an appeal in a case of this sort would not lie under the Code.

It is on this observation that the learned counsel for the respondent relies in support of his interpretation of S. 202. With great respect, we may say that, while there is no doubt as to the correctness of the decision in that case, that no appeal lay from the order of the District Judge to the High Court, it is difficult to see how S. 169, Companies Act of 1882 could possibly have applied. The order in question had not been passed by the District Judge, Agra, in the matter of the winding up of a company. Indeed, it was not an order under the Com-

panies Act at all. The execution of the payment order, as a decree, had been transferred to the District Judge Agra, under S. 39 and S. 40, Civil P. C.; and under S. 42 all orders passed by that Court were "subject to same rules in respect of appeal as if the decree had been passed by itself." The course of appeal from the order of the Agra Court was therefore to be determined by the Civil Procedure Code and not the Companies Act, and there is no question that under the Code no appeal lay from the order rejecting the objection under O. 21, R. 63.

After giving the matter careful consideration, we hold that the order under appeal in this case is not of a merely formal or ministerial character but finally decides points between the parties relating to substantial and important rights and is therefore appealable under S. 202, Companies Act. In this view of the case, it is not necessary to go into the further point argued before us by Mr. Badri Das that the order in question was also a "judgment" within Cl. 10, Letters Patent. We accordingly overrule the preliminary objection. On the merits, it will be convenient to take up first the appeals of Lala Mulk Raj Bhalla and Pandit Shiv Kishan Kaul, which raise common grounds. Counsel for both these appellants have accepted the decision of the learned Judge on Issue 1, that a petition under S. 235, Companies Act is in "the nature of a plaint" but that the provisions in the Civil Procedure Code are inapplicable to it so far as its contents and the formalities connected with it are concerned, as provision for these matters is made by the Companies Act and the Rules made thereunder. They contend however that the petition of 1st July 1935 did not constitute a valid and sufficient "statement of the claim" under S. 235 of the Act against either of them, as required by R. 77 of the Rules framed under the Act, inasmuch as (a) the petition did not fully and adequately set out the particulars on which the claim was based; (b) it did not state the sum sought to be recovered, and (c) it was not supported by a properly verified affidavit. Of these objections (b) and (c) are, in our opinion, without any substance and do not require detailed discussion. Neither S. 235, Companies Act nor the Rules framed thereunder require that the sum claimed by the liquidator from a director or officer of the company should be specifically stated in the petition. All that the Section says is

19. *Santi Lal v. Indian Exchange Bank*, Lahore, (1916) 8 A I R All 341=85 I O 6=38 All 537=14 A L J 722.

that the Court be asked "to examine into the conduct of the director or officer named in the petition," and

compel him to repay or restore the money or property or any part thereof or to contribute such sum to the assets of the Company by way of compensation in respect of the misfeasance as the Court thinks just.

In this case, this is exactly what the petition of 1st July 1935 had prayed for in the last paragraph. In support of objection (c), reference is made to R. 77 which lays down that where the application under S. 235 is filed by the Official Liquidator he may make a report to the Court stating any facts and information on which he proceeds, which are verified by affidavit, or derived from sworn evidence in the proceedings. It is true, that the petition presented by the Official Liquidator on 1st July 1935, was not accompanied by an affidavit, nor did it state that the information contained therein had been derived from sworn evidence in the proceedings. But no action was taken against the appellants on that petition. As stated already, further particulars were allowed to be filed at a later stage and they were supported by an affidavit sworn by the Official Liquidator on 22nd April 1937; and it was after this had been done that notice was issued to the appellants for the first time. The rules do not require that the affidavit should be filed along with the petition, or that, if it is not so filed, it cannot be received at a later date. We hold therefore that the proceedings against the appellants are not defective by reason of objections (b) and (c) mentioned above.

The remaining objection is that the petition did not fully and adequately set out the particulars on which the claim is based. In the original petition 35 persons had been named as defendants, whom the Official Liquidator sought to make liable for alleged acts of misfeasance. The appellants, Pt. Shiv Kishan Kaul and Lala Mulk Raj Bhalla were among them, being Nos. (18) and (19) in the list. It is contended on their behalf that this petition does not contain any specific allegations on which a claim under S. 235 could be based against them. In reply, the learned counsel for the liquidator referred us to paras. 10 and 12 of the petition which, he contended, adequately set out the charges against them. Para. 10 however does not appear to us to relate to these two appellants. It refers to Lala Harkishan Lal and the other directors who had taken "huge amounts which

were practically advances of the Bank's moneys by them to themselves" or who had "connived" at these "huge advances being made to L. Harkishan Lal or his concerns or other co-directors" and thus "actively colluded with him or altogether neglected the interests of the Bank." The two appellants are not mentioned by name in this paragraph, and it is admitted that neither of them was connected with the Bank when these "huge advances" were made. Para. 12 however refers, among others, to the two appellants and alleges that they did not "take proper and effective steps to safeguard the interests of the Bank" and "allowed valuable securities to be lost or depreciated" and are therefore "liable for the consequential loss or losses to the Bank caused by their acts, defaults or negligence." In the petition however no details of the securities alleged to have been lost or depreciated were given. They were subsequently set out in detail in the schedules attached to the document presented on 22nd February 1937. In these schedules "the headings of charges" and "brief facts pertaining to each defendant" were supplied: those relating to the two appellants will be found at pages 47 and 48 of the paper-book. Para. 12 of the original petition, read with the documents filed on 22nd July 1937, adequately sets out the allegations on which the claim in respect of the release of stocks belonging to the Lucknow Sugar Works, and their forcible removal by Lala Harkishan Lal is based. But, as regards the claim relating to the advances of Rs. 10,000 and Rs. 4000 respectively, mentioned in Cls. 5 and 6 of the schedule, we do not find the particulars sufficient to show on what grounds the liability of the appellants is based. We accordingly hold that the petition of 1st July 1935, read with the documents filed on 22nd April 1937, contains adequate particulars of the claim against the two appellants so far as the allegations relating to the release and removal of stocks from the Lucknow Sugar Mills are concerned, but not with regard to the advances aggregating to Rs. 14,000.

We now come to the case of appellant 3, Lala Raghunath Sahai. It has already been stated that he was not one of the defendants named in the original petition of 1st July 1935. He was first mentioned in the application of 16th July 1935, but that application merely asked that he be "added" as a defendant; it did not set out any alle-

gations against him; nor did it disclose the basis of the claim on which it was sought to make him liable. In Sch. B, attached to the document presented on 22nd April 1937, a summary of the case against him was for the first time given (p. 54), and in the Schedule at p. 130 are found details of the amount in respect of which it was stated that he had committed acts of misfeasance. We have read with the assistance of counsel, the relevant clauses of the statement of claim but are unable to find that any case of fraud, breach of trust or negligence, is disclosed against him. We must therefore hold that so far as he is concerned, the applications taken individually or collectively, do not comply with the requirements of Rule 77.

This brings us to Issue 3 in the case, as to whether the claim against the appellants should be tried jointly with the other defendants. It is conceded that neither Lala Mulk Raj Bhalla nor Pandit Shiv Kishan Kaul had anything to do with the dealings of the Bank with Lala Harkishan Lal and the other directors and officers until their appointment as directors a short time before the Bank shut its doors. One of them joined the directorate on 6th June 1931 and the other on 10th August 1931. Lala Mulk Raj Bhalla resigned in July 1932 and Pandit Shiv Kishan Kaul in September 1933. It is not alleged that either of them had borrowed any money from the Bank, individually or in conjunction with any other director or officer of the Bank, nor are there any allegations against them of having appropriated for their personal use, or otherwise taken possession of, any property of the Bank. The case against them is one of negligence in releasing to Lala Harkishan Lal, or allowing him to remove, certain stocks from the Lucknow Sugar Works in August 1931 and their failure to take proper steps to realize the assets during the period of resuscitation. These matters are entirely distinct from those which are the subject of investigation against the other defendants. There is no real common unity between them and it will be highly inconvenient to try the two cases together. We hold therefore that on the principle underlying O. 2, R. 6, Civil P. C., it will be just and convenient to have the petition against Lala Mulk Raj Bhalla and Pandit Shiv Kishan Kaul tried separately.

To sum up our findings on the three issues decided by the learned Judge in the

order under appeal are: (1) The decision on Issue 1 is correct (2) On Issue 2 we hold (a) that the various petitions filed by the Official Liquidator do not constitute a valid statement of claim against Lala Raghunath Sahai; but (b) that these petitions taken collectively, contain adequate particulars of the allegations against Lala Mulk Raj and Pandit Shiv Kishan Kaul with regard to the release to, and removal by, Lala Harkishan Lal of the stocks of the Lucknow Sugar Works; but not with regard to the advances of Rs. 10,000 and Rs. 4000. (3) On Issue 3 we hold that it will be just and convenient to try the allegations against Lala Mulk Raj Bhalla and Pandit Shiv Kishan Kaul separately from those against the other defendants. We accordingly accept the appeal of Lala Raghunath Sahai and dismiss the proceedings against him. The appeals of Lala Mulk Raj Bhalla and Pandit Shiv Kishan Kaul are accepted to the extent indicated above. In the circumstances we leave the parties to bear their own costs.

Before concluding we wish to make it clear that our decision in these appeals in no way deals with the question as to whether the claim against the appellants, or any of them, is or is not within limitation. That matter is the subject of other issues, and it has yet to be decided by the learned Judge as to what is the period prescribed by law for a petition under S. 235, Companies Act, what is the terminus a quo and when the proceedings against each defendant are to be taken to have been properly instituted.

R.M./R.K.

Order accordingly.

A. I. R. 1938 Lahore 671

ADDISON AND ABDUL RASHID JJ.

Mehar Langah and others —

Plaintiffs — Appellants.

v.

Mehr Allah Yar and others —

Defendants — Respondents.

First Appeal No. 49 of 1937, Decided on 14th January 1938, from decree of Senior Sub.Judge, Jhang, D/- 2nd November 1936.

(a) Limitation Act (1908), Art. 120—Partition proceeding—Plaintiff's title to land denied—Plaintiff never in possession—Suit for declaration that plaintiff was owner of land brought more than six years after denial of title is time barred.

In partition proceedings started in the year 1902, the plaintiffs' title to the land in dispute was denied at that time. The plaintiffs had never actually been in physical possession of the property in dispute :

Held that a suit for declaration that the plaintiffs were owners of land instituted on 19th August 1935, was clearly barred by time under Art. 120: *A I R 1917 Lah 293, Rel. on.* [P 672 C 2 ; P 673 C 1]

(b) Civil P. C. (1908), S. 11, Expln. 4—In previous suit plaintiff's predecessors claiming partition of whole shamilat—Subsequent suit by plaintiff claiming that certain well and land in shamilat was not liable to be partitioned is barred by *res judicata*.

A suit was instituted by the plaintiff's predecessors in which they claimed that entire shamilat was liable to be partitioned. A subsequent suit was brought by the plaintiff to the effect that certain well and land in the shamilat should be excluded from partition :

Held that this plea ought to have been raised and made a ground of attack in the previous suit by the plaintiff's predecessors. As it was not so raised, the subsequent suit was barred under Expln. 4 to S. 11. [P 673 C 1]

Malik Mohd. Aslam and Mohd. Amin —
for Appellants.

S. L. Puri and Chandar Gupta —
for Respondents 9 to 14.

Abdul Rashid J. — This appeal has arisen out of an action brought by the plaintiffs for a declaration to the effect that they are owners of 394 kanals and 4 marlas of land, and that this land is liable to be excluded from the partition of the village shamilat. The allegations of the plaintiffs are that their ancestors sank the well Hidayatwala almaaruf Jandwala in the shamilat of the village Mukhiana in the year 1886, that according to condition 14 of the *Wajib-ul-arz*, prepared at the settlement of 1880, and according to the judgment of Mr. Abbot, Settlement Officer, dated 3rd May 1902, they had become owners of the well and of land measuring 394 kanals and 4 marlas as this area was commanded by the well Hidayatwala almaaruf Jandwala. The defendants pleaded, *inter alia*, that there was no well, known as Hidayatwala almaaruf Jandwala, that no such well had been constructed by the plaintiffs' ancestors, that the plaintiffs' suit was time-barred, that it had already been decided by the Divisional Judge in his judgment dated 2nd August 1904, that the land in dispute was partible shamilat, that the present suit was therefore not entertainable, that condition 14 of the *Wajib-ul-arz* had been deleted by Mr. Abbot, Settlement Officer, by means of his judgment dated 3rd May 1902, and that the plaintiffs' suit was therefore liable to

dismissal. The trial Court held that the plaintiffs' suit was barred by limitation. It was further found that in the previous civil suit instituted by the predecessors of the present plaintiffs, they had failed to plead that the well in dispute and the land attached thereto should be excluded from shamilat and that the present suit was therefore barred by the rule of *res judicata*. On the facts, the learned Senior Subordinate Judge held that the plaintiffs had failed to establish that any well known as Hidayatwala almaaruf Jandwala was sunk by the plaintiffs' ancestors between the years 1880 and 1902, and that it had not been established that 394 kanals 4 marlas of land was attached to any such well. On these findings the plaintiffs' suit was dismissed. The plaintiffs have preferred an appeal to this Court.

There is no documentary evidence on the record showing that the well, known as Hidayatwala almaaruf Jandwala was sunk by the plaintiffs' ancestors in the year 1886, and that the well commanded 394 kanals 4 marlas of land. Ex. P-1, even if it be held to be admissible, does not help the plaintiffs. It merely shows that there was a *ghair mumkin dal* in a separate number which measured 1 kanal 9 marlas in the year 1900-01. Previous to it there is no specific *khasra* number showing any land as *ghair mumkin dal*. This *ghair mumkin dal* is not entered as Hidayatwala almaaruf Jandwala in any revenue record between the years 1880 and 1902. There is a well Hidayatwala which admittedly belongs to the plaintiffs and which has already been excluded from partition. It cannot be held that the entry in Ex. P-1 relates to another well named as Hidayatwala almaaruf Jandwala. Moreover Ex. P-1 shows that the well mentioned therein was constructed in *kharif* 1886-87 and was demolished in the *rabi* of the same year. The oral evidence produced by the plaintiffs shows that this well was in existence for two or three years and that only 10 or 11 kanals of land was attached to this well. In these circumstances the learned Senior Sub-Judge was right in holding that it had not been established that a well, known as Hidayatwala almaaruf Jandwala was sunk by the plaintiffs' ancestors in the year 1886 and that 394 kanals 4 marlas of land was attached to this well. The partition proceedings started in the year 1902. The plaintiffs' title to the land in dispute was denied at that

time. The present suit for declaration having been instituted on 19th August 1935 is clearly barred by time under Art. 120, Limitation Act as the plaintiffs have never actually been in physical possession of the property in dispute. Reference may be made in this connexion to 79 P R 1917.¹

The predecessors of the present plaintiffs filed a civil suit in the year 1902. In that suit they claimed that in spite of condition 14 of the *wajib-ul-arz* they were entitled to claim partition of the entire *shamlat* and that the measure of right should be the *jama* paid by each *khewatdar* at the time of the first regular settlement. In that suit it was the duty of the predecessors of the present plaintiffs to plead that the well and the land now in dispute should be excluded from partition as the *shamlat* was being partitioned at that time. As they did not raise any such plea in the previous suit, which had arisen out of the partition proceedings, the present suit is barred under Explan. 4 to S. 11, Civil P. C. The subject-matter of the present suit ought to have been made a ground of attack in the previous suit instituted by the predecessors of the present plaintiffs. For the reasons given above, we affirm the decision of the Court below and dismiss this appeal with costs.

D.S./R.K.

Appeal dismissed.

1. *Ghulam Hussain v. Saifullah Khan*, (1917) 4 A I R Lah 293=42 I C 346=79 P R 1917.

A. I. R. 1938 Lahore 673

TEK CHAND J.

Firm Hardayal Mal-Mohri Lal —
Plaintiffs — Appellants.

v.

Firm Messrs. Kishan Gopal Jhanji & Sons — Defendants — Respondents.

Second Appeal No. 197 of 1938, Decided on 1st June 1938, from decree of the Senior Sub-Judge, Gurdaspur, D/. 24th November 1937.

Contract — Enforcibility — Principal and agent—Agent having interest in contract may sue in his own name.

Where an agent enters into a contract as such, if he has an interest in the contract, he may sue in his own name, the agent being in such a case virtually a principal to the extent of his interest in the contract.

C. L. Aggarwal — *for Appellants.*

Achhru Ram — *for Respondent 1.*

Judgment. — The plaintiffs, Firm Hardayal Mal-Mohri Mal of Batala, instituted a suit against Messrs. Kishan Gopal Jhanji and Sons of Jullundur for recovery of Rs. 850 alleged to be due as the balance of the price of coal purchased by the defendants from a firm called Hardayal Mal-Mohri Mal Bengal Coal Co., which was then owned by the plaintiff and Damodar Chand, defendant 2, but which has since been dissolved and is now owned by the plaintiff alone. The defendants, Messrs. Kishan Gopal Jhanji and Sons, contested the suit on numerous grounds. The Subordinate Judge, Batala, decided all these points in favour of the plaintiff and against the defendants, and decreed the suit. On appeal before the Senior Subordinate Judge, the defendants, Firm Kishad Gopal Jhanji and Sons, did not challenge the findings of the trial Court on the merits, which were to the effect that Rs. 850 was due by these defendants as the balance of the price of coal supplied. They assailed the decree of the trial Court on two grounds: (1) that the Civil Court at Batala had no jurisdiction to entertain the suit as no part of the cause of action had arisen at Batala, and (2) that in the transactions in dispute the plaintiffs were not acting as principals, but were the agents of a Calcutta firm, known as Messrs. Tara Chand Ghansham Das, and therefore they had no *locus standi* to maintain the suit. The Senior Subordinate Judge overruled the first plea and, agreeing with the Court of first instance, held that the suit had been properly brought in the Batala Court. On the second point however he disagreed with the conclusion of the Subordinate Judge and found that the plaintiffs had acted as the agents of Messrs. Tara Chand Ghansham Das in the transactions in dispute. He therefore held that under S. 230, Contract Act, they could not personally enforce the contracts which had been entered into by them on behalf of their principals, and hence they had no *locus standi* to bring the present suit. On this finding the learned Judge accepted the defendants' appeal and dismissed the plaintiffs' suit with costs throughout.

On second appeal, it is contended that the finding of the learned Senior Subordinate Judge that in the transactions in dispute the plaintiffs had acted as the agents of the Calcutta firm and not as principals,

is vitiated by the fact that the learned Judge has omitted to consider important evidence on the record and has not taken into account the admissions of the representatives of the Calcutta firm who had deposed that they had no interest in the transactions. Secondly it has been urged that even if the plaintiffs were the agents of the Calcutta firm they were "agents having an interest" in the transactions and therefore in the eye of the law they were virtually principals and as such entitled to sue. The contention of the plaintiffs in the Courts below was that they were the "sole distributors" of Messrs. Tara Chand Ghansham Das in the Punjab, while the defendants contended that their real position was that of "sole agents" of the Calcutta firm in this province. On this point the evidence is conflicting. The learned Judge, after considering this evidence, has found that the plaintiffs' contention is incorrect. On second appeal, I see no adequate ground for going behind that finding. The plaintiffs therefore must be considered to have acted as agents of the Calcutta firm in these transactions.

This finding however is insufficient to justify the dismissal of the suit. The learned Judge should have further examined the evidence to determine the exact nature of the agency and definitely found whether or not the plaintiffs, as agents, had any "interest" in the transactions in question. I have heard counsel at length on this point, and find that the evidence on the record, including the documents produced by the defendants and the statements of their witnesses taken in Court and on commission shows that the plaintiffs were not agents of the Calcutta firm in the ordinary sense of the term, but they were "agents having an interest" in the transactions. It is admitted, and has indeed been found by the learned Judge himself in the first part of his judgment dealing with the question of jurisdiction, that all payments by defendants were actually made to the plaintiffs and not to the Calcutta firm. Secondly, Ranchod Das and N. B. Bose of the firm of Tara Chand Ghansham Das, who were examined by the defendants themselves, clearly deposed that the loss of the transactions was to fall not on the Calcutta firm but on Hardayal Mal. Mohri Mal. They also said that they had kept no separate accounts of the defendants with them, and whenever the defendants, in cases of emergency, sent any orders direct to Tara

Chand Ghansham Das in Calcutta, they immediately replied that they had noted the contract, but that the plaintiffs should be informed and that the price paid to them in order to avoid confusion. There is also evidence on the record that no commission was to be charged by the plaintiffs from the Calcutta firm, which would have been the case if they had been merely their agents in the ordinary sense of the term. It also appears that the railway receipts were invariably sent by the Calcutta firm to the plaintiffs, who forwarded them, with their own bills, to the defendants asking them to make payments to them and not to Tara Chand Ghansham Das. See *inter alia* Exs. P-48, P-50, P-51, P-18, P-14, P-30 and P-12. The defendants also promised to make payments to the plaintiffs at Batala and not to the Calcutta firm, which would have been the case if the plaintiffs were merely their agents without having an interest in the transactions.

The learned Judge, as also the learned counsel for the respondents, relied on certain postcards, Exs. D-7, D-51 and D-55 to D-60, which were sent by the Calcutta firm to the defendants, but they were merely advices of the despatch of goods and were never accompanied by railway receipts or bills. These documents therefore do not affect the matter. This is clearly a case of an "agency coupled with interest" and therefore the ordinary rule laid down in S. 230 is inapplicable. It is settled law in England and, as observed by Pollock and Mulla in their *Commentary on the Indian Contract Act* (Edn. 6) page 638 :

The like rule is laid down by Indian Courts that where an agent enters into a contract as such if he has an interest in the contract, he may sue in his own name. This is not a real exception to the rule laid down at the beginning of the Section, the agent being in such a case virtually a principal to the extent of his interest in the contract.

Mr. Achhru Ram argued that this point had not been pleaded in so many words and was not covered by the issues and should not be allowed to be raised at this stage. The material facts bearing on the point however were all brought out in the statements made by the plaintiff on oath, and in the document produced, and Issue 5 as framed by the trial Court was comprehensive enough to cover the point. The defendants therefore cannot say that they have been taken by surprise. As stated above, it has been found by the First Court, and that finding was not challenged either

before the lower Appellate Court or before me, that the sum of Rs. 850 was due by the defendants to the plaintiffs on the transactions in dispute. For the foregoing reasons, I accept the appeal, set aside the decree of the learned Senior Subordinate Judge and restore that of the Court of first instance decreeing the suit for Rs. 820. Having regard to all the circumstances, I leave the parties to bear their own costs throughout.

D.S./R.K.

Appeal accepted.

*** A. I. R. 1938 Lahore 675**

ADDISON AG. C. J. AND DIN MOHAMMAD J.

Court of Wards Guru Amarjit Singh Sahib — Plaintiff — Appellant.

v.

Devi Dawala — Defendant —

Respondent.

Letters Patent Appeal No. 53 of 1938, Decided on 19th May 1938, from decree of Bhide J., reported in *A I R 1938 Lah 488*.

* (a) Punjab Tenancy Act (16 of 1887), Ss. 57 and 59—Occupancy Tenancy—Period for redemption expiring—Mortgagee acquiring occupancy rights—Mortgagor losing his rights under S. 59—Mortgagee's rights are not retained: 40 P L R 240 = *A I R 1938 Lah 488, Reversed*.

On the expiry of the period of limitation for the redemption of a mortgage of an occupancy right under Art. 148, Limitation Act, the mortgagee who acquires the status of an occupancy tenant cannot continue to retain it even on the death of the mortgagor without leaving any heirs as mentioned in S. 59, Tenancy Act: 40 P L R 240 = *A I R 1938 Lah 488, Reversed*; 1 P R (1898) (Rev) and *A I R 1927 All 311, Disting.*; 79 P R 1878; 6 P R 1901 (Rev); 8 P R 1905 (Rev) and *A I R 1931 Lah 211, Applied*. [P 675 C 1, 2; P 676 C 1]

(b) Punjab Tenancy Act (16 of 1887), Ss. 53 to 59—Intention is to protect landlord.

A close study of Ss. 53 to 59 displays an anxiety on the part of the Legislature to safeguard the interests of the landlord as far as possible and to protect him against all intruders. [P 676 C 1]

Lala Achhru Ram — for Appellant.

J. L. Kapur — for Respondent.

Din Mohammad J.—This Letters Patent Appeal raises an interesting question of law on which, as conceded by both parties, there is no direct authority available. The question is whether on the expiry of the period of limitation for the redemption of a mortgage of an occupancy right under Art. 148, Limitation Act, the mortgagee acquires the status of an occupancy tenant and continues to retain it, even on the death of the mortgagor without leaving any heirs as

mentioned in S. 59, Tenancy Act. The relevant provisions of the enactments applicable to this case are Ss. 5 to 9 and 53 to 59, Tenancy Act, and S. 28 and Art. 148, Limitation Act. S. 5 enumerates the various classes of occupancy tenants. S. 6 deals with a special class of occupancy tenants. S. 7 relates to rights of occupancy in land taken in exchange. S. 8 enacts that nothing in Ss. 5 to 7 shall preclude any person from establishing a right of occupancy on any ground other than the grounds specified in those Sections. S. 9 lays down that no tenant shall acquire a right of occupancy by mere lapse of time. It would thus appear that S. 9 in a way restricts the generality of the provisions made in S. 8 and excludes the method of acquiring a right of occupancy by mere efflux of time from the grounds on which a right of occupancy can be established under S. 8.

Section 53 lays down certain conditions under which a tenant having a right of occupancy under S. 5 may transfer that right by sale, gift or mortgage. S. 54 makes it incumbent upon a mortgagee of a right of occupancy under S. 5 to follow the procedure as laid down in S. 53, if he proposes to foreclose his mortgage or otherwise enforce his lien on the land subject to the right of occupancy. S. 55 enacts that a right of occupancy under S. 5 may be sold in execution of a decree or order of a Court but notice of an intended sale shall be given to the landlord and he will be given a preferential right to purchase it. S. 56 provides that a right of occupancy under any other Section than S. 5 shall not be attached or sold in execution of a decree or order of any Court or without the previous consent in writing of the landlord, be transferred by private contract. S. 57 enacts that when a right of occupancy has been transferred by sale, gift or usufructuary mortgage to a person other than the landlord, that person shall, in respect of the land in which the right subsists, have the same rights, and be subject to the same liabilities, as the tenant to whom before the transfer the right belonged had and was subject to. The word "subsist" as used in Sec. 57 is significant. It indicates that the right acquired by a transfer exists only so long as the original right exists in respect of the land so transferred. In other words, the right acquired by a transfer expires as soon as the original right ceases to exist. Further where this Section confers upon the transferee the rights of the transferor,

it subjects him to the same liabilities. S. 58 restricts the power of an occupancy tenant to sublet the land for any period over seven years and in case of subletting makes the lessee along with the tenant subject to all the liabilities of the tenant under the Act. Here again the distinction between a person who acquires a right of occupancy by sale, gift or usufructuary mortgage, and a person to whom the land is sublet, is noteworthy. No privilege is conferred upon the lessee and the tenant is not absolved from his liabilities in the case of subletting. S. 58-A provides for a special case for the consolidation of holdings; and S. 59, among other things, says that if the deceased tenant has left no such persons as are mentioned in sub-s. (1) on whom his right of occupancy may devolve under that sub-section, the right shall be extinguished. A close study of these provisions displays an anxiety on the part of the Legislature to safeguard the interests of the landlord as far as possible and to protect him against all intruders.

Counsel for the mortgagee contends that a mortgagor has only 60 years under Art. 148, Limitation Act, within which to redeem his property and in case of his failure to do so, S. 28, Limitation Act, comes into play which says that at the determination of the period limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished. It is true that a tenant so long as he is alive or his line continues may lose his right to oust the mortgagee from the land in suit on the expiry of 60 years, but we cannot hold that the combined effect of these provisions is to inflict upon the landlord an occupancy tenant even after the right of occupancy ceases to exist owing to the death of the original tenant without any heirs. Counsel for the mortgagee contends that inasmuch as the extinguishment of the tenant's right to redeem extinguishes his right to that property altogether, if the original transfer has taken place with the consent of the landlord, he is bound to accept the successor of the original tenant as a rightful claimant to the occupancy holding. We, however, consider that this proposition of law runs counter to the whole scheme of the Tenancy Act. No tenant can acquire a right of occupancy by mere lapse of time as laid down in S. 9 of the Tenancy Act, and it cannot be denied that by virtue of S. 57 the mortgagee is a tenant. Further,

as pointed out above, a mortgagee remains a tenant only so long as the original right subsists as provided in S. 57 and consequently he loses any right that he acquires as against the mortgagor as soon as the right ceases to exist under S. 59 of the Tenancy Act.

Counsel for the respondent has relied on 1 P R 1898 (Rev.)¹ and A I R 1927 All 311² in support of his contention, but in our view neither of those judgments is in point. In 1 P R 1898 (Rev.)¹ the only question was whether a landlord could object to a mortgage made by the tenant in spite of the fact that he had acquiesced in it by acceptance of rent from the mortgagee, and the Financial Commissioner held that in the circumstances of that case he could not. The headnote, we consider, is couched in very wide terms and is misleading. In A I R 1927 All 311² the headnote reads as follows:

A mortgage of an occupancy holding is not permitted by law, but by entering into possession as mortgagees of the holding and by continuing in such possession for more than 12 years, the mortgagees can only prescribe a title for the limited interest of a usufructuary mortgagee but his possession is not adverse to the mortgagor, and if the mortgagor brings a suit for possession of the holding against the mortgagee within 12 years from the date of the execution of the mortgage the plaintiff can claim an unconditional decree for possession on the ground that the mortgage being of an occupancy holding is void in law; but by the continuance of the defendants' possession for more than 12 years as usufructuary mortgagees, there came into existence a legally operative mortgage which the plaintiffs must redeem as a condition precedent to a decree for possession of the holding.

Nothing that is said there helps the mortgagee in this case. Counsel for the appellant, on the other hand, has referred to 79 P R 1878,³ 6 P R 1901 (Rev.),⁴ 8 P R 1905 (Rev.)⁵ and 11 Lah 716.⁶ In 79 P R 1878,³ the proprietor of an occupancy holding sued to recover possession of land held by the defendant mortgagee from an occupancy tenant who had died without heirs two years prior to the institution of the suit. A Division Bench of the Punjab

1. *Jiwan Singh v. Maharaja Jagat Singh*, (1898) 1 P R 1898 Rev.

2. *Maha Mangal Rai v. Kishun Kandu*, (1927) 14 A I R All 311=100 I C 346.

3. *Sher Khan v. Pir Baksh*, (1878) 79 P R 1878.

4. *Narindar Singh v. Lehna Singh*, (1901) 6 P R 1901 Rev=36 P L R 1901.

5. *Shib Sahai v. Balbir Singh*, (1905) 8 P R 1905 Rev=67 P L R 1906.

6. *Nizam Din v. Mt. Wazir Begam*, (1931) 18 A I R Lah 211=131 I C 342=11 Lah 716=32 P L R 183.

Chief Court composed of Plowden and Elsmie JJ. held that the plaintiff was entitled to a decree as the interest of the mortgagee in the land could be no greater and last no longer than that of the mortgagor from whom it was derived, and that the mortgagor's interest having come wholly to an end by reason of his death without heirs, the mortgagee's interest ceased with it, even if the mortgage was made with the proprietor's knowledge or was afterwards assented to by him. In 6 P R 1901 (Rev.)⁴ Mr. Tuper followed this judgment and remarked :

The law is that the occupancy right is extinguished. There cannot be a subsisting mortgage of a right which has ceased to exist, and I must therefore hold that the landlords are entitled to the possession for which they sue.

In 8 P R 1905 (Rev.)⁵ Mr. Gordon Walker, Financial Commissioner, observed:

It is argued that occupancy rights have now been acquired by adverse possession, and that the mortgagee has acquired such rights by being allowed to enjoy them for more than 12 years. . . . It is sufficient reply to the above argument that occupancy rights can only be acquired in one of the ways described in the Tenancy Act; Since the death of the mortgagor-tenant, the mortgagee has merely been a tenant-at-will holding so long as the plaintiff did not disturb him, and lapse of time cannot alter his status.

In 11 Lah 716,⁶ both 79 P R 1878³ and 6 P R 1901 (Rev.)⁴ were referred to with approval and the principle enunciated in those judgments was affirmed by a Division Bench of this Court composed of Broadway and Currie JJ. It is true that the facts of the cases cited above are not on all fours with those of the present case but the principle deducible therefrom does hold good. It follows therefore that, even if the mortgagee in this case had stepped into the shoes of the original tenant on account of the lapse of time, he ceased to have any connexion with the land as soon as the tenant's death took place leaving no heirs behind. We accordingly allow this appeal, set aside the judgment of the learned Judge of this Court and restore that of the trial Court decreeing the plaintiff-appellant's suit. In the peculiar circumstances of the case however, we leave the parties to bear their own costs throughout.

B.D./R.K.

Appeal allowed.

A. I. R. 1938 Lahore 677

ADDISON AND DIN MOHAMMAD JJ.

Firm Karam Chand-Shankar Das—
Defendant—Appellant.

v.

Sm. Amar Kaur, Plaintiff and another,
Defendant—Respondents.

First Appeal No. 277 of 1937, Decided on 27th January 1938.

(a) Civil P. C. (1908), O. 21, R. 63—Occupancy rights of judgment-debtor attached in execution of decree—Landlord is entitled to bring suit for declaration that occupancy rights cannot be attached and sold.

Where the occupancy rights held by a judgment-debtor are attached in execution of a decree against him, the landlord of the land in which the occupancy rights are held, is entitled to bring a suit under O. 21, R. 63 for a declaration that the occupancy rights cannot be attached and sold in execution of the decree. [P 677 C 2; P 678 C 1]

(b) Punjab Tenancy Act (16 of 1887), Ss. 5, 6, 7 and 77 (3) (d)—Occupancy rights of judgment-debtor sought to be attached and sold—Civil Court has jurisdiction to decide whether rights fall under S. 5 or Ss. 6 and 7—Suit is not one under S. 77 (3) (d).

A Civil Court has jurisdiction to decide as to whether the occupancy rights held by a judgment-debtor, which are sought to be attached and sold in execution of a decree, fall under S. 5 or Ss. 6 and 7. Such a suit is not a suit by a tenant to establish a claim to a right of occupancy or by a landlord to prove that the tenant had not such a right.

[P 678 C 1]

Qabul Chand and Labh Singh —
for Appellant.

Mehr Chand Mahajan, Shamair Chand
and Parkash Chand—*for Respondents.*

Addison J.—The Firm Karam Chand-Shankar Das held a decree against Mt. Damodri to the extent of the property of her deceased husband in her hands. In execution thereof they attached certain occupancy rights in the name of Mt. Damodri which had come to her from her husband. The plaintiff, who is the landlord of the land in which Mt. Damodri has the occupancy rights put in objections under O. 21, R. 58, Civil P. C., but these were dismissed without enquiry on the ground that they were belated. Accordingly, the landlord instituted the present suit for a declaration that Mt. Damodri's occupancy rights could not be attached and sold in execution of the firm's decree. The suit has been decreed and the Firm Karam Chand-Shankar Das has preferred this appeal. It was first contested before us that the landlord had no locus standi to bring the present suit. O. 21, R. 58, however is very wide and runs as follows :

Where any claim is preferred to or any objection is made to the attachment of any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim, etc.

The claim therefore can be made by any person interested in any way in the land. The landlord is undoubtedly interested. If the occupancy rights are purchased, the purchaser will take the place of Mt. Damodri. The landlord has always the right of escheat. Mt. Damodri's line is apparently about to die out and the purchaser's line may continue for hundreds of years. Besides, under S. 56, Punjab Tenancy Act, a right of occupancy under any Section other than S. 5 cannot be attached or sold in execution of a decree or order of any Court; while under S. 55 the right of occupancy under S. 5 may be sold in execution of a decree or order of a Court but the landlord has the right to be declared the purchaser instead of the person making the highest bid. It is clear therefore that the landlord has a locus standi to bring the present suit.

It was next contended that the burden of proof was on the landlord to show that the tenancy was not under S. 5, Punjab Tenancy Act. This may be so but he has discharged that burden by producing the revenue papers where Mt. Damodri is recorded merely as an occupancy tenant, no Section being specified. This therefore throws the burden back upon the Firm Karam Chand. Shankar Das to establish that they can attach these occupancy rights, as they can only do so if they are under S. 5. This they have certainly failed to do and in fact the trial Judge has held that it has been established that the rights are not under S. 5, a question however which we need not proceed to discuss further. There was a third argument to the effect that the question whether the occupancy rights fall under S. 5 or Ss. 6 and 7 should have been decided by the Revenue Court under the Proviso to S. 77, Punjab Tenancy Act. We are unable to agree with this contention. S. 77 (3) (d) was relied upon in this connexion, it being claimed that the suit was by a tenant to establish a claim to a right of occupancy, or by a landlord to prove that a tenant had not such a right. Obviously however the suit is not of such a character and therefore the matter was one for the Civil Courts. We therefore dismiss this appeal but make no order as to costs in it.

B.M./R.K.

*Appeal dismissed.***A. I. R. 1938 Lahore 678**

ADDISON AND DIN MOHAMMAD JJ.

Hira Lal — Decree-holder — Appellant.

v.

Mohna Singh — Judgment-debtor — Respondent.

Execution First Appeal No. 354 of 1937, Decided on 28th March 1938, from order of Senior Sub-Judge, Amritsar, D/- 9th July 1937.

Execution — Step-in-aid — Application by decree-holder to withdraw certain moneys deposited in Court for his benefit is not step-in-aid.

An application by a decree-holder to withdraw certain money deposited in Court for his benefit is not a step-in-aid of execution so as to give a fresh starting point for limitation: *A I R 1938 Lah 138; 14 I C 335 and 103 P R 1908, Approved; Case law discussed.* [P 679 C 2]

J. N. Aggarwal and S. M. Sikri —
for Appellant.

S. L. Puri for M. L. Puri —
for Respondent.

Dalip Singh J. — In this case the decree-holder obtained a decree for Rupees 93,700 and interest on 17th December 1925. It is admitted that an application for execution was consigned to the record room on 9th January 1932. The next application was made on 3rd January 1936. This application would, ordinarily speaking, have been barred by time, but the decree-holder relied on an application made on 4th July 1933, to recover certain moneys deposited in Court. The Court being somewhat doubtful on the question of limitation, a special attempt was made to serve the judgment-debtor. On 28th July 1936, it was reported that the judgment-debtor was avoiding service. On 17th August 1936, it was reported that the judgment-debtor had refused service and a notice had been put on his dwelling house. On 21st August 1936, the Court held in the absence of the judgment-debtor following *A I R 1925 Bom 443*,¹ that the application was within time by reason of the application made on 4th July 1933. On 22nd January 1937, this application of 3rd January 1936 was consigned to the record room. On 2nd March 1937, the present application was made. The judgment-debtor pleaded bar of limitation and alleged that he had never been served and had never refused service as regards the appli-

1. *Mulchand Manaji v. Jamanbi Abdul Kabir Sahib*, (1925) 12 *A I R Bom 443*=89 *I C 228*=27 *Bom L R 671*.

eration of 3rd January 1936. The trial Court held on the evidence that it appeared that it had been wrongly reported that the judgment-debtor had refused to accept service.

I have been through the evidence and I see no reason to dissent from the finding of the trial Court on this point. It is therefore open to the judgment-debtor to urge that the application of 3rd January 1936 was wrongly held to be within time by reason of the application of 4th July 1933. The trial Court has held that there is a conflict of rulings between A I R 1925 Bom 443¹ and 14 I C 335,² a ruling of our own Court. It is admitted by learned counsel on both sides that this conflict of rulings exists and that Calcutta and Lahore hold that such an application, as the one made on 4th July 1933, is not a step-in-aid of execution and that Allahabad, Madras and Bombay hold that such an application is a step-in-aid of the execution. So far as our Court is concerned, there is one Single Bench ruling, namely A I R 1938 Lah 138³ in which a previous Full Bench ruling of the Chief Court, 103 P R 1908,⁴ was followed. There is also a Single Bench ruling of the Chief Court, 14 I C 335.² As the matter is not free from difficulty and there should be an authoritative decision of this Court in view of the conflict of rulings, I refer the case to a Division Bench on this point, namely whether an application to draw out monies deposited in Court for his benefit, by the decree-holder is a step-in-aid of execution or not.

Judgment of Division Bench

Addison J.—The only question involved in this appeal is whether the application, dated 4th July 1933, to recover certain monies deposited in Court in execution of the decree is a step-in-aid so as to give a fresh starting point for limitation. The Bombay High Court has held in 22 Bom 340⁵ and A I R 1925 Bom 443¹ that such an application is an application to the Court to take a step-in-aid of execution of the decree. It was held in A I R 1925 Mad 703⁶ that an application for payment out

of money in Court by a decree-holder is a step-in-aid of execution if the money in Court was realized in execution of the decree. A Full Bench of the Allahabad High Court held in 12 All 399⁷ that a "step-in-aid of execution" included an application made by a decree-holder to enter up part satisfaction of the decree. On the other hand, it was held in 8 Cal 89⁸ that an application made by a judgment-creditor to take out of Court certain monies there deposited by his judgment-debtor, cannot be considered to be an application to the Court to take a step-in-aid of execution, and is not, therefore, within the meaning of Cl. 4 of Art. 179, Sch. 2 of Act 15 of 1877. The decisions of the Punjab Chief Court and of this Court appear to have been uniform throughout. In 107 P R 1881⁹ there was an application for payment out to the decree-holder of a sum of money which had been deposited in Court, which application was granted and the money paid out. It was held by Plowden and Brandreth JJ. that it was not an application to take a step-in-aid of execution of the decree. A similar decision was given by Barkley and Burney JJ. in 88 P R 1884.¹⁰ Plowden and Tremlett JJ. affirmed the same principle in 27 P R 1888.¹¹ A Full Bench of the Punjab Chief Court held in 103 P R 1908⁴ that an application by a decree holder to the executing Court for payment to him of a certain sum of money deposited in Court in partial satisfaction of the decree does not ordinarily amount to an application to take some step-in-aid of execution. In 14 I C 335² Rattigan J. held that as a general rule, an application by a decree-holder to withdraw money deposited in Court for his benefit cannot be held to be a step-in-aid of execution, especially where the right of the decree-holder to withdraw the money is not contested by the judgment-debtor and payment of the money by the Court is a mere ministerial function. It was further said that it made no difference that the original application for execution had not been finally disposed of. Lastly, in A I R 1938 Lah 138³ Bhide J., following

2. Ram Das v. Kanshi Ram. (1912) 14 I C 335 = 156 P L R 1912 = 80 P W R 1912.

3. Amolak Chand v. Hoshiar Singh, (1938) 25 A I R Lah 138 = 175 I C 260 = 39 P L R 1027.

4. Kasu v. Atar Singh, (1908) 103 P R 1908 = 142 P W R 1908 (F B).

5. Bapu Chand v. Mugut Rao, (1898) 22 Bom 340.

6. Balaguruswami v. Guruswami Naicken, (1925) 12 A I R Mad 703 = 87 I C 989 = 48 M L J 506.

7. Sujan Singh v. Hira Singh, (1890) 12 All 399 = 1890 A W N 125 (F B).

8. Hem Chunder v. Brojo Soondari Debi, (1882) 8 Cal 89 = 10 C L R 272.

9. Nawab Saadat Ali Khan v. Nawab Muhammad Ali Khan, (1881) 107 P R 1841.

10. Mahomed Shaffee v. Budri Mal, (1884) 88 P R 1884.

11. Mul Chand v. Kour Singh, (1888) 27 P R 1888.

the previous rulings of the Chief Court, applied the same principle. In these circumstances we consider that the principle of *stare decisis* should apply. Apart from that, we are of opinion that the previous decisions of the Punjab Chief Court and of this Court lay down the law correctly. We accordingly dismiss this appeal with costs.

R.M./R.K.

*Appeal dismissed.***A. I. R. 1938 Lahore 680**

TEK CHAND J.

Abdul Maqsat and others — Plaintiffs
— Appellants.

v.

Mohammad Amin Khan, Defendant
and another, *Plaintiff* — Respondents.

Second Appeal No. 182 of 1935, Decided on 19th April 1938, from decree of Dist. Judge, Attock at Campbellpur, D/- 31st July 1934.

(a) Custom—Proof of existence—Essentials.

Proof of the existence of custom over a period of about 60 years is sufficient to hold that it is binding: 34 P R 1907; 85 P R 1901; 17 All 87 and 20 Mad 389, *Rel. on.* [P 684 C 1]

The technical rules of English law governing the establishment of custom cannot be followed rigidly in proving the existence of a custom in India: A I R 1930 P C 35; A I R 1917 P C 187 and A I R 1924 P C 113, *Rel. on.* [P 684 C 1]

In India a custom may fall into desuetude and be superseded by another custom according to the ethical and legal notions of the community in which it is in force, provided of course the existence of substituted custom can be proved by a series of well-known, concordant, and on the whole continuous instances, extending over a reasonable length of time: 4 Bom 545; 110 P R 1906 and 1 Cal 186, *Rel. on.* [P 684 C 2]

(b) Custom (Punjab) — Abadi Ferozepura — Right of reversion in malba of houses of non-proprietors.

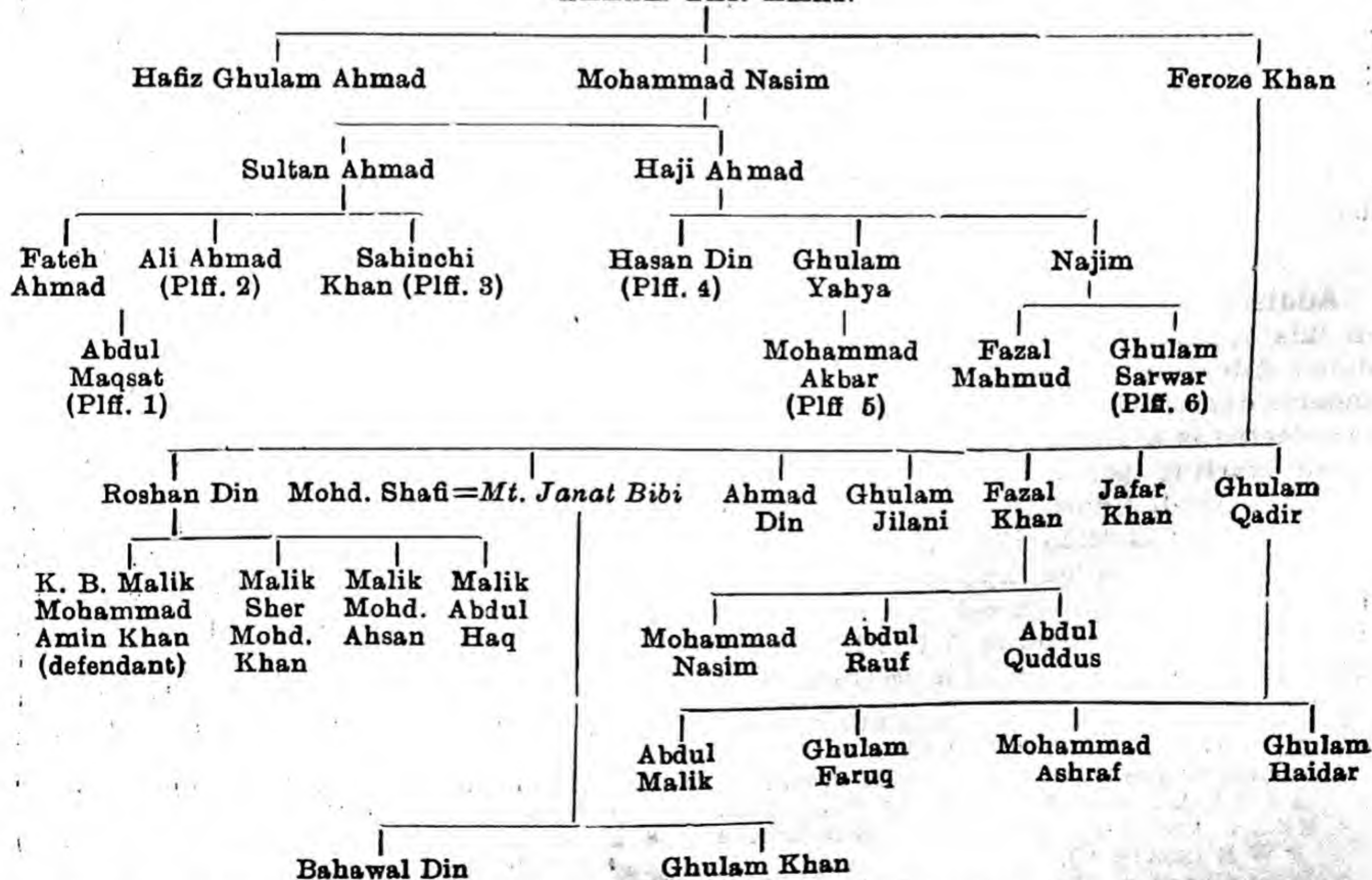
On the non-proprietors leaving, the right of reversion of the malba of the houses of the non-proprietors in Abadi Ferozepura held vested in M alone and not in all the proprietors of the village. [P 684 C 2]

Shamair Chand — *for Appellants.*

Barkat Ali and S. Hasan Jafari —
for Respondent (Defendant).

Judgment.—The parties to this litigation are the descendants of Malik Allah Yar Khan, Awan Qureshi of Mouza Shamsabad in Attock District. Their relationship will appear from the following pedigree-table.

ALLAH YAR KHAN



The six plaintiffs are the descendants of Mohammad Nasim, and the defendant Malik Mohammad Amin is the eldest

grandson of Feroze Khan. There has been litigation between these two branches of the family for over 60 years. The parties

have been before the Chief Court and the High Court on several occasions previously. Allah Yar Khan, the common ancestor of the parties, was the sole proprietor of Shamsabad. On his death the affairs of the family were managed by his eldest son Ghulam Ahmad. About the year 1844 Ghulam Ahmad retired from the management of the estate and devoted himself to the study of the Quran, for which reason he began to be described as Hafiz. Feroze Khan, though he was the youngest of the brothers, then took over the management of the estate, and both under the Sikh Rule and after the conquest of this part of the country by the British, he increased the family property considerably and acquired great influence locally. The British Government conferred a substantial jagir on him; and he was appointed the lambardar of Shamsabad and the zaildar of the ilaka. During the period that Feroze Khan was the head of the family, the abadi of Shamsabad was considerably extended; a new mohalla was founded by Feroze Khan and was named after him as Ferozepura. (It is in respect of certain rights in this mohalla that the present dispute has arisen.) At the time of the first settlement, disputes arose between Feroze Khan and Mohammad Nasim as to the shares in which they were to be entered as owners of the family landed property. This dispute was ultimately decided by the Chief Court (C. A. No. 369 of 1866) on 26th January 1867, it being held that Feroze Khan was entitled to one-half, and Ghulam Ahmad and Mohammad Nasim to one fourth each. About the same time, it was settled by the executive authorities that the jagir shall be held by Feroze Khan alone. Feroze Khan died in 1867 and on his death a peculiar mode of succession was adopted: his eldest son Roshan Din was given one-half of the estate and his other seven sons divided the remaining half among themselves in equal shares. The whole of the jagir was of course continued in the name of the eldest son Roshan Din alone, who was also appointed zaildar and lambardar in place of his father. Roshan Din died in 1893, leaving four sons: Mohammad Amin (defendant), Sher Mohammad, Mohammad Ahsan and Abdul Haq, who have appeared as witnesses in this case. On Roshan Din's death one-half of his estate went to the eldest son Mohammad Amin and the remaining half was taken by the other three sons in equal shares. The jagir was con-

tinued in the name of Mohammad Amin alone and he succeeded his father as the zaildar and lambardar.

In January 1900 a suit was instituted by the descendants of Mohammad Nasim, against the descendants of Feroze Khan, including Mohammad Amin. That suit was for possession by partition of a one-third share in the abadis of mauza Shamsabad including mohalla Ferozepura. The suit was resisted by Mohammad Amin who claimed (*inter alia*) that the abadi of Ferozepura had been founded by his grandfather, that he was the sole proprietor of it and that this mohalla should be excluded from the partition altogether. He further claimed that he alone was entitled to certain dues known as haq bua, watta rakhai, dhart, etc. This suit was ultimately decided by a Division Bench of the Chief Court in C. A. No. 122 of 1904 on 5th January 1910. The learned Judges held that Ferozepura had been founded by Malik Feroze Khan but it did not belong to him exclusively, and the site of the abadi of this mohalla, like that of mouza Shamsabad as a whole, was the property of all the descendants of Allah Yar Khan in the shares in which they had inherited the family estate as laid down in the Chief Court decision of 1867. It was further held that Mohammad Amin was solely entitled to the haq bua and the other dues mentioned above. Thirdly, Mohammad Amin had the exclusive right of locating non-proprietors in, and ejecting them from the abadi of Ferozepura but that he had no such right in Shamsabad generally, where the right vested in all the proprietors. Subject to these reservations, it was held that the plaintiffs were entitled to have the abadi of Shamsabad partitioned except in regard to existing houses, gardens, roads, ponds, mosques and other lands or structures of public utility.

In 1924-25 was held the last settlement of that part of Attock District, in which Shamsabad is situate. The settlement authorities made certain entries in the *wajibularz*, which led to considerable litigation between the descendants of Mohammad Nasim and Mohammad Amin. On 26th April 1929, the descendants of Mohammad Nasim instituted a suit against Mohammad Amin and others for a declaration that they were entitled to one-third share in haq bua, puchh bakri, watta rakhai, etc., in Shamsabad and that the entries in the

wajibularz to the effect that Mohammad Amin alone was entitled to these dues were incorrect. This suit was finally decided by the High Court in C. A. No. 1874 of 1932 on 8th January 1935 : the plaintiffs' claim was dismissed and the entries in the wajibularz relating to the dues mentioned above were upheld. The present dispute relates to another provision in the same wajibularz and is concerned with the right of reversion in the malba of the houses of the non-proprietors in mohalla Ferozepura. The disputed entry in the wajibularz of the settlement of 1924.25 is as follows :

The abadi of Ferozepura was founded by Malik Feroze Khan. Non-proprietors can build their kothas in the above mentioned abadi with the permission of Khan Bahadur Malik Mohammad Amin, and in the abadi of Shamsabad with the permission of the whole proprietary body. The right of locating or ejecting (the non-proprietors) is on the same lines. As long as the non-proprietors live there, they are not interfered with, but if they go to another place, they cannot sell or remove the malba which is taken by Khan Bahadur Malik Mohammad Amin in the abadi of Ferozepura and by the whole proprietary body in the abadi of Shamsabad.

Soon after the completion of the settlement, the six plaintiffs, who are the descendants of Mohammad Nasim, objected to this entry and for some years they carried on litigation before the revenue authorities. Being unsuccessful there, they instituted the present suit on 5th March 1930 in the Court of the Senior Subordinate Judge, Attock, for a declaration that the aforesaid entry, in so far as it related to the reversion of the malba in the abadi of Ferozepura was incorrect and inoperative against the plaintiffs' proprietary rights in the abadi of Ferozepura and that the defendant was not the sole owner of Ferozepura. The suit was dismissed by the Senior Subordinate Judge on 19th April 1930 on the preliminary ground that it was barred by res judicata by reason of the findings in the judgment of the Chief Court in Civil Appeal No. 122 of 1904, dated 5th January 1910, to which reference has been made above. This decision was affirmed on appeal by the District Judge on 12th January 1931. On second appeal (Civil Appeal No. 630 of 1931, decided by Bhide J. on 10th October 1932), both parties agreed as to the correctness of the first part of the entry, in so far as it stated that the abadi of Ferozepura was founded by Malik Feroze Khan, that non-proprietors could build their kothas in the abadi with the permission of Malik Mohammad Amin, and that the right

of locating or ejecting them vested in him. It was also agreed that Malik Mohammad Amin was not the sole owner of Ferozepura. The dispute was thus confined to the portion of the entry relating to the reversion of the malba of the houses of the non-proprietors in Ferozepura to Malik Mohammad Amin. On this point the learned Judge held that the matter was not res judicata by reason of the previous decision. He held that the question was one of custom which should be decided, independently of the former decision, on the evidence of the parties. As this point had not been tried by the Courts below, he accepted the appeal and remanded the case for re-hearing and re-decision of the question as to whether on the non-proprietors leaving Ferozepura the malba vested in Malik Mohammad Amin alone or in all the proprietors of the village. After the parties had produced oral and documentary evidence bearing on the point, the Subordinate Judge decided this issue against the plaintiffs and dismissed the suit on 23rd August 1933. This decision was upheld on appeal by the learned District Judge on 31st July 1934. He however granted a certificate under S. 41 (3), Punjab Courts Act for a second appeal to this Court on the question of custom involved.

Before me, the case has been argued at great length by Mr. Shamair Chand for the plaintiffs-appellants and Mr. Barkat Ali for the defendant-respondent. It is common ground that the entry in the wajibularz of the latest settlement being in favour of the defendant, the onus to prove that it is incorrect lies on the plaintiffs. It is also conceded, as observed by Bhide J. in his order of remand above referred to, that the existence of the custom cannot be proved by a process of logical reasoning : it must be established by instances of the actual course of events in the past. Before considering the evidence produced in the case, it is necessary to state a few facts which are no longer in controversy. It is now common ground that the ownership of the abadi of Ferozepura vests in all the descendants of Allah Yar Khan, the share of Feroze Khan's descendants being one-half and that of Mohammad Nasim's descendants one-fourth. (The third brother Ghulam Ahmad died issueless and the parties are not agreed before me as to who had succeeded to his share. This point is however not material for the purposes of this litigation.) It is also admitted that Feroze Khan was the founder of the mohalla and

that the right of locating and ejecting tenants in Ferozepura vests in Mohammad Amin alone. The next point worthy of note is that the plaintiffs have not produced a single instance, in which they, or any other descendants of Allah Yar Khan, except Mohammad Amin, have ever taken the malba on a non-proprietor abandoning his house in mohalla Ferozepura or his dying without wife or issue. It is also a significant fact that the oral evidence produced by them consists only of the statements of four of the plaintiffs themselves. No other person from the village, whether a proprietor or a non-proprietor, has come forward to depose that the entry in question was wrongly recorded in the wajibularz or that the actually prevailing custom is as alleged by the plaintiffs. It is also noteworthy that if the custom were as alleged by the plaintiffs, the descendants of the seven younger sons of Feroze Khan and the three younger sons of Roshan Din, would be entitled to a pro rata share in the malba of the houses abandoned by the non-proprietors and the share of Malik Mohammad Amin would be only 1/64th. But none of them has claimed any share. Indeed, three of his brothers, Sher Mohammad, Mohammad Ahsan and Abdul Haq, two of whom are members of the Provincial Civil Service and are not likely to forgo their shares if they had any, have actually given evidence supporting the custom as recorded in the wajibularz.

Another point, which it is necessary to mention, is that in the course of the settlement when the wajibularz was under preparation, the non-proprietors claimed that they were the proprietors of the malba and that they could alienate it to anybody they liked, without reference to the proprietary body. This claim was resisted by Mohammad Amin who stated that the non-proprietors could not sell the malba or the site underneath and that on their giving up residence in the village the malba reverted to him. Two of the plaintiffs, Sahinchi Khan (plaintiff 3) and Mohammad Akbar (plaintiff 5) and Fateh Ahmad, father of Abdul Maksat, plaintiff 1, made statements supporting the claim of the non-proprietors; they did not then put forward the claim which they have made in the present litigation that they were the owners of one-third of the abadi of Ferozepura and as such were entitled to their pro rata share in the malba. It may be mentioned that in their evidence as witnesses Sa-

hinchi Khan and Mohammad Akbar denied having made the statement; but this fact was proved by the Naib Tahsildar, Mohammad Taj-ud Din, who was examined as a witness in the case and by other evidence, which has been accepted as true by the Courts below. The defendant has examined 33 witnesses who have attempted to prove 23 instances in each of which on the line of a non-proprietor becoming extinct or his abandoning his residence in mohalla Ferozepura, the house was taken by the defendant Mohammad Amin or the malba removed by him. (After giving a summary of the instances the judgment proceeded further.) All these instances are supported by oral evidence of the witnesses produced by the defendant, who have been believed by both the Courts below. Mr. Shamair Chand has taken me through the evidence and after giving due consideration to his arguments, I see no reason to differ, except with regard to instance No. 19, the evidence relating to which is not sufficiently clear and specific. The name of the non-proprietor, the malba of whose house is stated to have been taken possession of by the defendant, is not disclosed by the witnesses. He is merely described as a Hindu who had embraced Islam. Leaving this instance out of consideration, there is clear proof of 22 cases in which the defendant alone took the house or the malba to the exclusion of, and without protest by, the plaintiffs or any other proprietor of the village. Some of these instances are as old as 60, 55 and 50 years; in 15 cases the reversion took place more than 20 years ago.

Mr. Shamair Chand relied largely on the entries in the wajibularz of the first three settlements held in 1862, 1882 and 1904. The entry in the first settlement however refers merely to the location and ejectment of tenants and is couched in vague phraseology, which might either mean that that right vested in all the proprietors, or in Feroze Khan alone who was described as khas lambardar. The entries in the second and third settlements are no doubt in favour of the plaintiffs. They related to the watta rakhai dues and also to the right of reversion of the malba on abandonment by a non-proprietor. With regard to the dues, the entry was found to be erroneous in the litigation which ended with the Chief Court decision in 1910 and with regard to the reversion of the malba it was superseded, after inquiry, by the wajibularz in the most recent settlement. Not a single

instance in support of the alleged rights of the plaintiffs is proved by oral or documentary evidence, whereas no less than 22 instances, several of which are of very early times, have been proved in favour of the defendant. The oral evidence almost unanimously supports him. Mr. Shamair Chand also referred me to two decisions of Mr. Ejaz Nabi, Munsif in 1881, in which at the instance of the proprietors certain alienations by non-proprietors in Ferozepura were set aside. These instances are really not in point as these were not really cases of reversion on the death of, or abandonment by, a non-proprietor, but of sale of the houses including the malba and the site by non-proprietors, and the sales were set aside at the instance of the proprietors.

As a last resort, Mr. Shamair Chand argued that the instances, even if they be held to be proved, were not sufficient to establish the custom in view of the recent decision of a Full Bench of this Court in 18 Lah 594¹ at p. 611, according to which a custom can be held proved only if it is "ancient" in the sense that it is shown to have existed "so long that the memory of man runneth not to the contrary." I do not think that this decision affects the present case. In the first place, the custom as recorded in the *wajibularz* is against the claim of the plaintiffs. The initial onus therefore was on them and they led no evidence except their own bare statements, unsupported by any instance to discharge it. On the other hand, the defendants have shown that the custom, as recorded, has been followed uniformly during a period of sixty years. Proof of the existence of custom over such a period has been considered by the Courts in India to be sufficient to hold that it is binding: *see inter alia* 34 P R 1907² at p. 161, 85 P R 1901,³ 17 All 87⁴ at p. 92, 20 Mad 389⁵ and Boulnois and Rattigan's Notes on Customary Law, p. 34. Moreover it has been held by their Lordships of the Privy Council in several cases that the technical rules of English law governing the establishment of custom cannot be followed rigidly in proving the exist-

tence of a custom in this country: 5 Luck 70⁶ at p. 75, 45 Cal 450⁷ at p. 460 and 5 Lah 200⁸ at p. 206. It is also well recognized that in India a custom may fall into desuetude and be superseded by another custom according to the ethical and legal notions of the community in which it is in force, provided of course the existence of the substituted custom can be proved by a series of well-known, concordant, and on the whole continuous instances, extending over a reasonable length of time: *cf.* 4 Bom 545,⁹ 110 P R 1906¹⁰ at p. 407; *cf.* 1 Cal 186¹¹ at p. 194 where proof of 40 years of practice was considered sufficient to destroy the existence of rule of descent which admittedly prevailed before. For the foregoing reasons, I hold that the custom, as recorded in the *wajibularz*, has been proved to exist and that the plaintiffs have failed to establish their claim except to the extent admitted by counsel for the defendant before Bhide J. that Malik Mohammad Amin was not the sole owner of Ferozepura. The decision of the Courts below therefore is correct. I dismiss the appeal with costs.

D.S./R.K.

Appeal dismissed.

6. Roshan Ali Khan v. Asghar Ali, (1930) 17 A I R P C 35=121 I C 517 = 57 I A 29 = 5 Luck 70 (P O).
7. Abdul Hussein Khan v. Mt. Bibi Sona Dero, (1917) 4 A I R P C 181=43 I C 306 = 45 I A 10=45 Cal 450 (P O).
8. Durga Devi v. Shambhu Nath, (1924) 11 A I R P C 113=80 I C 965=51 I A 182=5 Lah 200 (P C).
9. Mathura Naikin v. Esu Naikin, (1879) 4 Bom 545.
10. Daya Ram v. Sobal Singh, (1907) 110 P R 1906=31 P L R 1907=59 P W R 1907 (F B).
11. Raj Kishen Singh v. Ram Joy Surma, (1875) 1 Cal 186=19 W R 8(P C).

A. I. R. 1938 Lahore 684

RAM LALL J.

Hardial — Convict — Petitioner.

v.

Emperor.

Criminal Revision No. 1699 of 1937, Decided on 4th March 1938, from order of Sess. Judge, Ferozepore, D/- 8th November 1937.

Penal Code (1860), S. 366-A — Mere fact that accused tried to sell girl for immoral purposes is not sufficient to establish offence under Sec. 366-A.

The mere circumstance that the accused accompanied a person who was alleged to have raped the girl or he was trying to sell the girl, possibly for

1. Bahadur v. Nihal Kaur, (1937) 24 A I R Lah 451=169 I C 909=I L R (1937) Lah 594=39 P L R 349 (F B).

2. Maharaj Narain v. Banogi, (1907) 34 P R 1907.

3. Zarif Khan v. Amir Khan, (1901) 85 P R 1901.

4. Kuar Sen v. Mamman, (1895) 17 All 87=1895 A W N 10.

5. Palaniandi Tevan v. Puthiran Gonda Nadan, (1897) 20 Mad 389.

immoral purposes may be suspicious but is not sufficient to establish the essential ingredients of the offence under S. 366-A. [P 685 C 1, 2]

Jiwan Lal Kapur — *for Petitioner.*

Mohd. Monir, Asst. Advocate-General
— *for the Crown.*

Order.—Hardial, son of Gobinda, was tried by a Magistrate of the First Class in the Ferozepore District and sentenced to two years' rigorous imprisonment under S. 366-A, I. P. C. His appeal was rejected by the learned Sessions Judge, Ferozepore, by order dated 8th November 1937, and he has now moved this Court through Mr. Jiwan Lal Kapur, under S. 439, Criminal P. C., for a revision of that order. The brief facts are that one Mt. Manohri, a young girl of 14, was purchased by one Shashpal from her husband. This Shashpal sold the girl to Partu and to the petitioner. It is alleged that these two tried to sell Mt. Manohri unsuccessfully in the Montgomery District and brought her back to Abohar, where they represented that the girl though a Mahomedan was in fact a Jat. Partu, who was absconding at the time of the trial of the petitioner and has since been arrested, was suspected by Duni Chand, prosecution witness, of being a habitual abductor of women, and Duni Chand with Walla Ram and Chandi Ram went to where the girl was and on learning that she was a Mahomedan took her to the thana where a report was lodged. Partu made good his escape, but the petitioner was caught and challaned.

The petitioner's defence is that he was going about with Partu in search of employment and that he had no connexion either with the purchase or attempted sale of the girl and in any case had not ever tried to seduce her to illicit intercourse. In support of the story for the prosecution, we have the statement of Mt. Manohri corroborated by the circumstance of the petitioner going to Montgomery District and back to Abohar in the Ferozepore District in the company of the girl and Partu, and also by the allegation that he tried to run away when Walla Ram and others questioned the girl. It is significant that the girl herself attributes a prominent part to Partu, who, she says, used to rape her, but not a single question even was put to her as to what part the petitioner took in either enticing her away or seducing her to illicit intercourse. The mere circumstance that the petitioner accompanied Partu or he was trying to sell the girl, possibly for immoral purposes, may

be suspicious but is not sufficient in my opinion to establish the essential ingredients of the offence charged against the petitioner. His alleged attempt at running away also does not appear to me to be either satisfactorily proved or sufficiently corroborative of his guilt. It is not unlikely that realizing that Mt. Manohri was going to be taken to the thana he, in order to escape trouble, tried to slip away. This does not indicate necessarily a guilty knowledge. In my opinion there is a sufficient element of doubt in this case and the petitioner is entitled to the benefit of this doubt. I accordingly set aside the conviction and sentence passed on Hardial, petitioner, and direct that he will be released forthwith.

D.S./R.K.

Conviction set aside.

A. I. R. 1938 Lahore 685

BHIDE J.

Firm Jhinda Ram Fateh Chand —

Appellant.

v.

Mahni and others — Respondents.

Execution First Appeal No. 47 of 1938, Decided on 2nd May 1938, from order of Sub-Judge, First Class, Chiniot, D/- 15th December 1937.

(a) Punjab Relief of Indebtedness Act (7 of 1934), S. 21 — Civil Court can take cognizance of plea of lack of jurisdiction in Board to pass an order (*Obiter*).

Section 21 only debars a Civil Court from taking cognizance of certain classes of suits and a Civil Court can take cognizance of a plea of lack of inherent jurisdiction in the Board to pass a certain order. [P 686 C 1]

(b) Registration Act (1908), S. 17 (2) (vi) — Agreement recorded by Debt Conciliation Board relating to lease for period of 12 years — Agreement even if regarded as decree requires registration if it includes properties of persons not applicants before Board.

Even if an agreement recorded by the Debt Conciliation Board under S. 17, Punjab Relief of Indebtedness Act, relating to a lease for a period of 12 years be considered as a decree falling under S. 17 (2) (vi), Registration Act, it needs registration if the agreement includes properties of persons who were not applicants before the Board. [P 686 C 2]

Ram Chand Manchanda and Roop Chand — *for Appellant.*

Abdul Aziz and Inder Dev —

for Respondents.

Judgment.—This appeal arises out of an application for execution of an agreement recorded by the Debt Conciliation Board under S. 17, Punjab Relief of Indebtedness

Act. The material facts were that one Mahni had applied to the Board for settlement of his debts. Notices were issued to the creditors and thereafter an agreement was recorded by the Board to which not only the applicant Mahni but two other persons named Wali Dad, and Bhai Khan, his brothers, were parties. Neither Wali Dad nor Bhai Khan had made any application to the Board according to law. By virtue of the agreement certain property was leased for a period of 12 years. The agreement does not clearly state to whom the property in question belonged but apparently the debts of Mahni, Wali Dad, Bhai Khan and Muhammad (who is dead), a cousin of Mahni, were taken into consideration and presumably the property belonging to these persons was involved. One of the creditors then proceeded to execute this agreement when an objection was raised on behalf of Mahni and others that the agreement could not be executed as a decree, as the Board had no jurisdiction to record the agreement under S. 17 as Wali Dad and Bhai Khan had not made any application to the Board.

It was also contended that the agreement required registration as it related to a lease for a period of 12 years and secondly, even if it was to be considered as a decree falling under S. 17 (2) (vi), Registration Act, it needed registration as the agreement included properties of persons who were not applicants before the Board. S. 21, Punjab Relief of Indebtedness Act, is relied on by the judgment-debtors; but that Section only bars certain suits and does not appear to be in point. That Section only debars a Civil Court from taking cognizance of certain classes of suits, and as at present advised I do not see why a Civil Court should not be able to take cognizance of a plea of the kind raised in this case, viz. lack of inherent jurisdiction in the Board to pass a certain order. But I consider it unnecessary to decide this point, for, it seems to me clear that the agreement in question required registration, as it amounted to a lease for 12 years. The learned counsel for the appellant tried to argue that it was a 'mortgage' but the wording of the agreement appears to me to leave no doubt that it was tantamount to a lease as it purported to be (mustajiri) and as such it would fall under S. 17 (1) (d), Registration Act. S. 17 (2) (vi), which exempts certain classes of decrees from registration, applies only to documents falling

under Cls. (b) and (c) of S. 17 and not to those falling under Cl. (d) of that Section. Moreover, even under S. 17 (2) (vi) the agreement would have required registration as it comprised property which was extraneous to the subject-matter of the application of Mahni, which alone was before the Board. It seems to me therefore that the agreement recorded by the Board cannot be received in evidence for want of registration. I therefore uphold the decision of the Court below dismissing the application for execution of the said agreement on this ground, and dismiss the appeal. In view of all the circumstances I leave the parties to bear their costs in this Court.

D.S./R.K.

Appeal dismissed.

A. I. R. 1938 Lahore 686

ADDISON AG. C. J. AND DIN MOHAMMAD J.

Jai Dayal — Defendant — Appellant.

v.

*Dewan Ram Saran Das and others,
Plaintiffs and another, Defendant —
Respondents.*

First Appeal No. 401 of 1937, Decided on 3rd June 1938, from decree of Sub-Judge, 1st Class, Amritsar, D/- 9th August 1937.

(a) **Hindu Law—Religious endowment—Ceremonies of sankalp and samarpan are not essential — Intention of maker to divest and formal divesting are sufficient — On considering circumstances valid dedication held created.**

According to the Hindu law as administered in British India, the formal religious ceremonies of sankalp and samarpan, though ordinarily performed among the orthodox Hindus, are not essential for the creation of a valid endowment for religious purposes. So long as there is a clear and unequivocal manifestation of intention to create a trust and there is a formal divesting of the ownership in the property on the part of the donor and vesting the same in another, or even in the donor himself as a trustee, that is to say, so long as there is a clear change in the tenure of the property with the intention on the part of the donor to devote it to religious or public purposes, dedication thereof must be deemed to be complete. The evidence of divestiture may be contemporaneous and the subsequent acts and conduct of the donor are irrelevant and cannot reinvest him: *A I R 1934 Lah 771 and A I R 1935 Nag 35, Rel. on; A I R 1933 Lah 189 and A I R 1938 P C 73, Expl.; A I R 1933 Lah 833 and A I R 1937 Lah 106, Disting.*

[P 689 O 1, 2]

On more occasions than one, the dedicator declared in unequivocal terms that the house in question was set aside for the purpose of being used as a resting place for the marriage processions of the Khatris of the locality. More than one tablet was affixed on the house, the trend of all of which was to emphasize the wakf nature of the

property. On the completion of the building the dedicator requested the Governor of the Punjab to perform its opening ceremony and further invited almost all the gentry of the place on that occasion and there made a dedication to the effect that the house had been set aside for the purposes mentioned above :

Held that in the face of these circumstances it could not be urged that the house was not wakf or that the dedication was bad in the eye of the law on account of its being indefinite and vague. Hence, the using by the son of the dedicator of a part of the house as his own residence and allowing the other portion to be used as a girls' school was counter to the wishes of the settlor and was thus a breach of trust. [P 659 C 1]

(b) Estoppel - Person with full knowledge of facts admitting wakf nature of house — He cannot be allowed to resile from that position.

A party cannot be allowed to approbate and reprobate. Where a person with full knowledge of the facts in unmistakable terms admitted the wakf nature of a house, he cannot subsequently be allowed to resile from the position : *A I R 1935 Mad 1066 and A I R 1926 Lah 650, Rel. on.*

[P 690 C 1]

M. C. Mahajan and Yashpal Gandhi —
for Appellant.

M. L. Puri — *for Respondents*
(*Plaintiffs*).

Din Mohammad J. — This appeal has arisen out of a suit instituted by Diwan Ram Saran Das and four others, Khatri by caste, residents of Amritsar, against one Jai Dayal and his minor brother Madan Mohan, under S. 92, Civil P. C. The relief claimed was the removal of Jai Dayal from the managership of a house known as Janjghar, for the appointment of new trustees, for the settlement of a scheme for the future management of the said house and for rendition of accounts. It was alleged in the plaint that in 1923 the father of the defendants, Durga Das, built a house which he dedicated for the use of the marriage processions of the Khatri residents of the locality and that on the completion of the building he placed inscriptions on the front wall of the house explaining the object of the dedication. The house was so used during the life-time of Durga Das and for some time after his death which took place on 30th October 1929. But a year and a half prior to the institution of the suit, Jai Dayal took possession of the house and while he installed himself in one portion of the house, he leased the other portion as his personal property, thus diverting the house altogether from its original use. The minor defendant was impleaded merely on account of his relationship with Durga Das but no relief was asked for as against him.

Jai Dayal could not be served in the first instance and it was consequently prayed by the plaintiffs that service may be effected on his agent, Bhagwan Das. Notice was served on Bhagwan Das but he objected that he was not empowered to receive any summons on his behalf. The Subordinate Judge however repelled this contention and called upon him to submit his pleas which he did. He repudiated the claim of the plaintiffs and further raised several objections on technical grounds. On 27th July 1936, one Sahib Ditta appeared on behalf of Jai Dayal and described as his mukhtar-i-am. His statement was recorded before issues and in that statement he admitted that Durga Das had dedicated the house in suit for the purposes specified in the plaint, but he contended that the property was being used in conformity with the directions of Durga Das and that consequently no interference with the defendant's management was called for. On the very same day, Lala Dulat Ram Tandan, counsel for Bhagwan Das, made a statement questioning the locus standi of Sahib Ditta to make any statement on behalf of Jai Dayal. An issue was framed on this point along with certain other technical issues. The other issues were decided against the defendant but the issue in regard to Sahib Ditta's locus standi was left undisposed of. On 25th November 1936, Jai Dayal himself appeared in the case and put in his pleas traversing all the allegations made by the plaintiffs and raising other formal issues in the case. On the pleadings of the parties the following issues were framed :

(1) Is the property in dispute wakf property and if so, what is the nature of the wakf? (2) Has there been any breach of the terms of the wakf and if so, what; and what is its effect? (3) Did defendant realize any rent from the property in suit and is he liable to render accounts to the plaintiffs and if so, what amount is due? (4) Are all plaintiffs not taking interest in the suit and if so, what is its effect? (5) What is the jurisdictional value of the suit? (6) Are plaintiffs entitled to sue if Issues 1 and 2 are proved? (7) Relief?

Issues 4 to 6 were not pressed at the time of the arguments. Issue 2 was decided against the defendant and it was held that the defendant in using the building for his own residence and in letting out the rest of the building to a Pathshala was committing a breach of the trust and that consequently the plaintiffs were entitled to the relief prayed for, if it was held that the property was wakf. Issue 3 was found against the

plaintiffs. The main controversy raged round Issue 1 and after discussing all the pros and cons of the matter, the Subordinate Judge found in favour of the plaintiffs on that question and consequently authorized a respectable member of the Khatri brotherhood of the name of Rai Sahib Lala Labh Chand to call a meeting of the Khatri of Amritsar and elect a committee of five persons to take charge of the property in suit. Jai Dayal, defendant, has appealed.

Counsel for the appellant has contended that there was no valid wakf inasmuch as Durga Das never divested himself of the ownership in the property and also for the reason that his declaration was vague. He has further urged that the occupying of a portion of the house by Jai Dayal in the capacity of a supervisor of the building and his allowing the remaining part of the building to be used by a girls' school are not inconsistent with the object of the wakf and no case therefore has been established to justify his removal especially as he belongs to the founder's family. The main questions involved in this case therefore are: (1) Whether there was a valid dedication made by Durga Das, and (2) whether the circumstances brought on the record justify the eviction of Jai Dayal from the house and the settlement of a scheme for its future management on the lines proposed by the Subordinate Judge. There is abundant evidence on the record to show that on more occasions than one Durga Das declared in unequivocal terms that the house in question was set aside for the purpose of being used as a resting place for the marriage processions of the Khatri of the locality. More than one tablet was affixed on the house, the trend of all of which is to emphasize the wakf nature of the property. For example, one of them says that the house is a Khatri Shadighar built by Durga Das. Another reiterates the object of the construction of the building and lays down certain conditions under which it is to be used, one of which is that it can be used on the occasions of marriages or for any other laudable purpose for seven days and that for any time over and above that period, special permission is required. The third inscription again stresses the wakf nature of the property and adds that no person is entitled to sell, mortgage or dispose of the house in any other manner.

It is also reliably established that on the completion of the building Durga Das requested His Excellency Sir Edward Mac-

lagan, Governor of the Punjab, to perform its opening ceremony and further invited almost all the gentry of the place on that occasion and, there in the presence of all, made an unambiguous declaration to the effect that the house had been set aside for the purposes mentioned above. Throughout the period that Durga Das lived, he used the building in conformity with his declaration and never diverted it from its original purpose. A manager had been appointed by him to look after its maintenance and a chaukidar to keep watch on it. Marriage parties had to deposit Rs. 10 in advance to meet the expenditure on the supply of electricity and water and this state of affairs continued until some time after the death of Durga Das.

One day before his death, Durga Das made a will in which again the wakf nature of the property was emphasized in the clearest possible terms. While making the disposal of his properties, he stated that it should be remembered that he had already dedicated for charitable purposes the house in suit which was known as Janjghar. In order to ensure that it should not be misused, he referred to the inscriptions which had already been placed on it and reiterated his declaration that the house in suit should remain wakf for ever. Even Jai Dayal defendant himself, while entering into an agreement with his own minor brother of 17th August 1930 in regard to the property left by Durga Das, undertook to abide by the will of their father dated 29th October 1929, and to accept it in its entirety. Not only that, he even in the body of that agreement referred to the Janjghar in suit and declared that it was wakf and that it should remain so permanently. On the same day, the two brothers executed another agreement to refer certain disputes arising between them to the arbitration of one Lala Radha Kishen and one of the points in dispute was stated to be as to which of the secular properties of theirs should be attached to the house in suit to meet the necessary expenditure involved in its maintenance and up-keep. It was also suggested there that a committee should be set up and regular office-bearers nominated to look after the building. On 24th February 1932, the arbitrator made an award in which he declared the Janjghar to be wakf, but did not consider it necessary to appoint any outside committee to manage the building, inasmuch as no permanent income accrued from it.

In the face of the circumstances mentioned above, it cannot be urged that the house was not wakf or that the dedication made by Durga Das was bad in the eye of the law on account of its being indefinite and vague. Counsel for the appellant referred to A I R 1933 Lah 189¹ and A I R 1938 P C 73² in support of his contention that unless the sankalp and samarpan ceremonies are undergone, no valid dedication can take place under the Hindu law. It is true that in A I R 1933 Lah 189¹ some remarks were made which may be susceptible of the interpretation put upon it by the appellant's counsel, but as explained in 16 Lah 85,³ the learned Judges who were responsible for that decision did not intend to lay down any such rigid rule. The Hon'ble the Acting Chief Justice, who is a member of this Bench, was a party to that decision and he suggests that what was intended to be laid down in A I R 1933 Lah 189¹ has been rightly appreciated by the learned Judges in 16 Lah 85.³ There it has been clearly stated that according to the Hindu law as administered in British India, the formal religious ceremonies of sankalp and samarpan, though ordinarily performed among the orthodox Hindus are not essential for the creation of a valid endowment for religious purposes. Jai Lal J. who delivered the judgment says :

The true meaning of the law, in my opinion, is that so long as there is a clear and unequivocal manifestation of intention to create a trust of this description and there is a formal divesting of the ownership in the property on the part of the donor and vesting of the same in another or even in the donor himself as a trustee, that is to say, so long as there is a clear change in the tenure of the property with the intention on the part of the donor to devote it to religious or public purposes, dedication thereof must, in my opinion, be deemed to be complete.

I am in respectful agreement with the principle enunciated above, and I cannot think of any other case where the principles laid down above could be applied with greater force. In A I R 1935 Nag 35⁴ the same view was taken by the Additional Judicial Commissioners who further said that divesting of ownership which is neces-

sary in the case of such dedications, can be done by a clear expression of intention to dedicate the property and to renounce ownership coupled with acts showing appropriation of the income of the property to the purposes of the endowment. Nothing that is laid down in A I R 1938 P C 73² helps the appellant in my opinion. Their Lordships quoted with approval the following passage from the judgment of this Court under appeal :

It is not disputed that for the foundation of a charitable endowment by a Hindu in this Province no writing is required. What is necessary is that the purpose be clearly specified and that the property intended for the endowment should be set apart as dedicated to that purpose. It is necessary that the donor should divest himself of the property.

Their Lordships further added that the evidence of divestiture may be contemporaneous and the subsequent acts and conduct of the donor are irrelevant and cannot re-invest him. As stated above, Durga Das made even His Excellency the Governor of the Punjab to bear witness to his dedication and gave the whole world to understand not only by inscriptions but by both verbal and written declarations that he no longer possessed the house as secular property and that it was not subject to the incidents of sale, mortgage, etc. as secular property is. This divestiture does, on the authority of the Privy Council judgment cited above, complete the act of dedication and even if Durga Das or his descendants subsequently conducted themselves in a manner which was inconsistent with the original dedication, that would be immaterial. Counsel for the appellant has further referred to 14 Lah 827⁵ and A I R 1937 Lah 106⁶ in support of the proposition that a dedication made in vague terms was bad in law. With the proposition in the abstract no one can disagree, but the question is whether the present case comes within the mischief of the rule. In 14 Lah 827⁵ the three objects of the trust created by a will had to be read disjunctively so that the trustees had the discretionary power to apply the funds to any one of the three objects to the exclusion of the other two or in such proportion as they thought fit, and one of the three objects of the trust was invalid. It was on that basis that it

1. Chandu Lal v. Rampat Mal, (1933) 20 A I R Lah 189=141 I C 523=34 P L R 105.

2. Sunder Singh v. Sunder Singh, (1938) 25 A I R P C 73=172 I C 993=I L R (1938) Lah 63=65 I A 106 (P O).

3. Prem Nath v. Har Ram, (1934) 21 A I R Lah 771=154 I C 229=16 Lah 85=36 P L R 13.

4. Ram Swaroop v. Ramchandraji Mandir, (1935) 22 A I R Nag 35=157 I C 17=31 N L R 188. 1938 L/87 & 88

5. Narain Das v. Brij Lal, (1933) 20 A I R Lah 833=146 I C 1013=14 Lah 827=35 P L R 11.

6. Lal Chand Mehra v. Local Committee of Management Gurdwaras, Amritsar, (1937) 24 A I R Lah 106=172 I C 173.

was held that the whole bequest failed. This is not the case here. Moreover the House of Lords judgment which was relied upon in that case clearly stated that if the word 'charitable' had stood alone, the devise would have been sufficiently definite and valid and as remarked above, the present declaration had been made in these terms. In A I R 1937 Lah 106,⁶ it was said, and rightly so, that a trust by way of dharmarth cannot be enforced. In the present case the word 'dharmarth' is not used to indicate the object of the trust but to explain the nature of the property, and therefore that principle does not hold good.

As stated in A I R 1935 Mad 1066⁷ and A I R 1926 Lah 650⁸ a party cannot be allowed to approbate and reprobate. In the two agreements entered into between the two brothers on 17th August 1930, Jai Dayal had with full knowledge of the facts in unmistakable terms admitted the wakf nature of the house in suit and he cannot now be allowed to resile from that position.

I have no hesitation therefore in holding that the property in suit was set apart for ever for the use of the marriage processions of the Khatris of the locality and that it cannot be diverted now from its original purpose. The appellant in using a part of it as his own residence and allowing the other portion to be used as a girls' school has run counter to the wishes of the settlor and has thus committed a breach of trust. In the circumstances, the order made by the Subordinate Judge was the only proper order to be made. It will of course be open to Rai Sahib Lala Labh Chand, Honorary Magistrate, to consider the claim of Jai Dayal to be a member of the committee which may be set up to manage the building in suit, but I think it will not be advisable to force his hands in any manner. I would therefore affirm the decision of the Court below and dismiss this appeal with costs.

Addison Ag. C. J.—I agree.

D.S./R.K.

Appeal dismissed.

7. Lakshmiddevamma v. Kesavarao, (1935) 22 A I R Mad 1066=159 I C 943.

8. Ram Sarup v. Ram Saran, (1926) 13 A I R Lah 650=96 I C 915.

*** A. I. R. 1938 Lahore 690**

BHIDE J.

Ram Chand — Defendant — Appellant.
v.

Shamas Din, Plaintiff and others,
Defendants — Respondents.

First Appeal No. 68 of 1937, Decided on 29th November 1937, from order of Dist. Judge, Attock at Campbellpur, D/. 6th February 1937.

*** Civil P. C. (1908), S. 47—Suit by judgment-debtor to set aside sale held in execution on ground of fraud in respect of application under O. 21, R. 89—Matter falls under S. 47 and cannot be agitated by separate suit.**

A judgment-debtor brought a suit for setting aside a sale of his land held in execution on the ground that his sister made an application under O. 21, R. 89, Civil P. C., and had deposited the necessary amount but that this application was fraudulently removed by the decree-holder and the sale was obtained without this application being brought to the notice of the Court or any decision given thereon :

Held that the matter really was within the provisions of S. 47, Civil P. C. and could only be decided under that Section and not by a separate suit. The mere fact that the sale had been confirmed and an auction-purchaser was interested was no ground for holding that S. 47 could not apply : 19 Cal 683, *Foll.* ; A I R 1925 All 146, *Disting.* [P 691 C 1].

Prakash Chandar for Shamair Chand —
for Appellant.

Ganesh Datta — for Respondents.

Judgment.— This is a second appeal arising out of a suit instituted by the plaintiff Shamas Din for setting aside a sale of his land which had been effected in execution proceedings relating to a decree against him. The trial Court held that the suit was barred by the provisions of S. 47, Civil P. C., as well as under O. 21, R. 92 (3), Civil P. C. On appeal the learned District Judge however came to the conclusion that the suit was based on ground of fraud which was wider than the grounds which could be urged in an application under O. 21, R. 90, Civil P. C., and therefore the suit was competent. He accordingly accepted the appeal and remanded the suit for re-decision. From this order of remand the present appeal has been preferred by the defendant. The learned counsel for the appellant urged that there were two grounds on which the plaintiff had based his claim, namely (1) that the notice as regards the sale was not served on him when he was in jail and the sale was effected without his knowledge, and (2) that on

2nd January 1935 the plaintiff's sister made an application under O. 21, R. 89, Civil P. C. and had deposited the necessary amount, but that this application was fraudulently removed by the decree-holder and the sale was obtained without this application being brought to the notice of the Court or any decision given thereon.

As regards the first point the learned District Judge has himself held that a separate suit would be barred by the provisions of O. 21, R. 92 (3), Civil P. C., and it is therefore unnecessary to consider that point. The learned counsel for the appellant has however urged that the learned District Judge was not right in holding that the other ground of fraud in respect of the application under O. 21, R. 89 could be agitated by a separate suit. He contended that the matter really was within the provisions of S. 47, Civil P. C., and could only be decided under that Section and not by a separate suit. In support of this contention the learned counsel relied on a decision of their Lordships of the Privy Council reported in 19 Cal 683.¹ The learned counsel for the respondent on the other hand contended that S. 47 was not applicable, as the sale had already been confirmed and a third party, namely the auction-purchaser, was interested. But neither of these contentions appears to me to have force, in view of the Privy Council decision referred to above. In that case also the sale had been confirmed and it was held that the mere fact that an auction-purchaser was interested was no ground for holding that S. 47, Civil P. C., could not apply. The learned District Judge has relied on a ruling of the Allahabad High Court reported in A I R 1925 All 146.² But in that case the sale had been held by the Collector, apparently under Sch. 3, Civil P. C., and S. 47 was held to be inapplicable. In my judgment the decision of the trial Court was correct. I therefore accept the appeal and setting aside the order of remand passed by the learned District Judge restore the decree of the trial Court with costs throughout.

D.S./R.K.

Appeal accepted.

1. *Prosanno Kumar Sanyal v. Kali Das Sanyal*, (1892) 19 Cal 683=19 I A 186=6 Sar 209 (P C).

2. *Bhagwan Das v. Suraj Prasad*, (1925) 12 A I R All 146=84 I C 1081=47 All 217=22 A L J 1060.

A. I. R. 1938 Lahore 691

RAM LALL J.

Guranditta — Accused — Petitioner.

v.

Emperor.

Criminal Revn. No. 1 of 1938, Decided on 28th March 1938, case reported by Addl. Sess. Judge, Lahore, No. 60 of 1937, for orders of High Court.

(a) Punjab Motor Vehicles Rules, R. 23—Maximum load has not been provided for private lorries—Owner of private lorry carrying load heavier than its carrying capacity cannot be convicted under R. 23.

Unless the wording of the rules is beyond doubt, the manufacturers' specifications regarding maximum load which can be carried cannot be read as part of the rules made by the Punjab Government. When the rule-making authority has deliberately made a distinction between private lorries and public lorries and has specified that public lorries shall not carry more than a specified amount of weight, it is reasonable to assume that it was not intended that any such limitation should apply to vehicles which are not public motor vehicles. Hence the owner of private lorries cannot be convicted under R. 23 of Punjab Motor Vehicles Rules read with S. 16, Motor Vehicles Act, on the ground that his lorry was carrying a load in excess of its carrying capacity: *Criminal Revn. No. 519 of 1932, Rel. on.* [P 692 C 1, 2]

(b) Interpretation of Statutes—Construction of penal provision.

When two equally reasonable interpretations are possible, the penal provision should be so construed as not to place a burden on the subject.

[P 692 C 2]

Muhammad Amin Khan —

for Petitioner.

Khurshaid Zaman for Advocate-General
— *for the Crown.*

Order.—The learned Additional Sessions Judge of Lahore has made this reference and thirteen others which are based on similar facts and the same point of law is involved in each of the fourteen cases. In each of these cases the owners of private lorries were challaned by the police and convicted under R. 23 of the Punjab Motor Vehicles Rules read with S. 16, Punjab Motor Vehicles Act on the allegation that their lorries were carrying a load in excess of their carrying capacity. In each case the Magistrate, who tried the cases summarily, inflicted a sentence of fine. The sole question that arises is whether any maximum load has been provided in the rules for private lorries. All lorries are either public or private and this distinction has been deliberately drawn in the rules framed under the Act. R. 23 under which the

convictions have been registered is in the following terms :

Every motor vehicle shall be maintained in such a condition as to comply with the specifications and rules applying to the class of vehicle to which it belongs, and the owner thereof (and the driver if he drives the vehicle knowing that any rule is being contravened) shall be liable, in cases of breach of this rule, to the penalty imposed by S. 16 of the Act.

It will be seen that this rule merely enacts that vehicles should be maintained in accordance with the specifications and rules laid down by the rule-making authority. For each vehicle a permit is required and the forms for the application for a permit for different kinds of vehicles are given in Appx. 3 to the rules. Form A-2 is the relevant form for private lorries and form BB-2 is the relevant form for public motor vehicles. In form BB-2 a maximum load which may be carried by each vehicle is prescribed but in form A-2 there is no such provision. It is true that both in form A-2 and in form BB-2 as indeed also in form A-1, which is the relevant form for private motor cars, there is a column in which the carrying capacity of each vehicle has to be specified and this is usually taken from the manufacturers' specifications. It was urged by the learned counsel, who appeared before me for the Crown, that because the carrying capacity of private motor lorries was given in this form, any owner who loaded a vehicle in excess of this capacity was guilty of an offence inasmuch as R. 95 (b) laid down that all classes of motor vehicles should be maintained in such a condition as to prevent danger to the public or to any person riding in the vehicle. I am unable to accept this argument. To accept this contention would involve the proposition that if the manufacturers' specifications of a private motor car said that the carrying capacity of that car was five passengers, any owner who carried six or more passengers in it, for however short a time, was guilty of an offence. In the second place, this interpretation would amount to the creation of an offence by implication. Unless the wording of the rules is beyond doubt, the manufacturers' specifications cannot be read as part of the rules made by the Punjab Government. In the third place, when the rule-making authority has deliberately made a distinction between private lorries and public lorries and has specified that public lorries shall not carry more than a specified amount of weight, it is reasonable

to assume that it was not intended that any such limitation should apply to vehicles which are not public motor vehicles. Fourthly, the interpretation sought to be placed by the learned counsel for the Crown involves a question of fact, whether in each case there is danger to the public or to a passenger by overloading. The Crown would have to prove the existence of such danger in each case and this would place an intolerable burden on the shoulders of the prosecution. It is absurd to imagine that the rule-making authority left the matter in this condition when a simple rule or a clause in the application for a permit could have put the position beyond doubt.

Assuming however that the rules can be read in the manner suggested by the learned counsel for the prosecution, it is obvious that when two equally reasonable interpretations are possible, the penal provision should be so construed as not to place a burden on the subject. A similar point arose in Criminal Revn. No. 519 of 1932 before Coldstream J., where the petitioner found to have been driving a lorry with a heavier load than its recorded capacity was held not to have been guilty of an offence. For the reasons stated above, I accept the recommendation of the learned Additional Sessions Judge and set aside the conviction in each of the fourteen cases referred by him to the High Court. The fines, if paid, will be refunded.

D.S./R.K.

Conviction set aside.

A. I. R. 1938 Lahore 692

DALIP SINGH J.

Firm Prabhu Dyal Balkishan Dass —
Petitioners.

v.

Bhondu Mal and others — Respondents.

Civil Misc. Petition No. 766 of 1937, Decided on 18th January 1938, for stay of execution in F. A. No. 465 of 1936.

Civil P. C. (1908), S. 51 — Contumacious conduct on part of judgment-debtor is necessary for arrest.

Under the new Act arrest is not possible unless there has been some contumacious conduct on the part of the judgment-debtor and mere inability to pay does not justify arrest. [P 693 O 1]

Vishnu Datt — *for Petitioners.*

Shamair Chand — *for Respondents.*

Order. — This is an application for stay of execution by way of arrest. An affidavit has been put in by the decree-holder in

para. 3 of which it is stated that the judgment-debtor has mortgaged and sold all his available property and hence has made the execution of the decree impossible. In para. 6 it is stated that the appellant is delaying the printing of the record. This allegation does not appear to be correct. In para. 7 it is stated that loss will be caused to the decree-holder. On the application for arrest only notice has been issued by the Court to the judgment-debtor to show cause. Under the new Act arrest is not possible unless there has been some contumacious conduct on the part of the judgment-debtor and mere inability to pay does not justify arrest. At present, I cannot decide whether there has been any contumacy in the conduct of the judgment-debtor but, I see no reason why there should be any stay of the proceedings for arrest. The Court below can decide whether it is true as alleged that the judgment-debtor has done away with the entire property available and whether the proceeds of the alienations are available for the discharge of this debt. The judgment-debtor is unable to deposit security for the decretal amount. I therefore dismiss the petition for stay. No order as to costs of this petition.

D.S./R.K. *Petition dismissed.*

*** A. I. R. 1938 Lahore 693**

TEK CHAND AND RAM LALL JJ.

Nanak Chand — Accused — Petitioner.
v.

Suraj Parkash — Complainant — Respondent.

Criminal Revn. No. 51 of 1938, Decided on 25th April 1938, from order of Addl. Sess. Judge, Lahore, D/- 3rd January 1938.

*** Criminal P. C. (1898), S. 544 — Rules under, made by Punjab Government, Vol. 3, Chap. 9, R. 1—Rule framed by Lahore High Court that ordinarily expenses of defence witnesses are to be paid by Government in every warrant case is ultra vires (Per Blacker J.).**

The only fair interpretation of R. 1, Chap. 9, Vol. 3 framed by the Punjab Government which makes no distinction between prosecution witnesses and defence witnesses is that Government by exercising its power of restriction, which it is authorized to exercise by S. 544, Criminal P. C., has limited the cases in which Magistrates may pay the expenses of witnesses to those mentioned in the rule. If the rule framed by the High Court lays down the contrary, that is to say, that ordinarily the expenses of defence witnesses are to be paid by Government in every warrant case, it is ultra vires: *A I R 1929 Lah 23; 108 I C 907; A I R 1932 Lah 481; A I R 1936 Lah 919 and A I R 1937 Lah 458, Not foll.* [P 694 C 1]

Sardar Harbans Singh for Durga Das Khullar—*for Petitioner.*

ORDER OF REFERENCE

Blacker J.—This is a petition against the order of a Magistrate upheld by the learned Additional Sessions Judge of Lahore refusing to summon certain defence witnesses in a case under S. 500, Penal Code, unless their expenses were deposited by the accused petitioner. On behalf of the petitioner it is contended that it is settled by a string of judgments of this Court that in warrant cases the Magistrate should summon defence witnesses at Government expense. The judgments quoted are: *A I R 1929 Lah 23*,¹ *108 I C 907*,² *A I R 1932 Lah 481*,³ *A I R 1936 Lah 919*⁴ and *A I R 1937 Lah 458*.⁵ Faced with this mass of authority, I am rather diffident about taking the opposite view. But one thing should be noticed and that is that none of the last four authorities have done anything but merely followed the first. It is necessary, therefore to go back to the original case, *A I R 1929 Lah 23*.¹ The case proceeds on the ground that it has been laid down as a rule by the Lahore High Court that in a warrant case the costs of an accused's necessary witnesses should ordinarily be borne by Government. The authority quoted is Rules and Orders of the High Court, Vol. 2, Chapter 6, Para. 67 (now Vol. 3, Chap. 1-D, R. 14). The actual words are:

In ordinary warrant cases however the cost of causing the attendance of accused's necessary witnesses is usually borne by Government.

With the utmost possible respect to the very great learning of the Hon'ble Judge whose ruling this is, it would appear to me that the sentence which he quotes occurs in a part of Rules and Orders which are not really rules of the Court but are more in the nature of pieces of advice by this Court to the subordinate Courts as to the manner in which they should exercise their functions. In some cases the advice has statutory sanction behind it; in others it has not. This is one of the cases where it does not appear to have any statutory

1. *Syed Habib v. Emperor*, (1929) 16 *A I R Lah* 23=117 *I C* 667=30 *Or L J* 814.
2. *Habib v. Mehdi Hussain*, (1928) 108 *I C* 907.
3. *Ram Narain v. Emperor*, (1932) 19 *A I R Lah* 481=1932 *Cr C* 619=139 *I C* 508=32 *Cr L J* 761=33 *P L R* 811.
4. *Parshotam Das v. Emperor*, (1936) 23 *A I R Lah* 919=1936 *Cr C* 1007=166 *I C* 128=38 *P L R* 1165.
5. *Khushi Muhammad v. Abdulla Khan*, (1937) 24 *A I R Lah* 458=170 *I C* 539=38 *Cr L J* 941=39 *P L R* 137.

sanction behind it. Reference should be made to S. 544, Criminal P. C., which runs as follows :

Subject to any rules made by the Local Government, any Criminal Court may, if it thinks fit, order payment on the part of Government, of the reasonable expenses of any complainant or witness attending for the purposes of any enquiry, trial or other proceeding before such Court under this Code.

As the statute itself has given the power to make rules not to the High Court but to the Local Government, any rules made by the High Court would, I think, be ultra vires, especially if they are inconsistent with the rules made by Government. Now Government has in fact made such rules and they are contained in Chap. 9, Vol. 3 of the Rules and Orders. These rules from their heading are shown to be made under S. 544 and were in force as far back as 1st July 1898. The first of these rules runs as follows :

The Criminal Courts are authorized to pay, at the rates specified below, the expenses of complainants or witnesses—(1) in cases in which the prosecution is instituted or carried on by or under the orders or with the sanction of the Government or of any Judge, Magistrate, or any other public officer, or in which it shall appear to the presiding officer to be directly in furtherance of the interests of the public service ; (2) in all cases entered in Col. 5 of Sch. 2 appended to the Code of Criminal Procedure, as not bailable ; (3) in all cases which are cognizable by the police and (4) of witnesses in all cases in which they are compelled by the Magistrate, of his own motion, to attend under S. 540, Criminal P. C.

It seems to me that the only fair interpretation of this rule, which makes no distinction between prosecution witnesses and defence witnesses is that Government by exercising its power of restriction, which it is authorized to exercise by S. 544 of the Code, has limited the cases in which Magistrates may pay the expenses of witnesses to those mentioned above. If the rule framed by the High Court—if it was indeed intended to be a rule—lays down the contrary, that is to say that ordinarily the expenses of witnesses are to be paid by Government in every warrant case, it appears to me to be ultra vires. It has been urged before me that the rule framed by Government is inequitable. I am very tempted to agree. But as it is framed under the rule-making power given to the Local Government by the statute itself, it has statutory force and whatever may be a Judge's opinion about it, he is bound to follow it. That being so, my decision in this case would be that as the case is neither instituted by Government, nor non-bailable

nor cognizable by the police, Government cannot be made to pay the expenses of the witnesses and the petition must be dismissed. But, as I have said, there is considerable weight of authority in favour of the opposite view, and I therefore think that this is not a matter which should be decided by a Judge sitting singly. I accordingly recommend that it be laid before a larger Bench.

Order of Division Bench

Mr. Harbans Singh for Mr. Durga Das Khular states that he does not wish to proceed with the complaint. Dismissed.

D.S./R.K. *Complaint dismissed.*

* A. I. R. 1938 Lahore 694

ADDISON AND ABDUL RASHID JJ.

Mam Raj—Defendant—Appellant.

v.

*Firm Sher Singh-Jia Lal, Plaintiff
and another, Defendant—*

Respondents.

First Appeal No. 252 of 1937, Decided on 10th January 1938, from decree of Senior Sub.Judge, Hissar, D/- 20th April 1937.

* Hindu Law — Joint family — Debts contracted by manager on promissory note signed by him — Extent of liability of other members stated.

Where debts are contracted by manager of a joint Hindu family, the other co-parceners are liable not personally but only to the extent of their interest in the family property, unless, in the case of adult co-parceners, the contract sued upon, though purporting to have been entered into by the manager alone is in reality one to which they are actual contracting parties, or one to which they can be treated as being contracting parties by reason of their conduct, or which they have subsequently ratified. The fact that a coparcener used to work at the shop is by itself not such conduct as would cause him to be treated as one of the contracting parties : *A I R 1935 Lah 735 and A I R 1937 Lah 247, Rel. on.*

[P 695 C 1]

Faqir Chand Mittal — *for Appellant.*

Shamair Chand and Parkash Chandra—
for Respondent (Plaintiff).

Addison J. — The plaintiff firm sued Chhabil Das and Mam Raj for Rs. 10,242, principal and interest, on the basis of two promissory notes, dated 21st January 1932 and 21st July 1933, for Rs. 8000 and 720 respectively. The suit has been decreed and Mam Raj has appealed against the decision making him personally liable. Mam Raj is the nephew of Chhabil Das. The real defence of Mam Raj was that he

was not joint with his uncle. The Subordinate Judge came to the conclusion on the evidence that he was joint and on this finding held him liable along with Chhabil Das, although the promissory notes were signed only by Chhabil Das. The law on the subject is not in doubt. It is stated on p. 259 of Mulla's Hindu Law (Edn. 8) as follows:

As regards the other coparceners, they are liable only to the extent of their interest in the family property, unless, in the case of adult co-parceners, the contract sued upon, though purporting to have been entered into by the manager alone, is in reality one to which they are actual contracting parties, or one to which they can be treated as being contracting parties by reason of their conduct, or one which they have subsequently ratified.

It is not alleged that Mam Raj subsequently ratified the contract. While there is no finding of the Subordinate Judge that the contract was one to which he could be treated as being a contracting party by reason of his conduct, it is true that, in the course of his judgment when he was coming to the finding that they were joint, he stated, as one of the circumstances going to prove this, the fact that he also used to work at the shop, but that by itself is obviously not such conduct as would cause him to be treated as one of the contracting parties. The same view has been taken in two cases in 17 Lah 311¹ and 17 Lah 395.² There are many other authorities to the same effect. We therefore accept the appeal with costs and, modifying the decree of the Subordinate Judge with respect to Mam Raj, direct that Mam Raj is only liable to the extent of his share in the joint Hindu family property.

D.S./R.K.

Decree modified.

1. Mutsadi Lal v. Sakhir Chand, (1935) 22 A I R Lah 795 = 161 I C 91 = 17 Lah 311 = 38 P L R 654.
2. Shiv Charan Das v. Hari Ram, (1937) 24 A I R Lah 247 = 170 I C 418 = 17 Lah 395 = 38 P L R 842.

A. I. R. 1938 Lahore 695

ABDUL RASHID J.

*Kanwar Chandra Rajsaran Singh —
Judgment-debtor—Appellant.*

v.

Munshi Lal — Decree-holder —

Respondent.

Exn. Second Appeal No. 1392 of 1937, Decided on 26th January 1938, from order of Dist. Judge, Hissar at Gurgaon, D/- 17th July 1937.

Limitation Act (1908), Art. 181—Decree for possession by *M* against *R* — In taking possession *M* obstructed by *B* who had been in possession as result of decision of trial Court in suit between *B* and *R* — *M*'s application under O. 21, R. 97 dismissed—Meanwhile appeal by *R* against decision of trial Court in suit between him and *B*—High Court holding *R* to be lawful owner—Appeal by *B* to Privy Council — Application for execution by *M* more than three years after decision of High Court held barred under S. 181.

One *M* obtained a decree for possession against *R* on 12th February 1927 and took out execution. He was however obstructed in taking possession by *B* who was in possession as a result of the decision of the trial Court in a suit between *B* and *R*. *M*'s application under O. 21, R. 97 was dismissed on 12th June 1928 on the ground that *B* was in lawful possession of the land under a decree of a Civil Court. Meanwhile *R* had appealed against the decision of the trial Court in the suit between *B* and *R* and the High Court on 16th January 1929 held that *R* was the lawful owner of the property. *B* preferred an appeal to the Privy Council. *M* filed an application on 23rd October 1935 for execution of his decree for possession :

Held that it was incumbent on *M* to make an application for execution within three years from 16th January 1929 on which the High Court held that *R* was the lawful owner of the land. *M* had no right to await the result of an appeal to the Privy Council filed by *B* from the decision of the High Court. The application for execution of 23rd October 1935 was therefore time-barred under Art. 181, Limitation Act : *A I R 1926 All 409, Rel. on.* [P 696 C 1, 2]

Held further that if the previous application for execution was taken to be in suspense, then it was incumbent on *M* to take a step-in-aid of the execution every three years from 12th June 1928 till 23rd October 1935. [P 696 C 2]

D. N. Aggarwal — *for Appellant.*

Tek Chand — *for Respondent.*

Judgment. — Munshi Lal obtained a decree for possession of land against Brij Rajsaran Singh on 12th February 1927. On the 30th March the decree-holder took out execution. He could not however obtain possession of the land in dispute as it was reported to the executing Court that persons other than the judgment-debtor, namely Basant Singh and others, were in possession of the property. The decree-holder thereupon presented an application under O. 21, R. 97, Civil P. C., complaining of resistance or obstruction by Basant Singh and others, and asking the Court to investigate the matter and to remove the obstructors. Evidence was recorded by the executing Court, and on 12th June 1928, the executing Court made a final order to the effect that Basant Singh and others were in lawful possession of the land in dispute under a decree of a Civil Court and that as they were not parties to the suit

brought by Munshi Lal against Brij Rajsaran Singh, they could not be removed. The application of the decree-holder against the obstructors was dismissed. It was also ordered that the file relating to the execution of the decree may be consigned to the record room. From 12th June 1928 till 23rd October 1935 the decree-holder took no action. On the latter date he presented an application for the execution of his decree dated 12th February 1927. The judgment-debtor raised an objection to the effect that this application was barred by limitation. The executing Court upheld the objection and dismissed the application for execution. On appeal the learned District Judge held that the application dated 23rd October 1935 was within time. Against this order the judgment-debtor has preferred a second appeal to this Court.

The application presented by the decree-holder under O. 21, R. 97, was dismissed by the Court under O. 21, R. 99, on 12th June 1928. It was open therefore to the decree-holder to institute a suit under O. 21 R. 103, to establish his right and to make Basant Singh and others defendants in this case. This suit could be instituted within a period of one year from 12th June 1928. The decree-holder failed to institute any such suit and Basant Singh and others continued to be in possession of the property in dispute. It appears that the property in dispute originally belonged to one Khushal Singh. On the death of the widow of Khushal Singh, Basant Singh and others laid a claim to the property. Brij Rajsaran Singh, judgment-debtor in the present case, also claimed the same property as the adopted son of the last male-holder. The trial Court passed a decree in favour of Basant Singh and others for possession of the property. Brij Rajsaran Singh appealed to the Allahabad High Court and the High Court held that Brij Rajsaran Singh was validly adopted by Khushal Singh and that he was entitled to the property in dispute. The suit of Basant Singh and others was dismissed with costs by the High Court. The judgment of the High Court was delivered on 16th January 1929. So far as the Courts in India are concerned, it was therefore finally decided in January 1929 that Brij Rajsaran Singh was the lawful heir of Khushal Singh, the last male holder. It was incumbent on the present decree-holder to institute his application for execution at the latest within three years of 16th Janu-

ary 1929. The right to apply certainly accrued to him on that date if not earlier. His application is therefore clearly barred under Art. 181, Limitation Act.

The lower Appellate Court relied on A I R 1925 All 572,¹ a Single Bench ruling, but this decision was set aside by the Letters Patent Bench in A I R 1926 All 409.² It was held in the last case that where there is an obstacle to the execution proceedings, for instance, the order that execution proceedings be stayed until the decision of another regular suit, as soon as that obstacle is swept away by a Court of competent jurisdiction, the duty again arises upon the decree-holder to take execution proceedings within three years, notwithstanding the fact that the judgment-debtor may have in the interval filed an appeal. In the present case the decree-holder had no right to await the result of an appeal to their Lordships of the Privy Council by Basant Singh and others. The learned counsel for the respondent contended that the order dated 12th June 1928 did not amount to a dismissal of his execution application and that his execution application must be taken to be in suspense all the time from 1928 to 1935 and that the present application may be regarded as a request for the revival of the previous application. This contention is also untenable. If the previous application is taken to be in suspense then it was incumbent on the decree-holder to take a step in aid of the execution every three years from 12th June 1928 till 23rd October 1935. For the reasons given above, I accept this appeal, set aside the order of the learned District Judge dated 17th July 1937 and restore that of the Senior Subordinate Judge dated 4th February 1937 dismissing the present application for execution as time-barred. Having regard to all the circumstances, I leave the parties to bear their own costs throughout.

D.S./R.K.

Appeal accepted.

1. Ganga Jee v. Sat Narain Lal, (1925) 12 A I R All 572=87 I C 205.

2. Sat Narain Lal v. Ganga Lal, (1926) 13 A I R All 409=94 I C 1005.

* A. I. R. 1938 Lahore 697

BLACKER J.

Bawa Faqir Singh — Petitioner.

v.

Emperor.

Criminal Misc. Appln. No. 281 of 1937,
Decided on 19th December 1937.

* Criminal P. C. (1898), S. 498—Appeal decided by High Court—Leave for appeal to Privy Council granted by Judicial Committee—Power of High Court to grant application for bail pending decision of appeal to Privy Council depends upon direction by Privy Council to accused to apply to High Court for bail.

Once the High Court has passed orders in a criminal appeal, it becomes functus officio and has no seisin in the case. This seisin may be revived when the Judicial Committee has granted leave to appeal. The power of High Court to deal with an application for bail pending decision of appeal to Privy Council depends on whether they have been directed by the Privy Council to do so or not. Once leave is granted and seisin taken, S. 498 expressly empowers the High Court to act in the matter not on its own motion but on behalf of the Privy Council, and its jurisdiction to that limited extent revives : *Case law reviewed.* [P 698 C 1]

M. Sleem and Indar Dev —

for Petitioner.

Mohammad Monir, Assistant Advocate-
General — *for the Crown.*

Order. — The applicant, Bawa Faqir Singh, an advocate of this Court, was convicted by a Special Magistrate under Ss. 467, 471 and 120-B, I. P. C., and sentenced to five years' rigorous imprisonment. On appeal to the High Court he was acquitted of the charge under S. 467, I. P. C., but the conviction under the other Sections and the sentence were maintained. He has now obtained leave to appeal from the Judicial Committee of the Privy Council, a copy of whose order is before me. He applies for bail pending the decision of this appeal. The first question before me is whether I have power to consider this application. Mr. Sleem for the petitioner relies upon a recent Calcutta case, *Babulal v. Emperor*.¹ This case came before the Calcutta High Court on two occasions and the judgment of the Division Bench on the first occasion is reported in A I R 1936 Cal 809.¹ There the learned Judges held that between the time that the High Court had finally dealt with a criminal case and the time when leave to appeal had been granted by the Privy Council, the High Court was functus officio and had no power to grant bail. They therefore at that stage

refused to grant bail. Subsequently however, the petitioner in that case obtained leave to appeal from the Privy Council and Mr. Sleem has laid before the Court a certified copy of the order of a Single Bench Judge granting bail to the petitioner in that case. The order in question however is extremely brief and in no way discusses the question of jurisdiction which had been left open by the Division Bench. Counsel has also referred to a case, which was a Full Bench judgment of the Madras High Court in 24 Mad 161.² In that case the Madras High Court held again in a very brief order that they had jurisdiction to make the order and released the accused on bail pending the final decision of the Privy Council.

The petition has been opposed on behalf of the Crown by the learned Assistant Advocate-General. He has cited the Full Bench case of the Punjab Chief Court in 15 P R 1908.³ In that case the Punjab Chief Court decided that they had no power to grant bail and dismissed the petition. The Court based its decision on the argument that S. 498 could not be construed without reference to the other Sections of the Code, the principle underlying which being that only the Court to which an appeal is preferred can admit to bail. In 49 All 247,⁴ a Division Bench judgment of the Allahabad High Court, the Allahabad High Court held that S. 498 did not apply but that it had inherent powers under S. 561-A and granted bail. The learned Assistant Advocate-General however points out that this view that the Court has inherent powers under S. 561-A has not been accepted by other High Courts. He has referred to a very recent judgment of a Division Bench of the Nagpur High Court in 167 I C 373.⁵ The whole case-law on the subject has been very carefully reviewed in that judgment. There the learned Judges held that they had no jurisdiction. That case however is different to the present one in one essential particular and that is that in that case the Privy Council had not yet granted leave to appeal ; the

2. *Queen-Empress v. Subrahmania Ayyar*, (1901) 24 Mad 161 = 2 Weir 657 (F B).

3. *Diwan Chand v. King-Emperor*, (1908) 15 P R 1908 = 8 Cr L J 89 = 19 P W R 1908.

4. *Emperor v. Ram Sarup*, (1927) 14 A I R All 97 = 93 I C 593 = 27 Cr L J 1377 = 49 All 247 = 25 A L J 97.

5. *Bashir-ud-Din Ahmad v. Emperor*, (1937) 24 A I R Nag 181 = 167 I C 373 = 38 Cr L J 384 = I L R (1937) Nag 296.

1. (1936) 23 A I R Cal 809 = 1936 Cr C 1121 = 166 I C 612 = 40 C W N 1313 = I L R (1937) 1 Cal 464.

stage merely was that the petitioner had expressed his intention of filing an appeal before the Privy Council. It seems to me clear on a consideration of this case that once the High Court has passed orders in a criminal appeal, it becomes functus officio and has no seisin in the case. This seisin may be revived when the Judicial Committee has granted leave to appeal. In the Nagpur case however, the Bench pointed out that there was a further distinction between a case in which the Privy Council in granting leave to appeal had also given a direction to the appellant to apply to the High Court for bail, and one in which there was no such direction. If I may say so with the utmost respect, I am very greatly impressed by dictum of the learned Judges of the Nagpur High Court that the power of the High Court to deal with an application of this sort depends on whether they have been directed by the Privy Council to do so or not. They have pointed out that once leave is granted and seisin taken, S. 498 expressly empowers the High Court to act in the matter not on its own motion but on behalf of the Privy Council and that its jurisdiction to that limited extent revives.

The highest judicial Tribunal in the Empire is then seized of the proceedings and it directs a Court subordinate to it, as it has every right to do, to perform a function which it has authority to perform under this Section.

This appears to me to be the answer to the question of jurisdiction. In the Madras case referred to above, the Privy Council had directed the petitioner to apply for bail to the Madras High Court and by this direction it clearly delegated to the Madras High Court its own undoubted inherent power to grant bail. In the Calcutta case,¹ on which Mr. Sleem has relied, the order of the learned Single Bench Judge, which he has produced, makes no mention whatever of this point and gives no reason why he has held that he is empowered to grant bail. There is a passage in the petition for bail in this case, a copy of which has also been produced, in which it is stated that their Lordships advised application for bail to be made to the authorities in this country. It is therefore to be presumed that the learned Judge of the Calcutta High Court in that case held himself empowered to grant bail in consequence of this direction. In the present case there is no such direction before me. There is a similar statement in the petition in this

case that the question of bail had been left "as usual" to this Court, but this is not borne out by any of the documents produced, i. e. a cable and a letter for the solicitors, both of which are silent on the subject. I am therefore of opinion, after considering the authorities to which I have referred above, that this High Court has not now power to grant bail in this matter, unless it is directed to consider the petitioner's application for bail by their Lordships of the Judicial Committee of the Privy Council which has given him leave to appeal. Holding therefore that I have no power to grant bail at present, I dismiss the application with the remark that it can, in my opinion, be revived, if the petitioner obtains and produces any direction from their Lordships of the Privy Council in the matter, which would authorize this Court to go into the question of bail.

D.S./R.K. *Application dismissed.*

*** A. I. R. 1938 Lahore 698**

ADDISON AND DIN MOHAMMAD JJ.

Mian Bashir Ahmad — Defendant —
Petitioner.

v.

Mrs. Mary Minck — Plaintiff —
Respondent.

Civil Revn. No. 496 of 1937, Decided on 5th January 1938, from order of Sub-Judge, Third Class, Lahore, D/- 21st May 1937.

* Civil P. C. (1908), O. 3, Rr. 1 and 4 — 'Applying' is doing something more than mere acting—Provisions of Rr. 1 and 4 explained — Pleader applying on behalf of client must have his authority in writing.

A pleader who puts in an application on behalf of a litigant acts for him and cannot therefore do so, unless he is authorized in writing by him. While R. 1 of O. 3, mentions three functions of a pleader, viz. 'appearing,' 'applying' or 'acting' sub-rule (1) and sub-rule (2) of R. 4 merely deal with 'acting' and 'pleading' respectively; but that does not indicate that 'applying' is not covered by 'acting.' 'To apply' is to do something more than to 'appear' or 'to plead.' It is to take some active step on behalf of a person and thus to act for him, 'Applying' therefore is included in 'acting' and this is why no separate provision has been made by the Legislature in relation to this function of a pleader. To hold otherwise would lead to absurd results. R. 4 of O. 3 being silent on the point of applying, any pleader without any authority from a litigant and without putting in any memorandum of appearance would be in a position to present any application on his behalf. This obviously could not be the intention of the Legislature: *AIR 1926 Rang 215 and AIR 1936 Lah 500, Rel. on; 63 Cal 733 and AIR 1926 Lah 223, Disting.; Case law referred.* [P 700 C 1, 2]

C. L. Aggarwal — *for Petitioner.*

Vishnu Datt — *for Respondent.*

ORDER OF REFERENCE

Tek Chand J. — This petition for revision raises a question of general importance which, I think, should be authoritatively decided by a larger Bench. The facts briefly are that the respondent, Mrs. Mary Minck, instituted a suit against the defendant for declaration of a right of way and issue of a perpetual injunction. For the conduct of this case the plaintiff engaged Bawa Faqir Singh, advocate, who presented the plaint and conducted proceedings till November 1936. The next hearing of the case was fixed for 3rd December 1936; but a day before that date, Bawa Faqir Singh was convicted in a criminal case and committed to prison. The plaintiff was in England at the time and her local attorney, Mr. A. Minck, was not aware of the conviction of Bawa Faqir Singh. When the case was called on 3rd December, there was no appearance on behalf of the plaintiff and the suit was dismissed in default under O. 9, R. 8, Civil P. C. On 23rd December 1936, an application purporting to be under O. 9, R. 9, and S. 151, Civil P. C., was presented by Mr. Kali Sharn, pleader, who described himself as "counsel for the plaintiff." This application was not signed or verified by the plaintiff or her attorney, nor was it accompanied by a vakalatnama in favour of Mr. Kali Sharn from either of them. The Subordinate Judge fixed 4th January 1937 for the usual kaifiyat by the office. On that date a vakalatnama executed by Mr. A. Minck in favour of Mr. Kali Sharn was filed in Court.

This vakalatnama bears the date "4th January 1936," which is admittedly a mistake for "4th January 1937," as the court-fee stamp, which it bears, was purchased on that date. Notice of the application for restoration was issued to the opposite party, on whose behalf an objection was taken at the next hearing that there was no proper presentation of the application within 30 days from the date of dismissal prescribed by law for making such applications. It was urged that under O. 3, R. 4, Mr. Kali Sharn could not 'act' on behalf of the plaintiff on 23rd December 1936, as on that date he had no vakalatnama in writing from the plaintiff or her authorized agent. The Subordinate Judge has held that for the purpose of making an application for restoration of the suit, it was not necessary for the pleader to file a written vakalatnama from the plaintiff, and that "oral instructions" of the plaintiff's attorney

were sufficient. The defendant has preferred a petition for revision of this order and has contended that the view of the law taken by the Court below is wrong, and that the order restoring the suit was ultra vires, as it had been passed on an application which could not be considered to have been properly made before 4th January 1937, when it was time-barred. That a revision lies from such an order is admitted by the learned counsel for the respondent, and there is ample authority for it: see 7 Lah 161,¹ 107 I C 395,² A I R 1926 Lah 344,³ A I R 1926 Lah 642,⁴ A I R 1936 Lah 618⁵ and A I R 1934 Lah 231.⁶ The real question in dispute is one of the correct interpretation of R. 4 of O. 3, which lays down that:

No pleader shall act for any person in any Court, unless he has been appointed for the purpose by such person by a document in writing, signed by such person or by his recognized agent, or by some other person duly authorized by, or under, a power of attorney to make such appointment.

The word 'act' is not defined in the Code. It was added by the Civil Procedure Code Second Amendment Act of 1926. It has been argued that 'acting' does not include "making an application" in the progress of the suit, or an application for restoration of a suit which had terminated by dismissal in default or in which a decree had been passed ex parte. It is urged that it has a different meaning in the Code than what it has in England, as in R. 1 of O. 3, a clear distinction has been made between 'appearance', 'application' and 'act', and in R. 4 it is with regard to 'acting' alone that authority in writing is necessary. In 13 Lah 775,⁷ I, sitting in Single Bench, held that 'acting' included "making an application to refer a pending suit to arbitration." The correctness of that decision, in so far as it relates to the interpretation of R. 4, has been challenged, and it appears that

1. Piroj Shah v. Qarib Shah, (1926) 13 A I R Lah 379=95 I C 124=7 Lah 161=27 P L R 321.
2. Abdul Aziz v. Punjab National Bank, Ltd. Lahore, (1928) 107 I C 395.
3. Wiru Ram v. Amar Chand, (1926) 13 A I R Lah 344=94 I C 117=27 P L R 710.
4. Bhajjan Ram-Gil Raj Mal v. Mt. Narain Devi, (1926) 13 A I R Lah 642=96 I C 830.
5. Muhammad Sadiq v. Mt. Sami-ul-Nisa, (1936) 23 A I R Lah 618=161 I C 212.
6. Hari Krishna Datta v. K. R. Khosla, (1934) 21 A I R Lah 231=141 I C 570 = 34 P L R 557.
7. Amir Shah v. Abdul Aziz, (1932) 19 A I R Lah 373=136 I C 712=13 Lah 775=33 P L R 388.

the practice in the Courts is not uniform. The question is not altogether free from difficulty and is of general importance, and should, I think, be authoritatively settled by a large Bench. I accordingly refer it to a Division Bench. An early date will be fixed.

Addison and Din Mohammad JJ.—The only question that falls to be determined in this case is whether an application for restoration of a suit dismissed for default can be made by a pleader whose appointment has not been made in writing. The relevant provisions dealing with the subject are O. 3, R. 1 and O. 3, R. 4, Civil P. C., the material portions of which for facility of reference are reproduced below: O. 3, R. 1, reads as follows :

Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may. . . . be made or done by a pleader appearing, applying or acting on his behalf.

Order 3, R. 4, is in the following terms :

(1). No pleader shall act for any person in any Court, unless he has been appointed for the purpose by such person by a document in writing signed by such person or by his recognized agent.

(2) : : : : :

(3) : : : : :

(4) : : : : :

(5) No pleader who has been engaged for the purpose of pleading only shall plead on behalf of any party, unless he has filed in Court a memorandum of appearance signed by himself and stating

It would appear that the two provisions of law taken together lay down that in order to be able to act, a pleader must be appointed by a document in writing and in order to be able to plead he should submit a memorandum of appearance stating the particulars prescribed by sub-r. (5). No other method of authorising a pleader to act or plead is mentioned in O. 3, Civil P. C. It has been frankly conceded by counsel for the respondent that to put in an application of the nature involved in this case is not "to plead." The only question therefore that remains to be considered is whether the putting in of such petition amounts to acting or whether, as contended by counsel for the respondent, it is neither pleading nor acting and has thus not been specifically provided for in the Civil Procedure Code. After hearing counsel on both sides we are disposed to think that a pleader who puts in an application on behalf of a litigant acts for him and cannot therefore do so unless he is authorized in writing by him. It is true that, while R. 1

of O. 3 mentions three functions of a pleader, viz. 'appearing,' 'applying' or 'acting,' sub-r. (1) and sub-r. (5) of R. 4 merely deal with 'acting' and 'pleading' respectively; but that does not indicate that 'applying' is not covered by 'acting.' 'To apply' is to do something more than 'to appear' or 'to plead.' It is to take some active step on behalf of a person and thus to act for him. 'Applying' therefore is included in 'acting' and this is why no separate provision has been made by the Legislature in relation to this function of a pleader. To hold otherwise would lead to absurd results. R. 4 of O. 3 being silent on the point of applying, any pleader without any authority from a litigant and without putting in any memorandum of appearance would be in a position to present any application on his behalf. This obviously could not be the intention of the Legislature. It is a recognized principle of law that statutes should be interpreted in a reasonable manner so as to avoid all absurd interpretations, and the only reasonable interpretation in these circumstances is the one that we propose to put on the Rule.

In the conclusion at which we have arrived we are supported by authority. In 4 Rang 249,⁸ a Division Bench of the Rangoon High Court held that an advocate 'acts' when he files a memorandum of appeal or cross-objections or any other document in a case (other than a memorandum of appearance) and that in all such cases a power of attorney is necessary.

This ruling was followed by a single Judge of this Court in a case reported in 17 Lah 610⁹ where it was held that an appeal presented by an advocate other than the one in whose favour the appellant's power of attorney was given, is not properly presented and cannot be entertained. To the same effect is 13 Lah 775⁷ where Tek Chand J. held that in view of the distinction drawn in sub-rules (1) and (5) of O. 3, R. 4, Civil P. C., between pleaders acting and pleading, though a pleader could, on filing the necessary memorandum of appearance, appear and plead for another pleader on behalf of the persons who had engaged the latter, he had no power to act on his behalf without a document in writing executed in the manner prescribed, and in referring a pending suit to arbitration the advocate 'acted'

8. In the matter of Filing Powers, (1926) 13 A I R Rang 215=98 I O 15=4 Rang 249.

9. K. L. Gauba v. Indo-Swiss Trading Co. Ltd., (1936) 23 A I R Lah 500=169 I O 141=17 Lah 610=38 P L R 258.

and did not merely 'plead.' In A I R 1937 Mad 239,¹⁰ a Division Bench remarked that applications for execution could be made only by a pleader who was authorized in writing to do so and that in the absence of any such authority in writing, the pleader was wanting in capacity or in competence to act. In 33 P L R 517,¹¹ a Division Bench of this Court, of which one of us was a member, held that if an appeal is presented on the last day of limitation with a telegram attached, authorizing counsel to file an appeal and the power of attorney is later on put in, the appeal cannot be regarded as having been presented within limitation. As against these authorities, counsel for the respondent has relied on 63 Cal 733,¹² A I R 1924 Pat 114,¹³ A I R 1926 Lah 223,¹⁴ 55 I C 990,¹⁵ 40 All 147¹⁶ and A I R 1926 Bom 336.¹⁷ But in our opinion, none of these authorities is in point. In 63 Cal 733¹² an application for execution had been made within three years of the decree by a pleader who did not file his power of attorney till after more than three years had elapsed from the date of the decree. The application was however duly signed and verified by the decree-holder himself and was accepted by the Court which proceeded to act on it by issuing notices. On these facts a single Judge of the Calcutta High Court held that the application was in accordance with law and was not barred by limitation. It is noticeable however that the learned Judge did hold that in presenting the application for execution, the pleader acted on behalf of the decree-holder and the omission to put in the power of attorney was excused on different grounds.

10. Nandamani Ananga Bhima v. Madono Mohono Deo, (1937) 24 A I R Mad 239=165 I C 659= I L R (1937) Mad 320=71 M L J 604.

11. Mohammad Rafiq v. Mohammad Yasin, (1932) 33 P L R 517.

12. Jagadeesh Chandra Dhabal Deb v. Satya Kinkar, (1935) 63 Cal 733=40 C W N 730.

13. Banwari Rai v. Chethru Lal, (1924) 11 A I R Pat 114=74 I C 1033.

14. Allah Bakhsh v. Municipal Committee, Rohtak, (1926) 13 A I R Lah 223=92 I C 966=27 P L R 18.

15. Khaira v. Nathu, (1920) 7 A I R Lah 212=55 I C 990.

16. Bisheshar Nath v. Emperor, (1918) 5 A I R All 275=44 I C 28=40 All 147=19 Cr L J 865=16 A L J 64.

17. Mahomed Jafar v. Sheikh Ahmed, (1926) 13 A I R Bom 336=95 I C 266=28 Bom L R 538.

In A I R 1924 Pat 114,¹³ A had been authorized by B to put in an application in a Court. He accordingly signed a vakalat-nama in B's name and B accepted the authority given to the pleader by A. It was held by a Division Bench that the power to present the application included power to give and sign the power of attorney. In A I R 1926 Lah 223¹⁴ Dalip Singh J. observed that when the person on whose behalf an appeal is filed has accepted or ratified the action of the person who presented the appeal on his behalf, the person presenting the appeal has authority to present the appeal. He however did not base his judgment on this observation alone and further remarked that he would be inclined to extend the time under the provisions of S. 5, Limitation Act, if he considered it necessary to do so. Moreover, there the only question that arose for decision was whether a power of attorney signed on behalf of a Municipal Committee by the Secretary who had not been expressly authorized by the Committee to institute an appeal was valid, especially when the President had ratified the Secretary's act. It would be obvious therefore that that judgment was given on its own facts. In 55 I C 990¹⁵ Chevis J. held that when an appeal was presented by a pleader whose power of attorney was not signed by the appellant till after limitation had expired, the omission was obviously an oversight and the subsequent signing cured the defect. In 40 All 147¹⁶ Walsh J. observed that where a suit is duly authorised, the proper signing of the plaint is a matter of practice only and if a mistake or omission has been made, it may be amended at any time. In A I R 1926 Bom 336¹⁷ an appeal had been presented by a pleader duly appointed to act on the appellant's behalf by virtue of a power of attorney having been signed and in these circumstances the non-filing of the power of attorney in Court was condoned. In the result, we allow the petition and set aside the order of the Subordinate Judge restoring the suit. The petitioner will get his costs from the respondent.

B.D./R.K.

Petition allowed.

A. I. R. 1938 Lahore 702

ADDISON AG. C. J. AND DIN
MOHAMMAD J.*Gopal Dass — Defendant — Petitioner.*

v.

*Firm Seth Khushi Ram-Behari Lal,
Plaintiff and others, Defendants —
Respondents.*Civil Revn. No. 292 of 1938, Decided on
15th June 1938, from order of Senior Sub-
Judge, Lyallpur, D/- 24th February 1938.**Punjab Relief of Indebtedness Act (7 of
1934), S. 25—Application to Conciliation Board
for settlement of debts—Court in which pro-
ceeding in respect of such debts is pending
cannot refuse to stay it, holding that debt
exceeds pecuniary jurisdiction of Conciliation
Board.**

Any other Court is not competent to determine those matters which have been placed exclusively within the jurisdiction of the Board, nor can it be urged that so long as the Board has not determined those matters, any other Court can continue the proceedings before it in relation to them. The sole jurisdiction to determine whether a certain person is a debtor or not is by virtue of S. 7 vested in the Board alone, and its decision thereon is final; and the determination of this question involves everything which relates to the competency of the application, including the amount of debt owed by the applicant. The Board is empowered to dismiss an application submitted to it under various Sections of the Act and an application which exceeds the pecuniary limits of its jurisdiction is bound to be dismissed under the Proviso to S. 9. For an independent tribunal, therefore, to determine whether a certain application lies to the Board or not would be clearly to encroach upon its jurisdiction and to run counter to the entire scheme propounded in the Act itself: *A I R 1937 Cal 392; A I R 1938 Cal 23; A I R 1938 Cal 194; A I R 1938 Cal 455; A I R 1938 Cal 369 and A I R 1938 Cal 447, Rel. on.*

[P 703 C 1, 2]

J. L. Kapur — *for Petitioner.*J. N. Aggarwal — *for Respondent**(Plaintiff).*

Din Mohammad J.—This case raises an important question of law under the Punjab Relief of Indebtedness Act, which has not so far been authoritatively decided by this Court. It often happens that applications under S. 9 of the Act are made to a Debt Conciliation Board in relation to matters involved in pending suits and when the fact of such applications having been made is brought to the notice of the Civil Courts, they refuse to stay proceedings before them on the ground either that the application is not competent or that the applicant is not a debtor within the meaning of the Act. It is necessary there-

fore to consider the question at some length whether the Civil Courts are competent to do so. In the present case a suit for recovery of Rs. 31,000 was pending in the Court of the Senior Subordinate Judge, Lyallpur. During the pendency of that suit, one of the defendants, Gopal Das, a partner of the principal defendant which was a firm, made an application to the Debt Conciliation Board, stating among other things that his debt amounted to Rs. 5000. It appears that the Board admitted this application and an intimation to that effect was forwarded to the Senior Subordinate Judge. The plaintiff objected that inasmuch as the amount of debt owed by the defendant firm, of which Gopal Das was a partner, exceeded Rs. 10,000, which is the maximum limit of the pecuniary jurisdiction of a Conciliation Board, the Senior Subordinate Judge was not bound to suspend the proceedings in his Court as required by S. 25 of the Act. The Senior Subordinate Judge framed an issue on the point along with certain other issues with which we are not concerned, and holding that the amount of debt did exceed Rs. 10,000, refused to suspend the proceedings. The question therefore arises whether the action of the Subordinate Judge was in accordance with law.

The reply to the question propounded above turns upon the construction to be placed upon the wording of S. 25, considered in the light of the other provisions made in the Act in relation to the matters to be decided and the procedure to be adopted by the Board in connexion with the applications submitted to it. Sec. 7 defines the terms "debt" and "debtor" and inter alia enacts that if any question arises in proceedings under the Act whether a person is a debtor or not, the decision of a Debt Conciliation Board shall be final. S. 8 deals with the setting up of the Debt Conciliation Boards. S. 9 enables a debtor or any of his creditors to apply to the Board appointed for the area in which the debtor resides or holds any land to effect a settlement between the debtor and his creditors. A Proviso is attached to this Section which prohibits such applications if the debtor's debts exceed Rs. 10,000. S. 11 requires an applicant to mention among other things the particulars of all claims against him. S. 12 authorizes the Board inter alia to dismiss the application if it does not consider it desirable to attempt to effect the settlement prayed for. S. 13 lays down the

manner in which notices under the Act are to be issued and the statements by the creditors are to be submitted. S. 14 requires the creditors to produce all documents on which they rely. S. 15 empowers the Board to attempt an amicable settlement. S. 16 relates to the summoning and examining of the parties and witnesses and S. 17 deals with registration of the agreement arrived at between the disputants and the dismissal of the application so far as it relates to those creditors who do not come to an amicable settlement. S. 18 enables the Board to dismiss an application for want of diligent prosecution. S. 19 bars a second application. S. 20 provides for those cases where a creditor refuses to agree to an amicable settlement. S. 21 bars certain civil suits. Sec. 22 shuts out appeals and applications for revision against the order of the Board. S. 23 empowers the Board to review its own order. S. 24 provides for appearance of the parties before the Board and S. 25 not only bars new suits and other proceedings in relation to those debts for the settlement of which an application has been made to the Board, but further enjoins that any suit or other proceeding before a Civil Court in respect of any such debt shall be suspended until the Board has dismissed the application or an agreement has been made under S. 17. S. 26 extends limitation by the time spent in proceedings before a Conciliation Board and the time during which a person is debarred from suing or executing his decree under the provisions of the Act.

It will thus appear that the whole scheme of the Act is intended to invest the Board alone with the right to adjudicate upon the claims made to it so long as they are pending before it, and not only expressly prohibits the institution of new suits or other proceedings in relation to the debts awaiting decision in the Board but also suspends all pending proceedings in connexion therewith. In the face of such clear prohibition, it is not possible to argue that any other Court is competent to determine those matters which have been placed exclusively within the jurisdiction of the Board, nor can it be urged that so long as the Board has not determined those matters, any other Court can continue the proceedings before it in relation to them. It is clear that the sole jurisdiction to determine whether a certain person is a debtor or not is by virtue of S. 7 vested in the Board alone, and its decision thereon is final; and in our

view the determination of this question involves everything which relates to the competency of the application, including the amount of debt owed by the applicant. The Board is empowered to dismiss an application submitted to it under various Sections of the Act and an application which exceeds the pecuniary limits of its jurisdiction is bound to be dismissed under the Proviso to S. 9. For an independent tribunal therefore to determine whether a certain application lies to the Board or not, would be clearly to encroach upon its jurisdiction and to run counter to the entire scheme propounded in the Act itself. It would further make the Act unworkable and defeat the object with which it has been enacted.

Supposing a debtor makes an application to the Debt Conciliation Board alleging that all claims against him do not exceed Rs. 10,000; the Board is *prima facie* bound to entertain the application especially when the applications made before it are presumed to be correct inasmuch as they are to be verified in the manner prescribed by the Local Government. On the presentation of the application, therefore, the Board is not in a position to hold that the application does not lie on the ground that it exceeds its jurisdiction. The natural result will be that the application will be admitted to hearing under S. 12 of the Act and as soon as this is done, S. 25 will at once come into play and bar all new suits in relation to those debts which are covered by the application and suspend all pending proceedings in connexion therewith. If in the meantime a rival Court is also authorized to adjudicate on those matters which are pending decision in the Conciliation Board, it would nullify all the purposes for which the Board has been set up. This might lead to certain fantastic and amazing results as stated by Costello Ag. C. J. in 41 C W N 1363¹ at p. 1365, but with that aspect of the case, we are not concerned, as we have to interpret the law as we find it and are not to emphasize the defects of legislation and to refuse to give effect to it on the ground that it might lead to certain absurd results.

A party loses nothing, if a suit is barred or a proceeding is suspended in the meantime, inasmuch as S. 26 extends the period of limitation by the time spent in the

1. *Bhagawan Dayal v. Chandu Lal*, (1938) 25 A I R Cal 28=174 I C 51=I L R (1938) 1 Cal 257=41 C W N 1363.

Board. Obviously therefore it is the Board that is to determine whether it has jurisdiction or not in relation to an application put before it, and not an outside authority, be it a competent Civil Court, for the Board so long as it is functioning cannot be forestalled in any manner. We are supported in this conclusion by several authorities from the Calcutta High Court where similar provisions of law have been interpreted in the manner suggested by us. Reference may be made in this connexion to 41 C W N 928,² 41 C W N 1363,¹ 42 C W N 173,³ 42 C W N 411,⁴ 42 C W N 481⁵ and 42 C W N 529.⁶ In 41 C W N 928,² a Division Bench held that when on an application made thereto under S. 8, Bengal Agricultural Debtors Act, the Board has given notice thereof to the Court before which a proceeding in respect of a debt included in the application is pending, that proceeding must be stayed. In 41 C W N 1363¹, a suit had been instituted for recovery of Rs. 26,000 odd. During the pendency of that suit one of the defendants made an application to a Board set up under the provisions of the Bengal Agricultural Debtors Act, claiming that he was a debtor within the meaning of the Act, although the suit related to a sum exceeding the jurisdiction of the Board. On receiving the application, the Chairman of the Board sent a notice to the Subordinate Judge requiring stay of the suit pending in his Court. The Subordinate Judge refused to consider himself bound by that notice on the ground inter alia that the applicant was not a debtor within the meaning of the Act. Costello, Ag. C. J. observed that :

Although the alleged debt was as much as Rs. 26,000, yet it does not seem open to the Court to decide or even consider whether the debtor comes within the Act or whether he does not; that question rests solely with the Board.

In 42 C W N 173,³ it was held by a Division Bench that an Insolvency Court served with a notice under S. 34, Bengal Agricultural Debtors Act, has no jurisdiction to decide whether a person is a debtor within the meaning of the Act. In 42

C W N 411,⁴ Nasim Ali J. observed that the Civil Court had no jurisdiction to entertain questions which can be raised before the Board, for example, whether the debtor is a debtor within the meaning of the Act or whether he ordinarily resides within the local area for which the Board has been established. In the same volume at p. 481, Ameer Ali J. held that after a petition purporting to be one under S. 8, Bengal Agricultural Debtors Act, has been filed to a Debt Conciliation Board and before the petition has been dismissed or an award made, the High Court cannot in interlocutory proceedings decide whether the petition was properly presented or entertained. At p. 529 in the same volume, Edgley J. held that a Civil Court receiving a notice under S. 34, Bengal Agricultural Debtors Act, in respect of a debt for which several persons are jointly liable has no jurisdiction to inquire whether the application before the Board is a valid application under S. 9 of the Act and to refuse to stay proceedings if it thinks that there is no valid application.

No authority to the contrary has been cited before us nor do we consider that there could be one. We accordingly accept this petition, set aside the order of the Subordinate Judge and direct the suspension of the proceedings pending in his Court under S. 25, Punjab Relief of Indebtedness Act, until such time as the application before the Board is dismissed or an agreement is arrived at in connexion therewith. In view however of the difficult nature of the question involved, we leave the parties to bear their own costs before us.

D.S./R.K.

Petition accepted.

A. I. R. 1938 Lahore 704

SKEMP J.

Maya Singh — Plaintiff — Appellant.

v.

Udham Singh — Defendant — Respondent.

Second Appeal No. 93 of 1938, Decided on 14th May 1938, from decree of Dist. Judge, Lyallpur, D/- 3rd November 1937.

Limitation Act (1908), S. 14—Question whether, on facts found by lower Appellate Court, plaintiff acted with due diligence is mixed question of law and fact—To claim benefit of S. 14, error must be such as might be committed by reasonable and prudent man exercising due diligence and caution.

2. Satyendra Mohan v. Nibaran Chandra, (1937) 24 A I R Cal 392=172 I C 236=I L R (1937) 2 Cal 478=41 C W N 928.

3. Shib Dulal v. Kishore Ganj Loan Office, Ltd. Co., (1938) 25 A I R Cal 194=42 C W N 173.

4. Harish Chandra Pal v. Chandra Nath Saha, (1938) 25 A I R Cal 869=42 C W N 411.

5. Baljnath v. Tormull, (1938) 25 A I R Cal 455=42 C W N 481.

6. Jagat Kishore Acharjya v. Hazrat Ali, (1938) 25 A I R Cal 447=42 C W N 529.

The question whether a party acted in good faith within the meaning of S. 14 is a mixed question of law and fact and can be questioned in second appeal, provided that the lower Court's findings of fact are not interfered with: *A I R 1916 Oudh 139 and A I R 1927 Pat 256, Rel. on; A I R 1927 Lah 909 and A I R 1932 Lah 531, Expl.* [P 706 C 1]

Indulgence should be granted only in cases where error was an error that might be committed by a reasonable and prudent man exercising due diligence and caution. [P 706 C 1]

The defendant in a suit originally belonged to a village in the Jullundur District, and although he had no house, he still had some land there; but for a considerable period he had resided in the Lyallpur District. The plaintiff lodged a suit against him in Jullundur. He said in the plaint that the suit was lodged there because the residence of the parties and their dealings were within the limits of the Jullundur District. The defendant pleaded *inter alia* that he was a resident of Lyallpur District. The Jullundur Court finding that it had not jurisdiction returned the plaint for presentation to the proper Court:

Held that the plaintiff was entitled to deduct the time spent in prosecuting the suit at Jullundur, as he did not make such an error as to disentitle him to the benefit of S. 14 in lodging the suit in Jullundur where the defendant had land and where he originally belonged. [P 706 C 1]

Achhru Ram and Inder Dev —

for Appellant.

M. L. Puri — *for Respondent.*

Judgment. — Maya Singh, resident of Kapurthala, sued Udhram Singh on the basis of a bond for Rs. 700 executed on 13th February 1933, at Lyallpur. The plaintiff lodged the suit for Rs. 952, principal and interest, on 13th February 1936 in Jullundur. He said in the plaint that the suit was lodged there because the residence of the parties and their dealings were within the limits of the Jullundur District (*chunkih sakunat fariqain wa lenden andar hadud zillah Jullundur hai*). The defendant, Udhram Singh, pleaded *inter alia* that he was a resident of Lyallpur District and on 15th June 1936 the Jullundur Court finding that it had not jurisdiction returned the plaint for presentation in the proper Court. The following day the suit was lodged in the Lyallpur District. The defendant did not plead that the debt had not been contracted but pleaded that the suit was barred by limitation. The trial Court found that the plaintiff was entitled to deduct the time spent in prosecuting the suit at Jullundur, as he had been acting there with due diligence. He found that the suit was within time and granted the plaintiff a decree for Rs. 952 payable by instalments. On appeal however the learned District Judge found that

the plaintiff had not been acting with due diligence in lodging the suit at Jullundur, that the suit was therefore barred by time and he accepted the appeal. The point for determination before me is whether S. 14 (2), Limitation Act, applies; in other words, whether the plaintiff was acting with due diligence and in good faith in lodging the suit in Jullundur.

The learned District Judge found that the plaintiff did not act honestly in conducting the suit in the Jullundur Court, because according to the plaint the money was advanced at Jullundur, whereas afterwards both at Jullundur and Lyallpur the plaintiff admitted that the money was advanced at Lyallpur. It is pointed out by Mr. Achhru Ram for the plaintiff that the plaint does not say that the money was advanced at Jullundur but that the parties had dealings in Jullundur. I have already quoted the exact words of the plaint. It is admitted that the defendant originally belonged to village Udhesian in the Jullundur District, that although he has no house, he still has some land there but that for a considerable period he has resided in the Lyallpur District, that the defendant's son is a lambar-dar of village Udhesian and that the defendant visits the village on ceremonial occasions. Mr. Achhru Ram does not contend that the Jullundur Court had jurisdiction, but he urges that the mistake might have been made by a reasonable man and that the suit was prosecuted in good faith and with due diligence. Mr. Mukand Lal Puri for the respondent argues that the matter is concluded by a finding of fact and he cites two Single Bench judgments of this Court in support of his contention: 102 I C 628¹ by Campbell J. and A I R 1932 Lah 531² by Tek Chand J. In A I R 1932 Lah 531² Tek Chand J. said:

The learned District Judge on an examination of the facts and circumstances bearing on the matter has recorded a definite finding that Gahna Singh was acting in good faith. This finding is one of fact and cannot be challenged in second appeal.

The learned Judge was clearly referring to the particular case before him and did not intend to lay down any general principle. Similarly Campbell J. in 102 I C 628¹ was only referring to the particular facts before him. He said:

1. Ganga Ram-Bishen Das v. Hari Ram-Ram Lal, (1927) 14 A I R Lah 909=102 I C 628.
2. Kala Singh v. Gehna Singh, (1932) 19 A I R Lah 531=138 I C 646 = 14 Lah 106 = 33 P L R 740.

The trial Court and the lower Appellate Court have held that the plaintiffs were entitled to the benefit of S. 14... as they had filed the suits there (at Gujranwala) in good faith and had conducted them diligently. This is a finding of fact with which I cannot interfere.

On the other hand Mr. Achhru Ram has drawn my attention to 36 I C 702³ where a Single Bench of the Oudh Judicial Commissioner's Court held that

the question whether a party acted in good faith within the meaning of S. 14, Limitation Act, is a mixed question of law and fact and can be questioned in second appeal, provided that the lower Court's findings of fact are not interfered with.

To the same effect is 101 I C 674,⁴ a judgment of a Division Bench of the Patna High Court. This I think is the true principle. The facts must be accepted as found by the District Judge, but it is for the High Court to determine the question of law whether on these facts the plaintiff has acted with due diligence and in good faith. In the Oudh case, Mr. Stuart said that some general criterion must be laid down to distinguish cases in which indulgence is to be granted from those in which it should not be granted; and he thought that indulgence should be granted only in cases where error was an error that might be committed by a reasonable and prudent man exercising due diligence and caution. Applying this rule, I do not think the plaintiff made such an error as to disentitle him to the benefit of S. 14 in lodging the suit in Jullundur where the defendant has land and where he originally belonged. I accept this appeal, set aside the order of the District Judge dismissing the suit and hold that the suit was within time. The case is remanded under O. 41, R. 23, Civil P. C., for this purpose. Stamp on appeal to be refunded. Other costs to be costs in the cause.

D.S./R.K.

Case remanded.

3. Ram Jag Pandey v. Bhagwan Dat, (1916) 3 A I R Oudh 139=36 I C 702=19 O C 367.

4. Fazlul Jamil v. Halal-ud-din, (1927) 14 A I R Pat 256=101 I C 674=8 P L T 561.

A. I. R. 1938 Lahore 706

BLACKER J.

Amba Parshad — Complainant —
Petitioner.

v.

Imam Ali and another — Accused —
Respondents.

Criminal Misc. No. 63 of 1938, Decided on 29th March 1938, from order of Dist. Magistrate, Gurgaon, D/- 6.1.1938.

(a) Criminal P. C. (1898), Ss. 526, 528—**Case between Hindus and Mahomedans—Mere fact that Judge or Magistrate is Hindu or Mahomedan does not debar him from hearing it — But case reaching stage in which question of communalism has become very prominent — It is desirable that case should be transferred.**

Ordinarily, the mere fact that a case is between Hindus or Mahomedans does not ipso facto debar either a Hindu or Mahomedan Judge or Magistrate from hearing it. Where however the case has reached a stage in which the unfortunate question of communalism has become very prominent, by reason of the petitions for transfer by one of the parties, it is desirable in the interests of everybody concerned to transfer the case. [P 707 C 1, 2]

(b) Practice — Judgment—'Proof' — Court should avoid use of word 'proof' in interlocutory order — Fact cannot be said to be proved until final adjudication.

Although there is a technical use of the word 'proof' which is practically synonymous with 'evidence,' yet, in an interlocutory order, the expression 'proof' should be avoided as a fact cannot be said to be proved until it comes to the final adjudication. [P 707 C 1]

Prem Chand—for Petitioner.

Muhammad Amin Khan —

for Respondents.

Order.—This is a petition under S. 439, Criminal P. C., for setting aside the order of the District Magistrate, Gurgaon, dated 6th January 1938, under S. 528, Criminal P. C., transferring a case from the Court of the Additional District Magistrate to that of a Second Class Magistrate, and also under S. 526, Criminal P. C., for transfer of the case back to the Court of the Additional District Magistrate. In arguments before me, an additional prayer has been made that the case be transferred to the Court of the District Magistrate himself. The facts of the case are that the present petitioner, Amba Parshad, brought a complaint against Imam Ali and Kallu, under Ss. 295/297 and 448, Penal Code. This case was triable by a Second Class Magistrate, but the Additional District Magistrate, who was the ilaka Magistrate, kept it in his Court, and after hearing the complainant's evidence, framed a charge under Ss. 295/297, Penal Code. Thereupon the accused respondents filed an application in the Court of the District Magistrate praying for the transfer of the case. They did not ask for it to be sent to any particular Court but merely asked for it to be transferred from the Court of the Additional District Magistrate on the ground that he was taking an undue interest in the case. Although it was not definitely stated, there was an insinuation that as the case was one involving communal feelings and the Additional District

Magistrate was a Hindu, therefore he had taken this undue interest. This application was heard by the learned District Magistrate who appears to have been unimpressed by the allegations of communal partisanship against the Additional District Magistrate. At any rate, in his order, which is the subject of this revision petition, he has made no mention of this aspect of the case and as he has transferred the case to a Magistrate of the opposite community, it is apparent that he did not think that the religion of the Magistrate by itself was a legitimate ground for transfer. A certain amount of confusion has been unfortunately imported into this case by the terminology employed by the District Magistrate in his order. He has stated :

From the evidence it is clear that there is sufficient proof to show that the two accused had obtained a Civil Court's decree according to which they are entitled to occupy the plot of land in dispute.

It is true that there is a technical use of the word 'proof' which is practically synonymous with 'evidence,' but in an interlocutory order, the expression should be avoided as the fact cannot be held to be 'proved' until it comes to the final adjudication. What the learned District Magistrate meant to say, I think, is that from a document shown to him there appeared to be evidence in support of the defence raised by the accused which was that the place in dispute was not a temple at all, but was a piece of ground of which they were in possession by order of the Court. Whether this defence is true or not is not a matter which arises at this stage, but it is relevant that the defence has been raised. The learned District Magistrate clearly thought that as the case was not an important one and as it was triable by a Second Class Magistrate and as the defence raised made it desirable that the Magistrate concerned should inspect the spot, the balance of administrative convenience lay in having it tried by the local Second Class Magistrate, even though he did belong to one of the communities involved. On this ground it does not appear to me that the order of the learned District Magistrate is in itself in any way improper or one which would ordinarily be interfered with in revision.

But it seems to me that there can be no doubt that the case has now reached a stage in which this unfortunate question of communalism has become very prominent. Ordinarily, I would not accept the proposition that merely because the case was

between Hindus and Mahomedans, either a Hindu or a Mahomedan Judge or Magistrate was ipso facto debarred from hearing it. But it is clear that these petitions have unfortunately given the communal aspect of the case an importance which it really does not deserve on the merits, and it is useless to shut one's eyes to the fact that this question has now cropped up and become a prominent issue. It seems to me therefore that it would be desirable in the interests of everybody concerned that the learned District Magistrate take this case into his Court and dispose of it himself. I therefore order accordingly.

R.M./R.K.

Order accordingly.

* A. I. R. 1938 Lahore 707

ABDUL RASHID J.

*Mohammad Zaman and another —
Judgment-debtors—Appellants.*

v.

*Hans Raj Shah, Decree-holder, and
others, Judgment-debtors —*

Respondents.

Second Appeal No. 1498 of 1937, Decided on 28th January 1938, from decree of Dist. Judge, Rawalpindi, D/- 14th August 1937.

* (a) Limitation—Appeal—Trial Court delivering judgment without having previously fixed date for the same—Defendant being absent, judgment informed to his counsel on some later day—Limitation for appeal runs from day on which counsel for defendant is informed of judgment.

Where a Court delivers a judgment without having previously fixed a date for pronouncing the judgment, and the defendant being absent on that date, the judgment is informed to his counsel on some later day, this later day must be regarded as the date for pronouncing judgment and period of limitation for appeal must be deemed to run from that date and not from the date on which the judgment is actually pronounced : *A I R 1925 All 293, Rel. on.* [P 708 C 2]

(b) Limitation Act (1908), S. 12 — Time requisite for getting copies of judgment and decree should be excluded.

In calculating the period of limitation for filing an appeal, time requisite for obtaining a copy of the judgment and a copy of the decree sheet must be excluded : *A I R 1925 All 436, Rel. on.*

[P 708 C 2]

* (c) Limitation Act (1908), S. 4—Limitation for filing application for obtaining copy of decree expiring on holiday—Application made on day of reopening of Court should be deemed to be within limitation.

Even if it be assumed that the application for obtaining a copy of the decree does not strictly fall within the purview of S. 4, Limitation Act,

the general principle underlying this Section, which has been reproduced in S. 10, General Clauses Act, must be given effect to, namely that where an act or proceeding is allowed to be done on a certain day, then if the Court or office is closed on that day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day on which the Court or office is opened : *A I R 1922 P C 352, Disting.*

[P 709 C 1]

Allah Din Malik — *for Appellants.*

Dev Raj Sawhney — *for Respondents.*

Judgment.—On 23rd December 1936, Hans Raj Shah obtained a personal decree against Mohammad Zaman and Nathu, defendants, for Rs. 1573 on the basis of a registered deed of mortgage dated 5th February 1923. The learned Subordinate Judge announced the judgment to the counsel for Hans Raj Shah, plaintiff. He noted on the judgment that counsel for Mohammad Zaman was to be informed. No information was sent to the counsel for Mohammad Zaman till 8th January 1937. Against this decision, Mohammad Zaman and Nathu filed an appeal in the Court of the District Judge, Rawalpindi, on 19th February 1937. At the hearing, a preliminary objection was taken on behalf of the respondents to the effect that the appeal was barred by limitation. The learned District Judge accepted this objection and dismissed the appeal on the question of limitation. Mohammad Zaman and Nathu have accordingly preferred a second appeal to this Court. The learned District Judge has made the following observations in his judgment :

Now I fully concede that the conduct of the Subordinate Judge concerned, namely Lala Manohar Lal who has since been transferred, in not fixing a date for judgment is exceedingly objectionable. Nevertheless, the limitation law must be strictly applied and consequently the limitation period must be deemed to run from the actual date of the judgment and not from the date on which counsel was informed of it.

I am of the opinion that there is no justification for holding that the period of limitation must be deemed to run from 23rd December 1936 and not from 8th January 1937. O. 20, Rule 1, Civil P. C., lays down that the Court, after the case has been heard, shall pronounce judgment in open Court either at once or on some future day of which due notice shall be given to the parties or their pleaders. After hearing the arguments of the parties, the Court did not fix any date for the pronouncement of judgment. On 8th January 1937, the judgment was sent to the counsel for Mohammad Zaman and he wrote

down the word "noted" on the margin of the judgment. 8th January 1937 must therefore be regarded as the date for pronouncing judgment of which due notice was given to the counsel for Mohammad Zaman. Reference may be made in this connexion to a Division Bench ruling of the Allahabad High Court reported in 47 All 332.¹ In that case the judgment was signed, dated and delivered in the absence of the parties or their pleaders and without previous notice to them and the plaintiff was ordered to deposit the pre-emption money within three months of the date of the delivery of the said judgment. It was held that the judgment was not validly pronounced within the meaning of Rr. 1 and 3 of O. 20, Civil P. C., and that as regards the payment of the pre-emption price, time began to run against the plaintiff as from 14th January 1925, when he was informed of the judgment.

Mr. Sawhney on behalf of the respondent contended that even if 8th January 1937, be taken to be the date of the delivery of the judgment, the appeal to the learned District Judge was still barred by time. Mohammad Zaman applied for a copy of the judgment on 29th January and obtained it on 5th February. He applied for a copy of the decree on 16th February and obtained it on 19th February. The appeal was filed in the Court of the learned District Judge on the same day. If eight days be allowed for a copy of the judgment and four days for a copy of the decree, 19th February would be the last date of limitation. It was held in 47 All 509² that in calculating the period of limitation for filing an appeal, time requisite for obtaining a copy of the judgment of the appeal and a copy of the decree sheet must be excluded. The contention of the learned counsel for the respondent was that the last day of limitation for the filing of the appeal was 15th February 1937, and as no application for obtaining a copy of the decree was put in till 16th February, the time taken in obtaining copy of the decree cannot be excluded in computing the period of limitation. The Court was however closed on 15th February 1937. The appeal could therefore be put in till 4 P.M. on 16th

1. *Kharak Singh v. Laccham Singh*, (1925) 12 A I R All 293=86 I C 869=47 All 332=23 A L J 145.

2. *Ramzan Bakhsh v. Mahomed Ishaq*, (1925) 12 A I R All 436=87 I C 484=47 All 509=23 A L J 342.

February by virtue of S. 4, Limitation Act. As the application for obtaining a copy of the decree was made on 16th February, the application must be taken to have been made within limitation. Even if it be assumed that the application for obtaining a copy of the decree does not strictly fall within the purview of S. 4, Limitation Act, the general principle underlying this Section, which has been reproduced in S. 10, General Clauses Act, must be given effect to, namely that where an act or proceeding is allowed to be done on a certain day, then if the Court or office is closed on that day, the act or proceeding shall be considered as done or taken in due time, if it is done or taken on the next day afterwards on which the Court or office is opened. The facts of the Privy Council case reported in 49 Cal 999,³ relied upon by the learned counsel for the respondent, are very different from the facts of this case and no assistance can therefore be derived from that ruling.

For the reasons given above, I accept this appeal, set aside the judgment and the decree of the learned District Judge, dated 14th August 1937, and remand the case to him for a decision of the appeal preferred in his Court in accordance with law. The court-fee levied on the memorandum of appeal in this Court shall be refunded and the other costs shall abide the result. The learned counsel for the parties have been directed to cause their respective clients to appear in the Court of the learned District Judge of Rawalpindi on 1st March 1938.

D.S./R.K.

Case remanded.

3. *Pramatha Nath Roy v. William Arthur Lee* (1922) 9 A I R P C 352=68 I C 900=49 Cal 999=49 I A 307 (P C).

A. I. R. 1938 Lahore 709

TEK CHAND AND ABDUL RASHID JJ.

Karam Chand and another —
Defendants — Appellants.
v.

Narinjan Singh, Plaintiff, and others,
Defendants — Respondents.

Letters Patent Appeal No. 20 of 1937,
Decided on 14th May 1937, from order of
Skemp J., in S. A. No. 652 of 1936, D/. 4th
December 1936.

(a) Civil P. C. (1908), O. 32, R. 3—Person acting as de facto guardian ad litem—Formal order of appointment absent — Proceedings held not invalid.

Where a person acts as the de facto guardian ad litem of the minor, the mere absence of an order formally appointing such person as guardian ad litem is not fatal to the validity of the proceedings: 30 Cal 1021 (P C) and A I R 1923 Lah 575, Rel. on. [P 711 C 2]

(b) Civil P. C. (1908), O. 32, R. 7—Provisions are mandatory.

Where a suit was compromised by a guardian ad litem of a minor without complying with the provisions of R. 7, the compromise and the decree passed thereon are not binding on the minor, even if the compromise was signed by the minor, he being not *sui juris*. [P 711 C 2]

(c) Minor — Suit compromised by guardian ad litem — Court holding compromise as not binding on minors — Suit should be revived from stage where it was compromised.

When a compromise of a suit entered into by a guardian ad litem of a minor is held to be not binding on a minor, the proceedings in the original suit should be revived from the stage at which they were when the irregularity of compromise was committed: 35 All 487 (P C) and A I R 1936 Lah 861, Rel. on. [P 711 C 2]

J. L. Kapur and Qabul Chand Mital —
for Appellants.

Achhru Ram, Inder Dev, J. N. Agnihotri
for N. C. Pandit and N. C. Pandit —
for Respondents.

Tek Chand J. — The facts which have led to this litigation are as follows: Ladha Singh and Sham Singh, sons of Mul Singh, owned in equal shares two Ahatas in Lyallpur on which they had built a house. Ladha Singh had a son, Narinjan Singh, who was born on 19th April 1917. On 7th June 1920, Ladha Singh and Sham Singh mortgaged the house to one Ram Sarup for Rs. 5000 by a registered deed. In April 1922, Ladha Singh, ignoring this mortgage, orally gifted his one-half share in the house to his son Narinjan Singh who was five years old at the time, and on 24th April 1922 a mutation was sanctioned in respect of this gift showing Narinjan Singh as the owner of one-half of the house. On 24th May 1925, Sham Singh and Ladha Singh, ignoring the gift and describing themselves as owners of the house, mortgaged it to Ganesh Das, who redeemed the prior mortgagee, Ram Sarup. On 23rd September 1926, Ladha Singh and Sham Singh again mortgaged the house to Piar Singh for Rs. 6000 who paid off Ganesh Das. Four years later, on 22nd September 1930, Ladha Singh, acting as the mukhtar of Sham Singh and guardian of his son Narinjan Singh, (who was described as the owner of one-half) mortgaged the entire house to Karam Chand and Mt. Lal Devi, appellants, for Rs. 7500, the major por-

tion of which was utilized in paying off the prior mortgagee, Piar Singh. At the time of this last mortgage, the house was in possession of a tenant named Bhagwan Singh, from whom the mortgagees were authorized to realize the rent and credit it towards the interest payable under the mortgage deed. The tenant having failed to pay rent to the mortgagees, Karam Chand and Mt. Lal Devi, they brought a suit against him for recovery of the amount due. To this suit Sham Singh and Narinjan Singh, minor, through Ladha Singh as his guardian ad litem, were made parties. The suit was dismissed on the ground that Ladha Singh had no authority to mortgage the house on behalf of Narinjan Singh.

On 23rd February 1934, Karam Chand and Mt. Lal Devi instituted a suit against Sham Singh, Ladha Singh and Narinjan Singh for a declaration that they were the mortgagees in possession of the house under the mortgage deed of 22nd September 1930. In the plaint Narinjan Singh was described as a minor under the guardianship of his father Ladha Singh, and along with the plaint a list of the relations of Narinjan Singh was filed, which included Mt. Karam Devi, the grandmother of Narinjan Singh. No formal order appointing any person as the guardian ad litem of the minor was passed by the Court; Ladha Singh did not defend the suit either for himself or on behalf of the minor. But Mt. Karam Devi, describing herself as the guardian ad litem of Narinjan Singh, minor, filed a very comprehensive written statement denying the plaintiffs' claim and raising numerous objections to the validity of the mortgage of one-half of the house which was claimed as owned by Narinjan Singh under the oral gift by Ladha Singh made in April 1922. She engaged a pleader, Lala Hans Raj, to conduct the case on behalf of the minor. In the vakalatnama authority was given to Lala Hans Raj to "compromise the suit in whole or in part." After issues had been framed, and the plaintiffs' evidence recorded in part, the hearing was adjourned to 6th December 1934. On that date, an application to refer the dispute to the arbitration of certain named persons was presented to the Court signed by the plaintiffs, Ladha Singh, and Narinjan Singh himself, (who was 17 years and 7½ months old at the time) and Lala Hans Raj, pleader for Mt. Karam Devi, guardian ad litem of Narinjan Singh. The Court granted the application and referred

the dispute to arbitration. The arbitrators filed their award on 14th January 1935. It was to the effect that a sum of Rupees 7500 was due to the plaintiffs by the defendants, and that the transaction of mortgage, being for family necessity, was binding on Narinjan Singh.

Objections were filed by Lala Hans Raj, pleader for Mt. Karam Devi, guardian of Narinjan Singh, alleging that the arbitrators were guilty of misconduct and the award was invalid. On these objections, issues were framed and the hearing was adjourned to 11th March 1935 for evidence. On that date Karam Chand, plaintiff, Ladha Singh, Lala Hans Raj, pleader for Mt. Karam Devi, and Narinjan Singh (who was still a minor) made a joint statement before the Court that they had entered into a compromise to the effect that if the sum of Rs. 7150 was paid by the defendants, including Narinjan Singh, to the plaintiffs by 30th June 1935, the house in question would be released, free from all encumbrances; in default the mortgagees would be entitled to realize Rs. 7500 from the entire house, as provided in the award. This statement was signed by Karam Chand, plaintiff, Lala Hans Raj, pleader, Lala Ladha Singh and Narinjan Singh. Immediately after this, another statement was made by Lala Hans Raj, pleader, asking the Court "to sanction the compromise on behalf of Narinjan Singh, defendant." Thereupon the Subordinate Judge passed an order "accepting the compromise and granting a decree in accordance with its terms." No formal application under O. 32, R. 7, Civil P. C., for sanction to enter into the compromise on behalf of the minor was made by or on behalf of Mt. Karam Devi as the guardian ad litem; nor was any order granting the sanction passed; nor did the order accepting the compromise indicate that the compromise was for the benefit of the minor.

A few weeks later, on 19th April 1935, Narinjan Singh attained majority, and on 15th July 1935 he instituted the present suit for a declaration that the decree in the aforesaid suit was not binding on him, as: (1) he was not properly represented in the former suit, no application having been made for the appointment of a guardian ad litem for him, nor any order passed appointing any one as such guardian; and (2) that no express sanction had been given by the Court in respect of the compromise, which was not for his benefit.

The trial Judge decreed the suit, declaring that the decree of 11th March 1935 was ineffectual so far as Narinjan Singh, plaintiff, was concerned. On appeal by Karam Chand and Mt. Lal Devi, the Senior Subordinate Judge came to the contrary conclusion; he held that the plaintiff was effectively represented by Mt. Karam Devi in the former suit, and that though no formal order appointing her as guardian was passed, this was a mere irregularity which had not prejudiced the plaintiff in any way. He further found that it appeared from the proceedings in that suit that the Judge, who had passed the decree, had considered that the compromise was for the benefit of the minor, and that the mere fact that no formal order expressly sanctioning the compromise had been passed did not vitiate the decree based thereon. He accordingly accepted the appeal and dismissed the plaintiff's suit. On second appeal a learned Judge of this Court, sitting in Single Bench, held that there were serious irregularities inasmuch as no guardian ad litem had been appointed under O. 32, R. 3, Civil P. C., and that no sanction had been sought or granted by the Court to compromise as required by O. 32, R. 7, Civil P. C. He accordingly accepted the plaintiff's appeal and restored the decree of the trial Judge granting the plaintiff the declaration asked for. From this decree Karam Chand and Mt. Lal Devi had appealed under Cl. 10 of the Letters Patent, after having obtained the necessary certificate from the learned Judge.

It is no doubt true that Ladha Singh had been described as the guardian ad litem of Narinjan Singh minor in the plaint of the previous suit; it is also true that the interests of Ladha Singh were adverse to those of Narinjan Singh. But along with the plaint a list of the near relations of the minor had been given, as required by the Lahore High Court Rules, and one of the persons mentioned therein was his grandmother, Mt. Karam Devi. As already stated, Mt. Karam Devi appeared to resist the suit on behalf of Narinjan Singh. She engaged a pleader and filed a written statement raising every conceivable plea. The Court admitted the written statement, and allowed the pleader to cross-examine the witnesses produced by the then plaintiffs. Mt. Karam Devi had already filed another suit on behalf of the minor relating to this very property; and it is not alleged that her interests were in any way adverse to those

of the minor. It is clear that she acted as the de facto guardian ad litem of the minor and in the circumstances, the mere absence of an order formally appointing her as guardian ad litem is not fatal to the validity of the proceedings: 30 Cal 1021¹ and 5 Lah 38.² Mr. Achhru Ram, who appears on behalf of the plaintiff respondent, concedes that the decree in the former suit could not be set aside on this ground.

The other irregularity, however, is of a more serious nature. At the time of the compromise Narinjan Singh was admittedly a minor, and as laid down in O. 32, R. 7, Civil P. C., his guardian ad litem could have entered into a compromise only with the leave of the Court, expressly recorded in the proceedings. In this case no application for sanction to enter into a compromise was filed by Mt. Karam Devi, nor was an order expressly recorded by the Subordinate Judge granting sanction to the guardian to enter into a compromise. Nor again is there anything to indicate that when the terms of the compromise were placed before the Subordinate Judge, and accepted by him, he applied his mind to the all important question, that the compromise was for the benefit of the minor. It must therefore be held that the provisions of Rule 7 were not complied with, and the compromise and the decree passed thereon are not binding on the minor. It is no doubt true that Narinjan Singh himself had signed the statement embodying the terms of the compromise, but he was no *sui juris* then, and the so-called consent, given by him during minority, is of no avail. For this reason therefore the plaintiff is entitled to a declaration that the compromise and the decree based thereon are not binding on him.

The next question is as to the proper order to be passed on the above findings. Mr. Achhru Ram for the plaintiff-respondent concedes that the order of the trial Judge, restored by the learned Judge of this Court, granting the above declaration simpliciter is incomplete, and that it should have further been ordered that the proceedings in the original suit be revived from the stage at which they were when the irregularity above mentioned was committed: 35 All 487³ and A I R 1936 Lah

1. *Walian v. Banke Behari*, (1903) 30 Cal 1021 = 30 I A 182 = 7 C W N 774 = 8 Sar 512 (P C).

2. *Phulli v. Debi Pershad*, (1923) 10 A I R Lah 575 = 75 I C 449 = 5 Lah 38.

3. *Partab Singh v. Bhabuti Singh*, (1913) 35 All 487 = 21 I C 288 = 40 I A 182 = 16 O C 247 = 11 A L J 901 (P C).

861.⁴ In modification of the decree under appeal therefore, we pass a decree declaring that the plaintiff is not bound by the compromise and the decree based thereon passed by Lala Chhakan Lal, Subordinate Judge, on 11th March 1935, and we direct that the former suit be restored at its original number and proceedings therein restarted from the stage at which they were on 14th February 1935. Having regard to the peculiar circumstances of the case, we leave the parties to bear their own costs throughout. Both counsel have been directed to cause their respective clients to appear before Sheikh Maqbul Ahmad, Subordinate Judge, First Class, Lyallpur, on 14th June 1937, when a date will be fixed for further proceedings in accordance with the foregoing directions.

Abdul Rashid J.—I agree.

B.D./R.K.

Decree modified.

4. Wasanda Ram v. Ram Chand, (1936) 23 A I R Lah 861=168 I C 292.

A. I. R. 1938 Lahore 712

ADDISON AND DIN MOHAMMAD JJ.

Lala Megh Raj — Plaintiff —

Appellant.

v.

Firm Raghbar Das-Beni Prasad —

Defendant — Respondent.

First Appeal No. 327 of 1937, Decided on 2nd February 1938, from decree of Senior Sub-Judge, Ambala, D/. 16th June 1937.

(a) Civil P. C. (1908), O. 6, R. 17—Mere introduction of fresh matter does not alter nature of suit—Alteration affecting case is one where original suit is wholly displaced by proposed amendment or where totally inconsistent case is introduced—Leave to amend cannot be refused when such is not the case.

It is not by a mere change in the wording of the plaint or the introduction of fresh details that the nature of a suit is altered. The alteration which affects the case is one where the original suit is wholly displaced by the proposed amendment or where a totally different or inconsistent case is introduced. But where this is not the case, leave to amend cannot be refused merely on the ground that the words which did not find place in the original plaint had been introduced in the subsequent plaint, even though the effect of those words is not to introduce a new or an inconsistent case. [P 714 C 1]

(b) Deed—Construction—Power of attorney, construction of—Rule that powers of attorney should be strictly construed relates only to substantive portion of document and not to introductory remarks.

The rule laying down that powers of attorney should be strictly construed relates only to the substantive part of the document where a particular authority is conferred upon the attorney, and not to mere introductory particulars in the document. Documents in this country are not drafted with that meticulous care which is necessary and parties should not be penalized for such formal defects as are not material : (1893) A C 170, *Expl.*

[P 714 C 1, 2]

Mehr Chand Mahajan and Tek Chand

— *for Appellant.*

Barkat Ali (Malik) and Asa Ram —

for Respondent.

Din Mohammad J.—This appeal has arisen in the following circumstances : On 1st October 1936 a suit was instituted on behalf of Megh Raj as proprietor of the Firm Ganesha Mal Megh Raj, through L. Kundan Lal, against the Firm Raghbar Das Beni Parshad, through Beni Parshad. The claim was described in the following terms : "For recovery of Rs. 9815 principal and interest on the basis of bahi account and other oral and documentary evidence of all sorts." In para. 1 of the plaint it was stated that the plaintiff firm was a joint Hindu family firm carrying on business in Ambala city. In para. 2 of the plaint it was said that the defendant firm borrowed money from the plaintiff firm on bahi account and promissory note on various occasions commencing from the year 1929. In para. 3 reference was made to a certain draft executed by the defendant in which he admitted his liability to the extent of Rs. 9000 to the plaintiff firm. This petition of plaint was signed by Kundan Lal, mentioned above as mukhtar khas (special attorney). The defendant firm put in a written statement on 10th November 1936, in which, along with the pleas on facts, certain preliminary objections to the drafting of the plaint were also raised. It was contended inter alia that inasmuch as it was alleged in the plaint that the plaintiff firm was a joint Hindu family firm, the suit should have been instituted in the name of the firm and not in that of Megh Raj. It was also pleaded that the suit could not be instituted "through the special agent of Megh Raj." It was further urged that no details had been given in the plaint as to the date from which the account commenced and the date up to which it continued, nor of the amounts advanced and the amounts repaid; nor had any transliteration of the bahi entries been attached to the plaint. On 4th December 1936 the plaintiff put in a reply to these objections stating that the suit could proceed in the

form in which it was instituted and that it could be instituted through the special agent.

The Senior Subordinate Judge being otherwise busy on that date, adjourned the case to 20th January 1937; and on that date an order was made that inasmuch as in para. 2 of the plaint it had not been clearly stated how much money was borrowed on the promissory note, how much on bahi account and between which periods, the plaintiff should submit a properly amended plaint. In pursuance of this order, the plaintiff put in an amended plaint on 28th January 1937. In the column of claim it was reiterated that the suit was for recovery of Rs. 9815 principal and interest on the basis of bahi account and other oral and documentary evidence of every kind. In para. 2 of the amended plaint it was said that the firm Ganesha Mal Megh Raj was a joint Hindu family firm of which Megh Raj and his minor son Gian Chand were members. In paras. 3 to 7 the details of the accounts commencing from 17th April 1929 and ending on 23rd June 1932 were mentioned and reference was also made to an agreement, dated 24th July 1932, wherein the defendant had admitted his liability to the plaintiff to the extent of Rs. 12,600. The remaining paragraphs of the amended plaint merely repeated what had already been said in the original plaint. This plaint was signed by Megh Raj as proprietor of the Firm Ganesha Mal Megh Raj. To this amended plaint, further pleas were submitted by the defendant on 9th February 1937 and it was urged inter alia that the plaint had not been amended in accordance with the directions of the Court and that the amendments made had changed the nature of the suit as originally instituted and this was not permissible under the law. On the pleadings of the parties the Senior Subordinate Judge framed the following issues :

1. Has the amendment of the plaint been made in accordance with the orders of the Court? 2. Does not amendment made in the plaint change the nature of the suit as originally filed and if so, what is its effect? 3. Can the suit proceed in the name of the plaintiff as stated in the plaint, or should it be filed in the name of the Firm Ganesha Mal Megh Raj? 4. Is the signing and presentation of the plaint by Kundan Lal valid? 5. Is the mukhtarnama by L. Megh Raj in favour of L. Kundan Lal not properly attested and not valid?

In his decision on Issues 1 and 2, the Senior Subordinate Judge stated that counsel for the plaintiff had admitted that the

amendments made were not in accordance with the orders of the Court and he further amplified this statement by referring to certain matters which in his view had changed the nature of the suit. Some of the matters so referred to were as follows : 1. The plaintiff had omitted to make any mention of the debt borrowed on the foot of the promissory note as had been alleged in the original plaint. 2. The original plaint had been signed by Kundan Lal, whose locus standi was in dispute, while the amended plaint was signed by Megh Raj himself and this could not be done without the permission of the Court. 3. No mention was made in the original plaint of any other partner of the joint Hindu family firm, while in the amended plaint the name of Gian Chand was mentioned as another member of the joint family. 4. Para. 2 of the original plaint had been split up into six paragraphs, thus changing the entire aspect of the case.

On the grounds mentioned above he rejected the amended plaint and proceeded to deal with the plaint which had originally been presented. On Issues 3 and 4 the Senior Subordinate Judge decided that the power of attorney executed in favour of Kundan Lal was not valid, that it did not show that that power of attorney had been given for instituting the present suit and that consequently he had no locus standi to institute the suit on behalf of the firm. He further came to the conclusion that inasmuch as the power of attorney was defective, both the signing and presentation of the plaint were also invalid and so was the appointment of a pleader for conducting the case. On Issue 5 his decision went in favour of the plaintiff; but as he had decided the other issues against him, holding that there was no proper plaint before him nor were its presentation and attestation valid, he dismissed the suit with costs. The present appeal has been preferred from the said order of the Senior Subordinate Judge.

After hearing counsel for the parties, we are satisfied that the objections raised to the drafting of the plaint were too trivial to be taken notice of and that the Senior Subordinate Judge was entirely wrong in holding that by the amendments introduced in the amended plaint any directions given by him were disobeyed or that the character of the suit was altered. In fact, he had given no directions whatever in the matter and, as stated above, while making his order

requiring the plaintiff to amend the plaint, he had merely indicated that certain details were lacking in the original plaint. The Senior Subordinate Judge should have known that it is not by mere change in the wording of the plaint or the introduction of fresh details that the nature of a suit is altered and that the alteration which affects the case is the one where the original suit is wholly displaced by the proposed amendment or where a totally different or inconsistent case is introduced. But where this is not the case, leave to amend cannot be refused merely on the ground that the words which did not find place in the original plaint had been introduced in the subsequent plaint, even though the effect of those words is not to introduce a new or an inconsistent case. The objections raised and allowed by the Senior Subordinate Judge were so frivolous that counsel for the respondent before us did not make any attempt to rely on them. He frankly conceded that he could not support the judgment of the Senior Subordinate Judge on that score.

The only matter on which he laid much stress was that the power of attorney executed in favour of Kundan Lal could not authorize him to institute the present suit, inasmuch as in his power of attorney the title of the suit which he was authorized to institute was given as "*Megh Raj v. Beni Parshad*," and the present suit was by Megh Raj as proprietor of a certain firm against Beni Parshad as a representative of another firm. In our view this ground too is as flimsy as the other grounds taken by the defendant against the drafting of the plaint. Documents in this country are not drafted with that meticulous care which is necessary and parties cannot be penalized for such formal defects as are not material. If we ignore the description of the plaintiff and the defendant given in the title of the suit, the suit is between Megh Raj and Beni Parshad. In the plaint it was essential to give an exact description of the parties but we do not consider that the same care was necessary to be taken in the drafting of the power of attorney.

Counsel for the respondent has referred to 1893 A C 170¹ where at p. 177 of the report it is said that powers of attorney should be strictly construed; but those remarks relate to the substantive part of

the document where a particular authority is conferred upon the attorney and not to introductory particulars like the present. We may remark in this connexion that in spite of the fact that the defendant had put in pleas on two different occasions, the objection in this form was not taken on either occasion. What he intended to convey by his original objections was that Megh Raj not being a proper person to institute the suit in his own name, his special attorney too was equally incompetent. We need not discuss this matter further as it is sufficiently clear that there was no substance in any of the objections taken by the defendant to the form or frame of the suit. We accordingly accept the appeal, set aside the decree of the Senior Subordinate Judge dismissing the suit and remand the case to him under O. 41, R. 23, Civil P. C., for disposal in accordance with law. The court-fee paid on this appeal will be refunded to the appellant. Other costs of the appeal will be borne by the parties.

R.M./R.K.

Appeal accepted.

A. I. R. 1938 Lahore 714

BLACKER J.

Radha Kishen—Convict—Appellant.

v.

Emperor.

Criminal Appeal No. 1217 of 1937, Decided on 25th January 1938, from order of Magistrate, First Class, Mianwali, D/- 27th September 1937.

(a) Criminal Trial—Evidence—Statement of formal witness for prosecution assisting defence has not much weight.

Statement of a formal witness for the prosecution, which goes to assist the defence, does not have that weight which it would have had if he had been a witness for the prosecution as to the material facts of the case. [P 716 O 1]

(b) Criminal Trial—First information report—Delay in making report is only suspicious circumstance—It is no ground for rejecting evidence.

Delay in making a report to the police is only a suspicious circumstance which puts the Court on its guard and cannot by itself be held to be a reason for rejecting evidence which is otherwise fully entitled to credit. [P 717 O 1]

(c) Criminal Trial—Evidence—Police diary—Statement of witnesses recorded in police diary—Burden of rebutting it is not very heavy—Witness, respectable educated man and quite disinterested—Slight discrepancy in his statement in Court and what is recorded in 'diary'—His denial of accuracy of statement in diary may be accepted as correct.

1. Bryant, Powis and Bryant Ltd. v. La Banque De Peuple, (1893) A C 170=62 L J P O 68=1 R 836=68 L T 546=41 W R 600.

There is an initial presumption of accuracy in the case of official records but in the case of statements of witnesses recorded in the police diaries, the burden of rebutting them is not very heavy. Where the witness is a respectable educated man and quite disinterested and the difference between what he did say and what he is recorded as saying, is very slight and could easily have been due to a misunderstanding by the Police Officer recording the statement, his denial of the accuracy of the statement attributed to him by the Police Officer may be accepted as correct.

[P 717 C 1]

(d) Penal Code (1860), S. 304, Part 2 and S. 325—Accused striking only one lathi blow on head of deceased, on being struck with hockey stick by latter — Intention of accused merely appearing to give ordinary beating to deceased — Offence does not fall under S. 304, Part 2 but only under S. 325.

Where the accused struck only one blow with a stick on the head of the deceased, and that too after the latter had struck him on the thigh with a hockey stick and up to that point the accused merely appeared to have intended to give the deceased an ordinary beating with his stick, and ordinary beating was all that seemed to have been required by the motive suggested for the attack, it cannot be assumed in the circumstances of the case that the accused intentionally struck a blow which he knew was likely to cause death. The offence committed by him does not therefore fall under S. 304, Part 2 but one under S. 325.

[P 718 C 1]

B. R. Puri — *for Appellant.*

A. G. Maurice for Advocate-General —
for the Crown.

Judgment. — Radha Kishen appeals against a conviction under S. 304, Part 2 and a sentence of five years' rigorous imprisonment and Topan Ram appeals separately against the conviction under S. 325, I. P. C., and a sentence of three years' rigorous imprisonment. The appeals arise out of the same trial and I will dispose of them in one judgment. The facts of this case as set forth in the prosecution evidence are as follows: One Wazir Muhammad Khan was a teacher in the District Board School at Jandanwala in the Mianwali District. Radha Kishen was a resident of that village and Topan Ram was a resident of the village of Ahmed Shahwali. On 4th June last Wazir Muhammad Khan and Muhammad Zaman (P. W. 10) who is a Superintendent of the boarding house of the school had remonstrated with Radha Kishan for making water close to the boarding house. On 6th June which was a Sunday, Mohammed Zaman with other three masters and a candidate master was sitting in the room of the boarding house and Wazir Mohammed Khan who did not reside in the boarding

house came and joined them at 9 A. M. At some unspecified time afterwards Wazir Mohammed Khan went out to make water. At half past 11 these persons heard a row outside the boarding house and they saw Topan Ram, who had a stick, striking Wazir Mohammed Khan on the shoulder. Radha Kishan then struck him on the hand. Wazir Mohammed Khan had a hockey stick, which he usually carried with him, and he in return dealt Radha Kishen a blow on the right thigh. Radha Kishen then struck him on the head and he fell down. He was temporarily stunned but was helped into the boarding house and there he told the witnesses that he had again found Radha Kishen making water and there had been an altercation between them after which he went to the bazar. On his coming back he saw Radha Kishen and Topan Ram waiting for him and as he passed they attacked him in the manner described. The defence of Radha Kishen is that the affair took place at his shop in the bazar, that he was attacked by Wazir Mohammed Khan and that he wrested the hockey stick from Wazir Mohammed Khan and struck him, whereupon Wazir Mohammed Khan fell down and struck his head and became unconscious. Topan Ram's defence is an alibi. He has led evidence to show that on that day he was at Maghiana where he attested a document which has been produced as evidence.

The first thing that strikes one about this case is that the prosecution witnesses are respectable persons who have, as far as can be seen from the record, absolutely no motive for implicating any other person but the persons who actually committed this assault on Wazir Mohammed Khan. The mere fact that they are teachers in the same school does not mean that they have any reason to name innocent persons as the perpetrators of this assault and it has not been suggested that they have any enmity with either of the appellants or any other reason for falsely implicating them. That being so it seems to me that before one disbelieves their evidence one wants something more than the few circumstances that counsel have been able to glean from a diligent scrutiny of the record. The first contention of counsel is that the dying declaration of Wazir Mohammed Khan must be rejected on account of the medical evidence. There is no doubt that the Civil Surgeon at first

expressed the opinion that this blow would cause immediate unconsciousness which would continue until death. But he has under further examination admitted that it is quite possible that the first unconsciousness described may merely have been due to the deceased being stunned by the force of the blow, and that when he recovered from this, he would have a lucid interval before the final unconsciousness supervened which resulted in death. It cannot therefore be said that the medical evidence is in any way incompatible with the truth of the prosecution story. On the other hand, to some extent it supports it as the ordinary layman inventing a false story would not be likely to invent two separate periods of unconsciousness.

The second objection which counsel took was that the statement of Mohammed Zaman would show that Wazir Mohammed Khan went out to make water at 9 A. M. or shortly after and that therefore there is no explanation of what was happening between 9 o'clock and half past 11 when the assault is said to have taken place. But again this argument appears to me to flow from an unnecessary literal interpretation of Mohammed Zaman's evidence. No doubt as it reads it would suggest that Wazir Mohammed Khan left the place to make water somewhere about 9 o'clock but it does not necessarily mean this, and taken with the context obviously was not intended to mean anything of the sort. But if so, the dying declaration itself shows that when the deceased went out to make water he did not immediately come back to the school but went into the bazar and it is impossible to say how long he had been in the bazar. The prosecution witnesses were not with him and he being dead cannot tell us. The third objection arises from the evidence of the patwari who made the plan and appears as a prosecution witness. This witness is certainly a prosecution witness in name. But he is only a formal witness for the prosecution and if he makes a statement assisting the defence, it does not appear to me to have that weight which it would have had if he had been a witness for the prosecution as to the material facts of the case. In cross-examination he says that a certain place shown as No. 10 in his plan was pointed out to him by the witnesses as the scene of the fight. Now if this is true, that spot is inconsistent with the prosecution version and more consistent with the version given

by Radha Kishen. A careful examination of the plan, Ex. P. D., shows that there is a little mark in light blue ink which appears to have been made by a fountain pen and above it there are the Urdu numerals 10 in black ink. A certified copy of the plan has been produced in which there is a little round mark at the place where the 10 appears on Ex. P. D., but no mark corresponding to the mark in blue ink. The witness gave his evidence on 5th July and this certified copy was made on 28th June. If the round mark in the certified copy was copied from the blue ink mark in Ex. P. D., the patwari's evidence becomes open to grave suspicion, as this mark was clearly not made at the same time as the rest of the plan which is in black Indian ink. If it was not, there is no mark in Ex. P. D. of which it could be a reproduction, unless the second digit of the Urdu No. 10 was already in existence. This digit is not just a dot, but nearly a circle, and could be a badly written Urdu 5. If so, the patwari when he said he put down the No. 10 on the plan in Court would only have put down the 1, which with the other mark which could be read either as a large miswritten dot, or a small miswritten circle, would have constituted the No. 10. That this round mark may originally have been meant for an Urdu 5 is made likely by the fact that it is in front of a house, which by comparison with another house on the plan is shown to be 5 karams long. If this is not a 5, this is the only house in this part of the plan of which the dimensions are not shown. In either case therefore there is considerable doubt about the bonafides of the patwari's evidence and this doubt is increased when one finds that the notes on the plan by the Sub-Inspector of Police which are dated 7th June show quite a different spot as the scene of the occurrence. It seems to me therefore that the patwari's evidence on this point is not reliable and therefore does not prejudicially affect the prosecution case.

The next point taken by the counsel is the delay in making the report. The affair took place at half past 11, the report was made to the Head Master who lives about half a mile away at about 3 o'clock and his report was made at the police station at 3-30. It cannot be denied that there is a greater delay than one would expect under the circumstances but there was work, namely the attending to the injured man, which could reasonably occupy the

witnesses for some considerable time. It must also be remembered that witnesses are not ordinary zamindars used to criminal litigation who know the importance that the Courts have come to attach to an early report but school teachers who do not normally have anything to do with the Courts and would not realize that their failure to rush to the police at once would later give counsel an opportunity of arguing that they had invented the whole story. Moreover, it was not obviously the duty of any individual member of this party to go and report the facts to the police and this would probably also account to some extent for the delay in the report being made. After all, delay in making a report to the police is only a suspicious circumstance which puts the Court on its guard and cannot by itself be held to be a reason for rejecting evidence which is otherwise fully entitled to credit. In this case, as I have said above, the witnesses are thoroughly disinterested and have not been shown to have any motive for implicating the present appellants. An attempt has been made by counsel to criticize their conduct in not interfering to rescue Wazir Mohammed Khan, but here again only four blows were struck and the whole thing must have been over before they had time to lift a finger in his assistance.

Another circumstance in the case on which counsel has relied for criticizing the prosecution case is the fact that one of the prosecution witnesses has denied the accuracy of a statement alleged to have been made by him to the police. This statement was to the effect that the witnesses lifted Wazir Mohammad Khan from the place where he was injured into the boarding house. The story of the witness given in Court is that he walked supported by them. There is an initial presumption of accuracy in the case of official records, but I have never considered that in the case of the statements of witnesses recorded in police diaries the burden of rebutting it is very heavy. Where, as in this case, the witness is a respectable educated man and quite disinterested and the difference between what he did say and what he is recorded as saying is very slight and could easily have been due to a misunderstanding by the police officer recording the statement, I am quite prepared to accept as correct his denial of the accuracy of the statement attributed to him by the police officer.

To sum up therefore there seems to me no real reason for rejecting the prosecution evidence in this case. The learned Magistrate has felt some doubts about the truth of the evidence of three of the witnesses with regard to the previous altercation of the 4th June. I do not propose to deal with this at length except to say that I am not really convinced by the reasons which the learned Magistrate has given for casting doubt upon this evidence. To turn to the defence, I am in agreement with the learned Magistrate that the story told by Radha Kishen is far-fetched and I do not think that any reasonable person would accept it in the face of this disinterested and reliable prosecution evidence. The alibi of Topan Ram appears to be more formidable at first sight but it must be remembered that such evidence is easily procured in defence of a man who is in trouble and it would not be difficult for Topan Ram's relative who lives at Maghiana to procure witnesses in support of a story of this sort. Moreover as the learned Magistrate has pointed out it was not physically impossible for Topan Ram to have reached Maghiana on the day of the occurrence after the attack. There is also no reason why the signature of Topan Ram could not have been added to the document produced in evidence of a later date, and from its position and appearance on the deed it looks as if that may well have been the case. Moreover it is curious that a mere visitor to Maghiana should have been asked to attest this document when there must have been scores of local residents to do so, whose attendance would be easily procurable if they were later to be witnesses. But what is more important is that there is no suggestion of this defence in the cross-examination of the investigating officer and there was no mention of the attestation of this deed in the statement of Topan Ram recorded in Court on the 6th July. All that Topan Ram says is that he was at Maghiana on that day. It seems to me that if he had really got this important evidence in his favour, namely that he had attested this deed at Maghiana on the day of the occurrence, he could not have failed to have said so when questioned by the Court. The alibi therefore does not appear to me to be reliable and cannot rebut the prosecution case. I consider that the Magistrate has rightly convicted the appellants.

I am not however so convinced that any

offence under S. 304, Part 2, I. P. C., has been made out against Radha Kishen. After all he only struck one blow with a stick on the head and that was after the deceased had struck him on the thigh with a hockey stick. Up to that point the two appellants merely appear to have wished to give an ordinary beating with sticks to Wazir Muhammad Khan and an ordinary beating is all that seems to have been required by the motive suggested for the attack. I do not think therefore that it can be assumed in the circumstances of the case that Radha Kishen intentionally struck a blow which he knew was likely to cause death. I therefore alter his conviction to one under S. 325 and in the circumstances I reduce his sentence to one of three years' rigorous imprisonment. With regard to Topan Ram I also consider that the conviction under S. 325 is not justified by the facts on the record. There is nothing to show that the last blow struck by Radha Kishen was in furtherance of a common intention by him and Radha Kishen that grievous hurt should be caused, as up till the time when Wazir Mohammed Khan retaliated by hitting Radha Kishen with his hockey stick, the beating was merely an ordinary one and only simple hurt was caused. Topan Ram did not strike any blow after that. I accordingly alter the conviction in his case to one under S. 323, I. P. C., and reduce his sentence to six months' rigorous imprisonment.

R.M./R.K.

*Convictions altered.***A. I. R. 1938 Lahore 718**ADDISON, AG. C. J. AND
DIN MOHAMMAD J.*Firm Kishen Singh-Sant Ram —**Plaintiff — Appellant.*
v.*Firm Salig Ram-Bhagat Ram —**Defendant — Respondent.*

First Appeal No. 51 of 1938, Decided on 16th June 1938, from decree of Senior Sub-Judge, Ludhiana, D/- 22nd November 1937.

Civil P. C. (1908), S. 153 and O. 30, R. 1 — Suit by firm against firm working in Patiala State—Opposite party described as "firm S at Patiala through C, manager and proprietor" — Amendment by substituting name of C, sole proprietor and manager in place of firm S held should be allowed.

A firm brought a suit against another firm working in the Patiala State. The description of the

opposite party was given as "firm S situate at Patiala State through C, manager and proprietor of the said firm." An objection being brought that O. 30, R. 1 benefited firms in British India only and not the firms working in the Indian States, the plaintiff applied that the plaint should be allowed to be amended by substituting the name of C, the sole proprietor and manager of the firm in place of firm S :

Held that in view of the fact that the name of C was already on the record and that the only defect in the plaint was that the opposite party had been wrongly described, the amendment sought to be allowed. [P 718 O 2]

Dev Raj Sawhney — *for Appellant.*R. C. Soni — *for Respondent.*

Din Mohammad J. — An application under Para. 17 of Sch. 2 to the Civil P. C., was made by the Firm Kishen Singh-Sant Ram against the Firm Salig Ram-Bhagat Ram working in the Patiala State. The description of the opposite party was given as below :

Firm Salig Ram-Bhagat Ram, situate at Patiala State, Bazar Chaunk Kaserian, through Churanji Lal, manager and proprietor of the said firm.

At the trial an objection was raised that the opposite party being a foreign firm that is not working in British India, could not be sued in the manner in which it had been sued, inasmuch as O. 30, R. 1, Civil P. C., benefited firms in British India only, and not the firms working in the Indian States. Thereupon an application was made that the plaint be allowed to be amended in that respect. This application was disallowed by the trial Judge and eventually on 22nd November 1937, the original application under Sch. 2 was dismissed on the ground that no proceedings could be taken against the opposite party in the Courts in British India. It is from that order that the present appeal has been preferred. The amendment sought to be introduced was the substitution of the name of Churanji Lal, the sole proprietor and manager of the firm, in place of the Firm Salig Ram-Bhagat Ram and in view of the fact that the name of Churanji Lal was already on the record and that the only defect in the plaint was that the opposite party had been wrongly described and further considering that the claim of the plaintiff firm is within time, we do not consider that it was proper for the Court of the Senior Subordinate Judge to have refused to allow the amendment prayed for.

We accordingly accept this appeal, set aside the order of the trial Judge and remand the case to him for disposal in accordance with law after allowing the

plaintiff to make the necessary amendment in the description of the opposite party. There will be no order as to costs before us.

D.S./R.K.

Case remanded.

*** A. I. R. 1938 Lahore 719**

ADDISON AND DIN MOHAMMAD JJ.

Mt. Aishan — Appellant.

v.

Jodha Ram and others — Respondents.

Second Appeal No. 35 of 1937, Decided on 25th January 1938, case referred by Abdul Rashid J., from order of Dist. Judge, Mianwali, D/- 3rd April 1937.

*** Mahomedan Law—Marriage — Option of puberty—Sunni sect — Option is retained until knowledge of marriage is known to girl—Once option is exercised, marriage is cancelled from date it took place and not when option is exercised.**

Among Sunnis the rule of Mahomedan law respecting the doctrine of the option of puberty is that a girl who was unaware of her marriage, when she attains puberty retains her option of repudiation until she becomes aware of the marriage, and the option is prolonged until she is acquainted with the fact that she has the right to repudiate the marriage; and she can exercise that right within a reasonable time thereafter: *A I R 1922 All 155 and A I R 1929 Lah 827, Rel. on.* [P 719 C 2, P 720 C 1]

By the exercise of the option of puberty the marriage ceases to be a marriage and must be treated as having never taken place. [P 720 C 2]

Bashir Ahmad — *for Appellant.*

V. N. Sethi — *for Respondent*

(Jodha Ram).

Iqbal Singh — *for Official Receiver*

(Arjan Shah Singh).

ORDER OF REFERENCE

Abdul Rashid J. — One Mehrwan had two sons, namely Ahmad and Mohammad. Ahmad died many years ago and his daughter Mt. Aishan was brought up by her uncle Mohammad. Mohammad had a son Amir. On 11th July 1928, Mohammad brought about a marriage between his son Amir, who was about two years of age, and his niece Mt. Aishan who was 11 or 12 years old at the time of her marriage. Mohammad was adjudicated an insolvent in the year 1935. On 16th November 1935, Jodha Ram, one of the creditors of Mohammad, presented an application in the Court of the Insolvency Judge under Ss. 4 and 69, Provincial Insolvency Act, stating that Mt. Aishan having been married to Amir in the year 1928 had forfeited her life estate, that

the land inherited by Mt. Aishan from her father Ahmad had become the property of Mohammad insolvent and that this land be included amongst the assets of the insolvent. This application was opposed by Mt. Aishan mainly on the ground that her uncle Mohammad had no right to marry her to his son Amir who was only two years of age, and that this marriage had been repudiated by her on attaining puberty and she had obtained a decree on 18th July 1936, annulling her marriage with Amir. The Insolvency Court held that Mt. Aishan had got to know of the marriage soon after it had been celebrated and as the option of puberty, according to Mt. Aishan, was exercised in the beginning of 1935, it could not be said that the option was exercised within a reasonable time. On Issue 2 however, the Court held that Mt. Aishan's statement that she had exercised her option of puberty by repudiating the marriage at home had not been established and that she had never exercised such option at home. The petition under S. 4 was accepted and it was ordered that the land in dispute be included in the insolvent's assets. Against this decision Mt. Aishan preferred an appeal. Her appeal having been dismissed, she has come up to this Court on second appeal.

It was contended by the learned counsel for the appellant that the mere fact that Mt. Aishan did not exercise her option of puberty within a reasonable time of attaining puberty does not deprive her of her right to exercise her option at a subsequent time, if she was unaware of the fact that she had the right to repudiate the marriage. In support of this contention the learned counsel quoted a large number of authorities. It is however unnecessary to refer to all of them as the point has been dealt with at length in a Division Bench ruling of this Court reported in 11 Lah 172.¹ It was held therein that among Sunnis the rule of Mahomedan law respecting the doctrine of the option of puberty was that a girl who was unaware of her marriage, when she attained puberty, retained her option of repudiation until she became aware of the marriage, and the option was prolonged until she was acquainted with the fact that she had the right to repudiate the marriage; and that she could exercise that right within a reasonable

1. Rahmat Ali v. Allah Ditti, (1929) 16 A I R Lah 827 = 122 I C 481 = 11 Lah 172 = 30 P L R 664.

time thereafter. As soon as a notice was served on her by the Insolvency Court, Mt. Aishan brought a suit and obtained a decree annulling her marriage with Amir. The finding of the lower Courts that Mt. Aishan did not exercise her option within a reasonable time of her attainment of puberty is therefore not sufficient for the decision of the point involved in this case.

Another difficulty involved in this case is as to the effect of the exercise of the option of puberty. It is contended by the learned counsel for the appellant that even if Mt. Aishan forfeited her life-estate on the date of her marriage with Amir, that forfeiture was not absolute and that as soon as her marriage with Amir was annulled, the property reverted to Mt. Aishan. The forfeiture was subject to the effect of the exercise of the option of puberty. At the time of the marriage between Amir and Mt. Aishan, Mohammad was the guardian both of the bride and the bridegroom. Both of them were minors at the time, one being his son and the other his niece. It seems to be in the highest degree inequitable that by performing a marriage between these two minors, Mohammad should be taken to have secured the estate of Mt. Aishan for himself in such a manner that even the exercise of the option of puberty by Mt. Aishan could not entitle her to the return of the estate. It may be mentioned that in the revenue records the land continued to be shown as the property of Mt. Aishan, and was never mutated in favour of Mohammad. The points involved in this case are of great importance. Subject to the orders of the learned Chief Justice, I refer this case to a Division Bench.

Judgment of the Division Bench

The facts are fully stated in the order referring this appeal to a Division Bench and need not be repeated. We are in agreement with the learned Judge who referred the appeal that the law is correctly stated in 44 All 61² and 11 Lah 172.¹ Mt. Aishan therefore had the right to repudiate this most unreasonable marriage within a reasonable time after she came to know of the existence of her right to do so. The second point involved in the appeal is without authority. She was married at the age of 11 or 12 to a boy aged 2. She has repudiated that marriage. The question is whe-

ther the marriage is dissolved from the date of repudiation or whether the marriage must be taken to have been repudiated as from the date of the marriage, in other words should the marriage be treated, once it has been repudiated, as never having taken place? The question is important in this way, by the fact of her uncle having married her to his two-year old son when both were minors, she lost her life estate in the land of her father, if the marriage was an effective one and only ceased to be a marriage as from the date of repudiation. As remarked by the learned single Judge who referred the appeal, it seems to be in the highest degree inequitable that by performing a marriage between these two minors, Mohammad should be taken to have secured the estate of Mt. Aishan for himself in such a manner that even the exercise of the option of puberty by Mt. Aishan could not entitle her to the return of the estate. It seems to us that the better view is that by the exercise of the option of puberty the marriage must be taken never to have had any effect. This does not go against Para. 211 of Mulla's Principles of Mahomedan Law, Edn. 10. If a marriage is not repudiated, it will, of course, be effective from the date of the marriage. If before repudiation either party to the marriage dies, the other will inherit from him or her. But there is no authority either way as to what is the effect if the option is exercised. We hold that by the exercise of the option of puberty the marriage ceases to be a marriage and must be treated as having never taken place.

For the reasons given, we accept the appeal and hold that the land in question belongs to Mt. Aishan and not to her insolvent uncle Mohammad. Parties will bear their own costs throughout. We may note that the learned counsel appearing for the Official Receiver stated that he had compromised the matter with Mt. Aishan. If that is so, it would appear that this decision will not affect him; but the appeal was contested by one of the creditors, Jodha Ram, and there could thus be no compromise before us nor was it sought to compromise the matter before us.

B.D./R.K.

Appeal allowed.

2. Bismillah Begam v. Nur Mahomed, (1922) 9 A I R All 155=68 I O 702=44 All 61=19 A L J 845.

A. I. R. 1938 Lahore 721

ADDISON AND DIN MOHAMMAD JJ.

*Dalip Singh and others —**Defendants — Appellants.*

v.

Jagat Singh and others, Plaintiffs and others, Defendants — Respondents.

First Appeals Nos. 41 & 91 of 1937, Decided 6th April 1938, from order of Senior Sub-Judge, Multan, D/- 2nd November 1936.

(a) Punjab Colonization of Government Lands Act (5 of 1912), S. 19 — *A* and *B* contracting that *A* should bid at auction for both *A* and *B* and that land so purchased should be treated as joint — *A* obtaining land and recorded as tenant — Suit by *B* to enforce his title — *B* becomes tenant when land was purchased and objections under S. 19 held not maintainable.

A entered into a contract with *B* by which *A* was to bid at an auction held by Government for the sale of land. The land if purchased was to be treated as the property of the parties in certain defined shares. *A* was successful in bidding for the land. *A* then had his name recorded as the occupancy tenant of that land until full payment of the purchase money and interest. A suit brought by *B* to enforce his title to the land under the agreement was resisted on the ground that under S. 19 the rights or interests vested in a tenant under the Act could not be transferred without the consent in writing of the Commissioner and that any transfer made without such consent in writing was void :

Held that by virtue of the contract entered into between the parties, the title to the property vested in both the persons as soon as the purchase was effected, and *B* became joint tenant with *A* from the very beginning; and as *B* did not acquire any interest in pursuance of any transfer from *A*, the latter's objection must fail : *A I R 1930 Lah 835, Foll.; A I R 1932 Lah 32 and A I R 1936 Lah 576, Rel. on.* [P 722 C 2]

(b) Registration — Contract — Agreement to divide property if successful in obtaining it need not be registered.

An agreement between certain persons providing the manner in which certain property should be divided between them in the event of their succeeding in purchasing the same is not an agreement falling under S. 17 (1) (b), Registration Act. Further, registration is not necessary by reason of S. 17 (2) (v) as the document merely creates a right to obtaining another document later on : *89 P R 1908, Foll.* [P 722 C 2]

(c) Registration — Unregistered contract — Part performance carried out—It is admissible in evidence for purposes of S. 53-A, T. P. Act.

Where there has been a performance of an unregistered contract, the document could be received as evidence of part performance of a contract for the purposes of S. 53-A. [P 722 C 2; P 723 C 1]

(d) Contract Act (1872), S. 65 — Contract void from inception — Money advanced is recoverable.

1938 L/91 & 92

Where a contract is void from its inception, it would fall within the terms of S. 65 as a contract which has become void; and money advanced on it would be recoverable : *A I R 1922 P C 403; A I R 1932 Oudh 193 (F B) and A I R 1933 Lah 291, Rel. on; A I R 1931 Oudh 309, Ref.* [P 723 C 1, 2]

M. L. Puri and M. L. Sethi —

for Appellants.

Mehr Chand Mahajan —

for Respondents.

Addison J.—In First Appeal No. 41 of 1937 the plaintiffs claimed that defendants 1 to 5 on behalf of themselves as well as on behalf of the plaintiffs and defendants 6 and 7 bid at an auction of Government land for certain lot which they were successful in getting on certain terms from Government. Prior to 6th May 1925, the parties entered into an oral agreement according to which defendants 1 to 5 alone were to bid but the parties were to subscribe in certain proportions towards the purchase money and obtain certain shares in the land. A formal agreement dated 6th May 1925 set out this fact. Apparently, Government preferred bids to be made by a small number of persons and it was for this reason that defendants 1 to 5 were alone put forward to bid, although the bid was on behalf of all the parties. It was especially mentioned in the agreement that in fact all the parties were the purchasers although defendants 1 to 5 put themselves forward as the purchasers. Six days later, namely on 12th May 1925, defendants 1 to 5 paid the original deposit amounting to Rs. 15,792 and signed a formal agreement in favour of Government to the effect that they would pay the balance in six equal instalments extending from 15th July 1930 to 15th January 1933. The deposit was subscribed by the parties according to their shares and it is not disputed that parties took possession of the land and have all along remained in possession according to those shares. Apparently, many of the colonists who bid for land were unable to pay the instalments and Government confiscated their lands, including the land purchased in the name of defendants 1 to 5. Government later restored the land to defendants 1 to 5 but slightly varied the terms. The purchasers were allowed to become occupancy tenants under S. 8, Punjab Tenancy Act, without paying anything further and they became entitled to purchase the full proprietary rights on 31st March 1937, a date which has now passed though the suit was instituted in

December 1934. It may further be mentioned that by the original agreement between the parties of 6th May 1925 defendants 1 to 5 contracted that they would execute a deed of partnership as soon as their application to the Deputy Commissioner to associate plaintiffs with them in the transaction was accepted and that after proprietary rights had been obtained they would cause a sale deed to be executed in favour of their co-partners, damages being fixed if this was not done.

In 1933 defendants 1 to 5 applied to the revenue authorities to mutate the land in accordance with the original agreement. An investigation was held by the Tehsildar of Khanewal who reported to the Deputy Commissioner that this should be done. Accordingly the Deputy Commissioner by order, dated 17th March 1934, effected mutation in the names of all the parties in accordance with the original agreement. Some of the defendants however appealed to the Commissioner and were successful on 14th August 1934 in getting the Deputy Commissioner's order cancelled, apparently on the ground that the transaction was contrary to S. 19, Colonization of Government Lands (Punjab) Act. The order of the Commissioner having been upheld by the Financial Commissioner, the plaintiffs brought the present suit to remove the cloud that was cast upon their possession of the land. They sued for a declaration that they were from the beginning partners with defendants 1 to 5 in the purchase of the land and were in possession of the property in that capacity, and for an injunction against these defendants to restrain them from interfering with their possession. In the alternative they claimed damages amounting to Rs. 6180. Only defendants 1 to 4 contested the suit. The declaration and injunction claimed have been granted by the trial Court and against this decision the defendants have appealed. A case nearly on all fours with the present is 11 Lah 685.¹ There the defendant entered into a contract with the plaintiffs by which the former was to bid at an auction held by Government for the sale of land. The land if purchased was to be treated as the property of all the parties in certain defined shares. The defendant was successful in bidding for the land. The sum was to be paid by instalments.

1. *Preman v. Hardit Singh*, (1930) 17 A I R Lah 885=126 I C 523=11 Lah 685=32 P L R 185.

The defendant then had his name recorded as the tenant of that land until full payment of the purchase money and interest. The suit brought by the plaintiffs to enforce their title to the land under the agreement was resisted on the ground that under S. 19, Colonization of Government Lands (Punjab) Act, the rights or interests vested in a tenant under the Act could not be transferred without the consent in writing of the Commissioner and that any transfer made without such consent in writing was void. It was held that :

By virtue of the contract entered into between the parties, the title to the property vested in all the persons as soon as the purchase was effected, and the plaintiffs became joint tenants with the defendant from the very beginning ; and as they did not acquire any interest in pursuance of any transfer from the defendant, the latter's objection must fail.

This covers the case of the contract entered into between the parties in this appeal. This decision was followed in A I R 1932 Lah 32² and A I R 1936 Lah 576.³ It cannot there be said that the contract entered into between the parties offends against S. 19 of the Act. It was sought to distinguish these authorities on the ground that in the present case defendants 1 to 5 were occupancy tenants and that the defendant in 11 Lah 685¹ was only a tenant. But that obviously makes no difference. It is obvious that the Civil Courts have jurisdiction to grant the relief claimed. Nothing has been shown to us, excluding the jurisdiction of the Civil Courts. The only other question argued was that the agreement referred to was inadmissible in evidence as it was compulsorily registrable under S. 17 (1) (b), Registration Act. This contention must also be repelled. It was held in 89 P R 1908⁴ that an agreement between certain persons providing the manner in which certain property should be divided between them in the event of their succeeding in purchasing the same was not an agreement falling under S. 17 (1) (b), Registration Act. Further, registration is not necessary by reason of S. 17 (2) (v) as the document merely creates a right to obtain another document later on.

Lastly, there has been in the present case part performance so that by virtue of

2. *Nand v. Bhagat Singh*, (1932) 19 A I R Lah 32=134 I C 101=32 P L R 879.

3. *Waryam Singh v. Sundar Singh*, (1936) 23 A I R Lah 576=165 I C 156.

4. *Bhan Singh v. Thakar Das*, (1908) 89 PR 1908=145 P W R 1908.

S. 49, Registration Act, the document could be received as evidence of part performance of a contract for the purposes of S. 53-A, T. P. Act; and in any case could be looked at to see the nature of the possession. There is thus no force in this contention. It was finally argued that the original agreement between the parties came to an end with the confiscation of the land by Government when the instalments were not paid. But, it is clear from the Government letter that this confiscation was set aside and the land restored though the terms were easier. Defendants 1 to 5 therefore got back the land for themselves and for their co-partners. For the reasons given we dismiss this appeal with costs. It remains to discuss the connected appeal No. 91 of 1937. It was conceded before us that the transfer by Budh Singh in this case was after he was put in possession. This being so, the transaction does offend against S. 19, Colonization of Government Lands (Punjab) Act. The decree granted in that case was therefore incompetent. Counsel for the respondent however argued that the plaintiff was entitled to the refund of the money he had paid, namely the sum of Rs. 1200. This is covered by A I R 1933 Lah 291⁵ where it was said that the sum originally advanced would be recoverable even though the attempted dealing with the land was inoperative. The learned Judges who decided that case relied on 45 All 179,⁶ where it was held that in a case where there was no effectual transfer of certain villages since the vendor had only an expectancy, yet under S. 65, Contract Act, the purchase money was recoverable. It was said by their Lordships in that case that the agreement was void from its inception and that S. 65 applied. It was contended on behalf of the respondents that a different view had been taken in A I R 1931 Oudh 309.⁷ If that is so, it cannot override the decision of their Lordships of the Privy Council, while a Full Bench held in A I R 1932 Oudh 193⁸ that, where a contract in writing is void from its incep-

tion, it would fall within the terms of S. 65 as a contract which has become void. For the reasons given we accept this appeal partially and setting aside the decree of the trial Judge grant the plaintiff a decree for Rs. 1200 with costs throughout. This relief was claimed by him in the alternative.

B.D./R.K. *Appeal partly accepted.*

* A. I. R. 1938 Lahore 723

DALIP SINGH J.

Kanshi Ram — Plaintiff — Appellant.
v.

Dula Rai & Co. — Defendant —
Respondent.

Second Appeal No. 1039 of 1937, Decided on 4th February 1938, from decree of Dist. Judge, Amritsar, D/- 29th May 1937.

* Principal and Agent—Suit by principal for rendition of accounts — Decree can be passed in favour of agent.

A decree can be passed in favour of an agent in a suit brought by a principal for rendition of accounts. It cannot however be laid down that a decree must be passed in favour of the defendant: A I R 1932 Lah 619, *Dissent.*; A I R 1924 All 854; 32 All 525 and A I R 1931 Mad 185, *Rel. on*; 14 Cal 147 (P C), *Ref.* [P 724 C 2]

M. C. Mahajan, C. L. Aggarwal and Yashpal Gandhi — *for Appellant.*

Achhru Ram and P. A. Bahal —
for Respondent.

Judgment.—In this case the plaintiff as principal brought a suit for rendition of accounts against the defendant as agent. The defendant pleaded that he was a pucca arhtia and also denied liability to render accounts. Issues were framed: (1) whether the defendant was a pucca arhtia, and (2) whether he was liable to render accounts; and no evidence being led by the defendant, the plaintiff obtained a preliminary decree for accounts. On going into accounts to proceed to final decree it was found that the sum of Rs. 885-11-0 was due to the defendant by the plaintiff and the trial Court gave a decree to the defendant for this amount. I have been informed that the defendant has sued in Bombay for a sum of Rs. 845-8-0 against the plaintiff for money paid by the defendant as agent on plaintiff's behalf. That suit has been stayed pending the decision of the present case. On appeal the learned District Judge dismissed the appeal holding that it was possible to pass a decree in favour of the defendant agent and that the defendant

5. *Qurban Hussain v. Fazal Shah*, (1933) 20 A I R Lah 291=145 I C 163.

6. *Harnath Kuar v. Indar Bahadur Singh*, (1922) 9 A I R P C 403=71 I C 629=45 All 179=50 I A 69=26 O C 223 (P C).

7. *Mahomed Muzaffar Hussain v. Madad Ali*, (1931) 18 A I R Oudh 309=132 I C 543=6 Luck 689=8 O W N 718.

8. *Municipal Board, Lucknow v. S. C. Deb*, (1932) 19 A I R Oudh 193=137 I C 574=8 Luck 1=9 O W N 461 (F B).

was entitled to settle the accounts in dispute without reference to the plaintiff before the due date, on the failure of the plaintiff to deposit margin money as required by the terms of their contract. The plaintiff has come in second appeal and the learned counsel has contended firstly that the learned District Judge is wrong in holding that the terms of the contract in question made any reference to deposit of margin money. The plaintiff admits that he signed the form contained in Ex. C/49 which runs as follows:

We shall thank you to wire your head office to do the following business on our account on your usual terms under rules and regulations of the Marwari Chamber of Commerce.

The plaintiff points out that in Exs. C/31, C/33, C/35, C/36, C/38 which contain the acceptance of the order by the defendant firm, there is no mention of the clause "on your usual terms." The relevant words run as follows:

We have this day sold by your order and on your account as follows subject to the rules and regulations of the Marwari Chamber of Commerce.

The plaintiff therefore contends that the words on "your usual terms" either refer to the rules and regulations of the Marwari Chamber of Commerce or refer to some customary terms which have not been proved and do not refer to the terms contained in Exs. DW/KC and DW/RC. As regards this point, the difficulty of the learned counsel is that he has to contend either that the words "on your usual terms" are superfluous or that there was a substantial variation between the offer and acceptance in which case there would be no contract. This was never the case of parties. With reference to the argument as to customary terms, the words are not "on the usual terms" but "on your usual terms" which obviously refer to some particular terms of the defendant. On this point there is a finding of fact by the learned District Judge that the terms contained in Exs. DW/KC and DW/RC are the usual terms of the defendant in dealing with his constituents. It is true that the two independent witnesses have stated that they had signed the forms containing these usual terms and the plaintiff is not shown to have signed any such terms. One witness however did depose that the plaintiff dealt with the defendant on those terms. I am unable to say whether the distinction was present to the mind of the learned District Judge or not when he gave the finding of fact, but I am not prepared to hold that the finding of

fact is vitiated by this circumstance and I therefore repel the first contention of the learned counsel for the appellant.

The next point made was that there was no proof of a specific demand for margin money. The plaintiff's case however was that there was never any demand for margin money at all and there is again a finding of fact by the learned District Judge that margin money was demanded. The learned counsel contends that there is no statement that a specific amount was demanded but in the absence of any pleading to this effect, I think it must be taken that the amount due under the terms of the contract was demanded. There is nothing to show that any exorbitant demand was made and therefore the plaintiff refused to pay it. Hence I repel this contention of the counsel also. The third point made by the learned counsel was that no decree could be passed in favour of an agent in a suit brought by a principal for rendition of accounts and he cited A I R 1932 Lah 619.¹ With great respect to the learned Judge who gave that ruling I venture to differ from that ruling on the authority of the two Allahabad cases cited in the judgment of the learned District Judge, namely A I R 1924 All 854² and 32 All 525.³ These rulings have been approved of by the Madras High Court in 54 Mad 654⁴ at p. 659, where a reference is also made to the dictum of their Lordships of the Privy Council in 14 Cal 147.⁵ None of these rulings however laid down that a decree must be passed in favour of the defendant. The defendant in this case as stated has brought a suit for Rs. 845-8-0 in Bombay. In order to obtain a decree in this Court the defendant (not being a pucca arhtia) would not only have to show that he made a settlement on behalf of the plaintiff but that he had actually paid the sums due under the settlement. No loss has been proved in this case. Ordinarily speaking, I might have framed an issue and remanded the case for a finding on this point but in view of the fact that the defendant's suit

1. Kesho Ram v. Joti Sarup Goela & Sons, (1932) 19 A I R Lah 619=140 I C 15.
2. Ram Charan v. Bulaqi, (1924) 11 A I R All 854=83 I C 880=46 All 858=22 A L J 783.
3. Permanand v. Jagat Narain, (1911) 32 All 525=6 I C 162=7 A L J 543.
4. Annu Avathanigal v. Somasundara Avathanigal, (1931) 18 A I R Mad 185=191 I C 165=54 Mad 654=62 M L J 45.
5. Huri Nath Rai v. Krishna Kumar, (1887) 14 Cal 147=13 I A 123 (P C).

is pending, I see no reason why the powers of the Court should be exercised in his favour.

I would therefore accept this appeal so far as to do away with the decree in favour of the defendant for Rs. 885-11-0 and I dismiss the plaintiff's suit leaving the parties to bear their own costs of the final decree proceedings. As regards the costs for the hearing of 19th January 1938, the defendant-respondent has furnished no valid excuse for the absence and I assess costs of that hearing at Rs. 50.

D.S./R.K.

Appeal accepted.

*** A. I. R. 1938 Lahore 725**

ADDISON AG. C. J. AND DIN
MOHAMMAD J.

Peoples Bank of Northern India Ltd.
through Official Liquidator —
Petitioner.

v.

Sm. Primla Devi and others —

Respondents.

Civil Misc. Appeal No. 370 of 1936, Decided on 17th June 1938, for cancellation of certificate granted to respondents for leave to appeal to His Majesty in Council.

* (a) Civil P. C. (1908), O. 45, R. 7—Delay in depositing security — Condonation possible for cogent reasons — Courts closed when time fixed expired — Security could be deposited when Court reopened — Money deposited with Bank for purchase of security to be deposited — Delay held could be excused.

The period prescribed by a Court for giving security under O. 45, Rule 7 can be extended for cogent reasons. [P 725 C 2]

Where the petitioner who was to have furnished security had deposited money in Bank who were to purchase Government securities could not get from the Bank the Government papers within time :

Held that delay caused could be condoned and time for depositing security could be extended : 10 Cal 557 (P C) ; 6 All 250 (F B) and A I R 1927 Bom 217 (F B), *Rel. on* ; *Case law referred*. [P 726 C 2 ; P 727 C 1, 2]

Where time fixed for depositing security under R. 7 expires when Court is closed, security can be deposited on the day when the Court re-opens : 39 C W N 651, *Rel. on*. [P 727 C 2]

(b) Civil P. C. (1908), O. 45, Rr. 7 and 9 — Security order—Revoking acceptance — Revocation must be before admission of appeal under Rule 8.

The only power of revoking the acceptance of the security furnished under R. 7 vested in the High Court is the one given by virtue of Rule 9, O. 45, Civil P. C., and that Rule comes into play only before the admission of the appeal under R. 8 and not at any subsequent stage. [P 727 C 1]

D. C. Ralli and Bhagwat Dayal —
for Petitioner.

J. N. Aggarwal and Madan Gopal —
for Respondents.

Din Mohammad J.—This is a petition submitted by the Official Liquidator of the Peoples Bank of Northern India Ltd. (in liquidation) praying that the certificate granted to the respondents for leave to appeal to His Majesty in Council be cancelled, inasmuch as no security had been deposited by them within the time prescribed by law. After hearing counsel for the parties, I have arrived at the conclusion that this petition should be dismissed. It will be necessary to set out a few facts in order fully to appreciate the grounds on which, in my view, this petition should fail. On 3rd July 1936, a Division Bench of this Court, of which I was a member, granted the respondents a certificate under S. 109, Civil P. C., for leave to appeal to His Majesty in Council. Under R. 7, O. 45, Civil P. C., they were required to furnish security in cash or in Government securities in the alternative within six weeks from the date of the grant. The period thus allowed expired on 14th August 1936, but no security was furnished on or before this date. On 22nd August, Mr. Madan Gopal advocate, made an application enclosing the two halves of two Government promissory notes, one for Rs. 3000 and the other for Rs. 1000, duly endorsed in favour of the Registrar of the High Court and stating that he had instructed Lloyds Bank on 18th July to purchase securities, that although the Bank had promised to do so within two or three weeks, it did not carry out its undertaking, that the default was not intentional and that on that ground the security though late by one week be accepted. Thereupon, the Registrar on 11th September 1936, forwarded the papers to me when I was sitting as a Vacation Judge, with the recommendation that, in view of the circumstances disclosed in the case, the delay may be condoned. Reference in the note was made to the commentary appended to R. 7, O. 45, in Mulla's Civil Procedure Code, and it was suggested that this Court had power to extend the time if "cogent reasons" were forthcoming. This commentary was based on a judgment of their Lordships of the Privy Council reported in 10 Cal 557¹ and a Full Bench judgment of the

1. *Burjore & Bhawani Pershad v. Bhagana*, (1884) 10 Cal 557=11 I A 7=4 Sar 498 (P C)

Allahabad High Court reported in 6 All 250.²

In 10 Cal 557¹ their Lordships of the Privy Council, while referring to the wording of S. 602, Act 10 of 1877 (which has now been replaced by Act 5 of 1908) remarked that the words relating to the time within which security is to be given are directory only and although they are not to be departed from without cogent reasons, the Court from which the appeal is preferred has the right of extending the time. In the case before their Lordships, the Oudh Judicial Commissioner had condoned the delay and their Lordships maintained that order. In 6 All 250² Sir Robert Stuart C. J., sitting with Straight, Oldfield, Brodhurst and Tyrrell JJ., followed this judgment of their Lordships of the Privy Council and referring *inter alia* to the wording of Ss. 603, 604 and 605 came to the conclusion that the power to extend the time for giving security was vested in the Court in spite of the apparently mandatory language of S. 602. In the present Civil Procedure Code, the terminology used in R. 7 of O. 45, so far as the period of limitation under consideration is concerned, is just the same as had been used in S. 602 and so is the language of Ss. 603, 604 and 605. I accordingly authorized the Registrar to accept the security as tendered. On 1st October 1936, the appeal to His Majesty in Council was declared to be admitted by the Bench granting the certificate in terms of R. 8 of O. 45 and a notice thereof was duly given to the respondent, that is the present petitioner. A correct copy of the record was transmitted to His Majesty in Council in due course and the appeal is now pending before their Lordships of the Privy Council, and has been registered there as P. C. Appeal No. 84 of 1937 as affirmed by Mr. Madan Gopal.

On 20th April 1938, the present petition was submitted by the Official Liquidator, alleging that no security had been put in by the respondents on or before the 14th August, that it was furnished on the 22nd August, that it was accepted without any authority by the High Court office and that the order of 1st October 1936 was made in ignorance of the fact that no security had been furnished within the time prescribed by law. It was further stated that the *ex parte* order, dated 1st October, was not binding on the petitioner and that

2. *Fazulunnissa Begam v. Mulo*, (1884) 6 All 250 = 1884 A W N 71 (F B).

this Court had no power to extend the time fixed in R. 7 of O. 45. It was consequently prayed that the certificate granted by this Court to the respondents be cancelled. It appears that the petitioner, while submitting this petition, had the Privy Council judgment referred to above in his mind and it was presumably on that account that, in para. 7 of the petition he added that there being no cogent reasons, the delay could not be condoned by this Court. So far as the cogency of the reasons for furnishing security after the expiry of the time prescribed is concerned, there can be no two opinions. The money required for the purchase of the Government promissory notes had been deposited within a fortnight of the order and for the delay that occurred in securing the promissory notes, it was the Bank that was responsible and not the respondents.

Counsel for the petitioner has relied on A I R 1935 Lah 733,³ A I R 1938 Lah 207,⁴ 39 C W N 651,⁵ 55 All 432⁶ and 55 Mad 835.⁷ In A I R 1935 Lah 733,³ 55 Mad 835⁷ and 55 All 432⁶ were relied on and the Bombay judgment reported in 51 Bom 430⁸ which was to the contrary was dissented from. A I R 1938 Lah 207⁴ followed A I R 1935 Lah 733.³ In 55 Mad 835,⁷ it was conceded that the old rule empowered the High Court to extend the time but it was observed that in view of the change introduced in the wording of R. 7 of O. 45 in substituting "not exceeding 60 days" for "within six weeks" in connexion with another limit of time provided therein, the power so vested had been expressly taken away and could not therefore now be exercised. 55 All 432⁶ followed 55 Mad 835.⁷ In 39 C W N 651⁵ it was held that the object of R. 7 was to put a limit definitely, finally and completely upon the amount of extension that the High Court could grant

3. *Munna Lal v. Gajraj Singh*, (1935) 22 A I R Lah 733=159 I O 232.

4. *Chandar Bhan v. Fateh Sher*, (1938) 25 A I R Lah 207=40 P L R 658.

5. *Govinda Narain Singh v. Shamlal Singh*, (1926) 39 C W N 651.

6. *B, an Advocate of Benares v. Judges of High Court, Allahabad*, (1933) 20 A I R All 241=143 I O 559=55 All 432=1933 A L J 207 (F B).

7. *Poornananthachi v. Gopalaswami*, (1932) 19 A I R Mad 484=138 I O 663=55 Mad 835=62 M L J 665.

8. *Nilkant Balwant v. Sachidanand Vidya Nar-simha Bharathi*, (1927) 14 A I R Bom 217=101 I O 555=51 Bom 430=29 Bom L R 352 (F B).

in the matter of appeals to the Privy Council, but no authority was referred to therein or discussed. In 51 Bom 430⁸ however, it was held that the Court could enlarge the time for furnishing security. In view of the judgment of their Lordships of the Privy Council referred to above as well as of this judgment, it cannot be said that the law is well settled that the power of extending the time for furnishing security does not vest in this Court. It is in the case of obligatory provisions only that the hands of the Court are tied down, and if once it is held in view of the judgment of their Lordships of the Privy Council that the provision embodied in this rule is directory, the power of the High Court to condone such delays remains unaffected, whatever the change in the body of the Rule. Besides, the argument employed by the learned Judges of the Allahabad High Court in 6 All 250² also deserves consideration. As stated above while adverting to the language of S. 603, which now corresponds to R. 8, O. 45, Civil P. C., Sir Robert Stuart C. J. remarked that the words "to the satisfaction of the Court" as used in that Section, and which, as I have said before have been used in the corresponding R. 8 too, read in the light of the provisions made in Ss. 604 and 605 invest the Court with discretion to extend the time fixed in S. 602, especially as the words "as before provided" have not been used.

I need not however further dilate on this aspect of the question inasmuch as the petitioner is clearly guilty of laches and is not entitled to any relief on that score alone. As remarked above, the notice of admission of the appeal under Rule 8 was given to him in due course and he slept over it for full 18 months before he presented this petition. He knew full well that the records had been submitted to the Privy Council and the appeal had been registered there and that no proceedings were pending in this Court now. He further should have known that the only power of revoking the acceptance of the security furnished under R. 7 vested in this Court is the one given by virtue of R. 9, O. 45, Civil P. C., and that that Rule comes into play only before the admission of the appeal under R. 8 and not at any subsequent stage. That occasion, it is obvious, had long passed in this case before the present petition was submitted.

Counsel for the respondents contends that as soon as the records are transmitted to the

Privy Council, this Court becomes *functus officio* and all further orders in relation to the appeal, except those which are expressly vested in this Court by virtue of the provisions of the Code of Civil Procedure, are to be made by their Lordships of the Privy Council. I need not however discuss this aspect of the case as I am clear that so far as the cancellation of the certificate granted to the respondents is concerned, the petitioner is not entitled to any relief inasmuch as (1) the delay had been condoned by this Court for reasons which cannot be described as cogent; (2) the stage for cancelling the acceptance of the security has long passed; and (3) the petitioner has been guilty of gross negligence. There is another aspect of the case also which may be referred to in this connexion. The High Court was closed for long vacation from 17th July to 30th September 1936 (both days inclusive) and the period of six weeks from the date of the certificate expired on 14th August when the Court was closed for all purposes relating to civil matters except certain urgent petitions which had been expressly provided for. The furnishing of the security under R. 7 falls under the Code of Civil Procedure and in my view, if on no other ground, on this ground alone the respondents could defer compliance with the order of security until the day when the Court re-opened. The following remarks in 39 C W N 651,⁵ an authority relied upon by the petitioner himself, support me in this conclusion:

Now the certificate was on 2nd August 1926. The Court closed for the vacation on the 26th of that month and the Court resumed after vacation on 8th November 1926. The applicants therefore would have been in time if on the reopening day, i. e. on 8th November, they had deposited the security.

In this case however, the respondents did not wait so long and deposited the Government promissory notes long before the vacation had come to an end, and were not therefore guilty of any delay at all. On the grounds mentioned above therefore I would dismiss this petition with costs.

Addison Ag. C. J. — I agree.

B.D./R.K.

Petition dismissed.

A. I. R. 1938 Lahore 728

ADDISON AND DIN MOHAMMAD JJ.

Peoples Bank of Northern India (in liquidation), Lahore—Decree-holder—Appellant.

v.

Messrs. Durga Dass-Bhagwan Das, Kasur, Judgment-debtors and another—Respondents.

Letters Patent Appeal No. 141 of 1937, Decided on 10th March 1938, against judgment of Bhide J., reported in A I R 1938 Lah 123.

Civil P. C. (1908), O. 21, R. 57—Warrant for attachment of moveables belonging to judgment-debtor obtained by decree-holder—Bailiff on being informed on spot that property was already sold, submitting report to that effect—Executing Court passing order directing case to be consigned to record room—Order held did not amount to dismissal of execution application—Fresh application for execution held not barred : A I R 1938 Lah 123, Reversed.

On an application by a decree-holder, a warrant of attachment of certain moveable property belonging to the judgment-debtor was issued. When the bailiff went to the spot accompanied by the decree-holder's representative, he was informed that the property was already sold. On a report being submitted by him to that effect, the execution Court made an order that the case be consigned to the record room inasmuch as the decree-holder's representative had failed to get the property attached :

Held that the inability on the part of the decree-holder to get the property attached did not amount to a default contemplated by O. 21, R. 57 and the consignment of the execution case to the record room did not amount to a dismissal of the application so as to attract the penal provisions of O. 21, R. 57, and this being so a fresh application by the decree-holder for execution was not barred: A I R 1938 Lah 123, Reversed; A I R 1923 Mad 703 ; A I R 1915 Mad 885 and A I R 1926 All 734, Rel. on ; A I R 1935 Mad 17, Distinguishing. [P 728 C 2 ; P 729 C 1]

Bhagwat Dayal—for Appellant.

Din Mohammad J.—The facts of this case have been fully set out in the judgment under appeal and need not be recapitulated. The sole question now before us is whether the application for execution presented by the decree-holder on 19th August 1936 can proceed. The judgment-debtor contends that it cannot inasmuch as no application for attachment has been made along with it, while the decree-holder maintains that it can, inasmuch as the property sought to be sold was once before attached in 1933 and that that attachment subsists. Bhide J., from whose decision the present appeal has been preferred, has held that although the application for execution

submitted by the decree-holder in 1933 ended in a compromise and the attachment consequently did not cease, the default of the decree-holder in connexion with the subsequent application submitted by him on 20th November 1935 and decided by the execution Court on 31st January 1936, put an end to the attachment and that therefore no fresh application could be made without first applying for the attachment of the property in question. It is necessary to determine therefore whether any such default was committed by the decree-holder in relation to the application dated 20th November 1935, as is contemplated in O. 21, R. 57, Civil P. C. This Rule reads as follows :

Where any property has been attached in execution of a decree but by reason of the decree-holder's default the Court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease.

This Rule obviously contemplates the happening of two events before the application can be dismissed : (i) the attachment of the property and (ii) the decree-holder's default which disables the Court from proceeding further with the application. What happened in this case was that on an application made by the decree-holder a warrant of attachment of certain moveable property belonging to the judgment-debtor was issued and when the bailiff went to the spot accompanied by the decree-holder's representative, he was informed that the property had already been sold. On a report being submitted by him to that effect, the execution Court made an order that the case be consigned to the record room as the decree-holder's representative had not got the property attached. This obviously was the only default attributed to the decree-holder. Considering however that the property was already under attachment and that that attachment was perfectly legal and valid and was subsisting on the date when the bailiff went there with the decree-holder, it cannot be reasonably said that in not getting the property attached the decree-holder made any default. He was not expected to do what already had been done and in failing to do an unnecessary thing he could not be accused of any laches or negligence within the meaning of Rule 57. The consignment of the execution case to the record room therefore did not amount

to a dismissal of the application so as to attract the penal provisions of R. 57 and this being so, the fresh application presented by the decree-holder could not be barred. Counsel for the appellant has referred to A I R 1923 Mad 703,¹ 28 I C 62² and 48 All 698³ and, in our view, these judgments lend a good deal of support to his contention. In A I R 1923 Mad 703¹ the following remarks are pertinent :

No doubt the first six words of the Section "where any property has been attached" are literally satisfied in the present case. But, we are not prepared to hold that such literal satisfaction is sufficient. It seems to us that the Section as a whole is applicable only to cases, in which the stage of attachment has been passed and in which the Court is conscious that the next stage is intended and is not applicable to an abnormal case, such as that before us, where no one concerned, neither the party nor the Court, was conscious of the true facts and where, if there was in fact an attachment, the party and the Court were not aware of it and were proceeding as though there were none . . . The order in respect of which default is contemplated, must clearly be one, which could be made after attachment, not one, as here appropriate only before it. Taking this view, we hold that O. 21, R. 57, was not applicable to the present case or to the order of dismissal now under consideration at all.

In the present case too, as stated above, both the Court and the decree-holder were under a misapprehension that the previous attachment did not exist and that a fresh attachment was necessary and learning that the property had been already sold by the judgment-debtor, the only order that was made by the Court was that inasmuch as the decree-holder had failed to get the property attached, the case should be consigned to the record room. This inability on the part of the decree-holder to get the property attached does not in our view amount to a default contemplated in Rule 57. In 28 I C 62,² which again is a case from the Madras High Court, the headnote reads as follows :

Under O. 21, R. 57, a previously existing attachment ceases to exist on the dismissal of an application for execution only when the circumstances required by the rule are established.

The object of the Rule is to prevent the continuance of an attachment for an indefinite period on the practice of 'striking off' an application for execution previously in vogue for statistical purposes and the operation of the Rule must therefore be confined within the smallest possible limits.

1. Venkateswarayyan v. Aswatha Narayanan, (1923) 10 A I R Mad 703=75 I C 491=45 M L J 315.

2. Venkatasubbiah v. Subbiah, (1915) 2 A I R Mad 885=28 I C 62.

3. Bijai Saran Sahi v. Deo Kishen Prasad, (1926) 18 A I R All 734=97 I C 102=48 All 698=24 A L J 901.

In 48 All 598³ it was observed :

The Rule incorporated in the Code (R. 57 of O. 21) embodied the results of the decisions which had been arrived at by different Courts as regards the effect of an order striking off an execution proceeding on an attachment made in that proceeding, and in substance what it lays down is that if the decree-holder has been in default in not taking the necessary steps to proceed further with the application for execution, and the Court has to dismiss the proceeding, the legal result of such dismissal shall be that the attachment shall cease. That rule does not however apply to a case where a Court strikes off an execution proceeding or consigns the record to the record room to suit its own convenience, or to reduce its pending file, without any default having been committed by the decree-holder, or without his having been asked to take any further steps necessary for proceeding with it. . . . As there was no default it cannot be said that the order aforesaid was an order dismissing the application under O. 21, R. 57, Civil P. C.

No one has appeared for the respondents in this case and consequently the opposite view has not been satisfactorily discussed before us. Counsel for the appellant has on our enquiry referred us to A I R 1935 Mad 17⁴ as an authority against his contention, but we consider that that judgment is distinguishable on facts. As at present advised therefore, we consider that the view taken by the learned Judge of this Court is wrong. We accordingly allow the appeal, set aside the order of the single Judge and restore that of the execution Court. We however make no order as to costs.

R.M./R.K.

Order set aside.

4. Ayyappa Naicker v. Thayammal, (1935) 22 A I R Mad 17=154 I C 736=67 M L J 801.

* A. I. R. 1938 Lahore 729

TEK CHAND J.

Gian Chand — Plaintiff — Petitioner.
v.

Mohammad Ali — Defendant —
Respondent.

Civil Revn. No. 709 of 1937, Decided on 11th January 1938, from decree of Small Cause Court Judge, Rohtak, D/- 1st June 1937.

* Usurious Loans Act (1918), S. 3 (as amended by S. 5 of Punjab Act 7 of 1934)—Subsequent mortgage independent of prior mortgage — Mere fact that consideration for second mortgage was amount due on first would not make them one transaction — In suit on second mortgage Court cannot reopen account of first mortgage.

In a mortgage of 1930, the property mortgaged comprised one-half of the house, and on the principal sum thus secured, interest was agreed to be paid at 18½ per cent. per annum and the term of that mortgage was two years. Accounts under that transaction were gone into and were finally

closed. Another mortgage was executed on 7th March 1934 and the property mortgaged by it was the whole house and not one-half as before. The rate of interest fixed was Rs. 9 on the entire mortgage money. The term of this mortgage was also fixed different. The mortgagee brought a suit on the second mortgage :

Held that in these circumstances the two transactions were independent of each other and the mere fact that the consideration for the second transaction was the amount due on the first, would not make them one transaction. Hence it was not permissible to the Court to re-open account of mortgage transaction of 1930 under S. 3 of the Act, as that mortgage and the mortgage in dispute were two independent transactions. [P 730 C 2]

Held further that the suit was not brought on a series of transactions but was brought on the transaction of March 1934 only, which was independent transaction from the first. Hence the Explanation to Proviso (1) of S. 3 did not apply. [P 730 C 2]

Faqir Chand Mital — *for Petitioner.*

Gulzari Lal — *for Respondent.*

Order — By a registered deed, dated 7th March 1934, the defendant mortgaged his house with the plaintiff for Rs. 875 for a term of three years. It was stipulated that the mortgagor would pay Rs. 9 per month in lump sum as interest on the mortgage debt. Interest was agreed to be paid monthly and on default the mortgagee was given the right to sue for its recovery without joining a claim for recovery of the principal amount in the same suit. Under this provision the mortgagee brought three suits for recovery of interest at Rs. 9 per month for a period aggregating eleven months, and the suits were decreed. By these decrees, the plaintiff realized Rs. 99 as interest. The defendant also paid out of Court interest at Rs. 9 per mensem for a further period of 21 months. In this way, the plaintiff has realized interest at Rs. 9 per mensem for 32 months. He has now brought the present suit for recovery of Rs. 27 as interest for three months, from 7th November 1936 to 6th February 1937. The defendant raised various pleas, of which the one important for our present purposes is that the dealings between the parties first began on 17th June 1930 when the defendant had borrowed Rs. 550 from the plaintiff on a mortgage of one-half of the house and on that transaction the amount due was Rs. 875 on 7th March 1934 in lieu of which the mortgage in dispute was executed. It was accordingly contended that under S. 3, Usurious Loans Act 10 of 1918, as amended by S. 5 of (Punjab) Act 7 of 1934, the whole account from 1930 should be re-opened, and if this were done

it would be found that the plaintiff had been paid on account of interest much more than the maximum permissible under the Act. The lower Court has accepted this plea, and has dismissed the suit.

In my opinion, in the peculiar facts of this case it was not permissible to the Court to re-open account of the mortgage transaction of 1930 under S. 3 of the Act, as that mortgage and the mortgage in dispute are two independent transactions. In 1930 the property mortgaged comprised one-half of the house, and on the principal sum thus secured, interest was agreed to be paid at $18\frac{3}{4}$ per cent. per annum and the term of that mortgage was two years. Accounts under that transaction were gone into and were finally closed. The mortgage with which we are concerned was executed on 7th March 1934, and the property mortgaged by it is the whole house and not one-half as before. The rate of interest fixed was Rs. 9 on the entire mortgage money, which is much less than $18\frac{3}{4}$ per cent. per annum. The term of this mortgage was also fixed different. In these circumstances, the two transactions appear to be independent of each other, and the mere fact that the consideration for the second transaction is the amount due on the first, will not make them one transaction. This was practically conceded by the learned counsel for the respondent. The learned Judge has applied the Explanation to Proviso 1 of S. 3 which lays down that in the case of a suit "brought on a series of transactions" the expression "the transaction" means, for the purpose of Proviso 1, the first of such transactions. Admittedly, the present suit is not brought on a series of transactions but is brought on the transaction of 7th March 1934 only. The mortgage of 1930 was an independent transaction which had been closed and accordingly could not be re-opened in the present suit. To this extent therefore the learned Judge has erroneously applied the provisions of S. 3, Usurious Loans Act.

The plaintiff however is entitled to have the account re-opened from 7th March 1934, the date on which the present mortgage was effected. From that date under (Punjab) Act 7 of 1934, the maximum simple interest permissible (on a secured loan) is 12 per cent. per annum. At this rate, the mortgagee could not charge more than Rs. 8-12-0 per mensem on Rs. 875. In the mortgage deed however, interest was stipulated to be paid in lump sum at Rs. 9 per

mensem, which is four annas in excess of the maximum permissible. The defendant has already paid him out of Court interest for 21 months at Rs. 9. For this period therefore, he has charged Rs. 5-4-0 in excess. Similarly for the three months covered by the suit, his claim is excessive by 12 annas. Deducting Rs. 6 from the amount claimed, the plaintiff is entitled to a decree for Rs. 21 only. Besides, this interest for 11 months at the stipulated rate had been realized by decrees of Courts. No deduction however can be made out of this amount, under Proviso 2 to S. 3 of the Act. I accept the petition for revision, set aside the decree of the Court below and in modification thereof pass a decree for Rs. 21 in favour of the plaintiff against the defendant. As neither party has been successful in full, I leave them to bear their own costs.

D.S./R.K.

*Decree modified.***A. I. R. 1938 Lahore 731**

BLACKER J.

Molar — Accused — Appellant.

v.

Emperor.

Criminal Appeal No. 13 of 1938, Decided on 16th March 1938, from order of Magistrate, First Class, Rohtak, D/- 20th December 1937.

Criminal Trial — Confession — Accused making confession, although coming from police custody, present before Court for considerable period — Overwhelming prosecution evidence recorded against him — Held that no inference could be drawn that confession was improperly induced.

Although the accused making a confessional statement (which he retracted later) had admittedly come from police custody that day, he was before the Court for a considerable period and overwhelming prosecution evidence was recorded against him before his statement was taken :

Held that no inference could be drawn that his confession was in any way improperly induced. It was more likely to have been due to the fact that he had an intelligence to see that he had been caught red-handed and that the evidence which had been given against him in his presence was overwhelming : A I R 1928 Lah 724, Disting.

[P 732 C 1]

Faquir Chand — *for Appellant.*Abdul Aziz (Sheikh) *for Advocate-General — for the Crown.*

Judgment.— Molar appeals from his conviction under S. 395 read with Section 398, I. P. C., and a sentence of seven years' rigo-

rous imprisonment. The case for the prosecution is that on the night of 11th November 1937, after sunset time, a dacoity was committed in the village of Rabra in the shop of Suraj Bhan by 8 persons some of whom were armed with pistols and guns. The outcries of the victim attracted the villagers to the spot and the dacoits ran away firing their guns. Nevertheless the present appellant, who was not armed with a fire arm, was overtaken and caught. On being examined under S. 342, Criminal P. C., he admitted his guilt and pleaded guilty to the charge against him. There were two other co-accused : one was acquitted by the learned Magistrate on the ground that his name was not mentioned in the first information report and that although the first information report was not made by an actual eye-witness, he was known to so many other of the witnesses that if he had really been one of the dacoits his name would certainly have been mentioned in the report. The other, Divan Singh, was acquitted because the learned trial Magistrate was not fully satisfied with the evidence as to the identification parade in which he was picked out by certain witnesses. The Magistrate appears to think that because some of the witnesses picked out another person in the identification parade in his place, the persons who picked him out correctly must have done so through some trickery practised by the police.

The first point that has been made with regard to the conviction of the present appellant is that the confessional statement made by him on 20th November in the Court of the trial Magistrate should not be relied upon because it was retracted a few days later and because it appears to have been the result of some improper inducement. Reliance is placed on a judgment of a Division Bench of this Court reported in A I R 1928 Lah 724.¹ In that case an incomplete chalan was put into Court by the police and after three witnesses had been examined, the Court took the statement of the accused under S. 342, Criminal P. C., and on his admission and plea of guilty committed him in spite of the fact that some weeks later he had retracted. The learned Judges who heard that appeal were of opinion that they could draw an inference that the confessional

1. Sullah v. Mohammada, (1928) 15 A I R Lah 724=110 I C 329=29 Cr L J 697=29 P L R 368.

statement had been improperly induced from the mere fact that the police did not have the confession recorded under S. 164, Criminal P. C., but took an incomplete chalan into Court.

Whether that inference was justifiable in the circumstances of that case is immaterial for the decision of this one. In this case there was no incomplete chalan and although the appellant had admittedly come from police custody that day, he was before the Court for a considerable period and overwhelming evidence for the prosecution was recorded against him before his statement was taken. In these circumstances one cannot say that there is any cogent inference that his confession was in any way improperly induced. It was more likely to have been due to the fact that he had the intelligence to see that he had been caught red-handed and that the evidence which had been given against him in his presence was overwhelming. It cannot be denied that the evidence on the record shows that even apart from the confession there cannot be the slightest doubt about his guilt. He was actually seen by a number of witnesses : he was caught there and then within a couple of minutes at a distance of a few fields from the village. It has been contended on his behalf that the mere fact that he was arrested shortly after the dacoity near the village does not prove that he was one of the persons who were committing the dacoity and he himself said in his subsequent statement that he had gone to the village to buy a bullock and that he was arrested by mistake although he was an innocent person. This argument might have been of some avail if the evidence against him had merely been that given by the witnesses in examination-in-chief. But, unfortunately for the appellant, these prosecution witnesses were all cross-examined at length after the charge and a perusal of their cross-examination leaves not the slightest doubt that the pursuit from the place where the dacoity was committed to the place where he was arrested was continuous and the same transaction. Moreover, there is evidence of more than one witness who deposed that he was seen by them actually at the shop where the dacoity was taking place. His plea that he had merely gone to the village to purchase a bullock is falsified by the clear evidence of the prosecution witnesses that no mention of this story was made at the time he was arrested. In my opinion

there is no reasonable doubt of his guilt and I accordingly dismiss the appeal.

R.M./R.K.

Appeal dismissed.

* A. I. R. 1938 Lahore 732

TEK CHAND J.

Bur Singh — Defendant — Appellant.
v.

Kehru and another, Plaintiffs and others, Defendants — Respondents.

Second Appeal No. 891 of 1937, Decided on 22nd December 1937, from decree of Addl. Dist. Judge, Ferozepore, D/- 11th May 1937.

* Contract Act (1872), S. 23—Security bond for appearance of accused on fixed date — No agreement between surety and accused that latter would reimburse former for amount of security which might be forfeited — Amount subsequently forfeited — Accused three years afterwards voluntarily executing mortgage in favour of surety, consideration being amount forfeited — S. 23 held did not apply — Even in case of agreement to reimburse, accused held could not recover mortgaged land, both parties being in *pari delicto*.

A surety furnished security for the appearance of the accused on a fixed date before the Magistrate. There was no agreement, express or implied, made between him and the accused at that time that the accused would subsequently reimburse him for such amount as might be forfeited. The security bond was subsequently forfeited as the accused failed to appear on the fixed date. Three years afterwards the accused voluntarily and out of gratitude executed a mortgage in favour of the surety, the consideration of the mortgage being the amount forfeited. The accused subsequently brought a suit for the recovery of the land on the ground that consideration for the mortgage was against public policy :

Held that S. 23 did not apply to the case and it was therefore not open to the accused to get back the land without paying the surety the amount for which the mortgage had been effected : *1 All 751; 32 Bom 449 and 1 P R 1899, Disting.*
[P 734 C 2]

Held further that even if an agreement to reimburse had been made between the parties at the time when the security bond was executed, the plaintiff's suit would still fail on the ground that both parties being in *pari delicto*, the Court would help neither party and would let the estate remain where it falls, because a person who has transferred his property to another for an illegal or immoral purpose cannot get the transfer annulled on the ground that the consideration was illegal or immoral : *A I R 1921 Oudh 132, Rel. on.* [P 734 C 2]

R. P. Khosla — *for Appellant.*

Amar Singh and S. Kartar Singh for
Amar Singh (on 13th December 1937)
— *for Respondents.*

Judgment. — This second appeal arises out of a suit instituted by two brothers,

Kehru and Mehru, plaintiffs-respondents, against their uncle Bur Singh, defendant-appellant, for possession of 17 kanals 10 marlas of land which the plaintiffs alleged belonged to them but of which the defendant Bur Singh had been in unlawful possession, for six years preceding the suit. The defendant admitted that the plaintiffs were the owners of the land, but pleaded that he was lawfully in possession as a mortgagee under a mortgage effected orally by Kehru, plaintiff, in 1930. In their replication, the plaintiffs denied the factum and validity of the alleged mortgage. The trial Judge found that the alleged mortgage had not been proved, and consequently Bur Singh, defendant, had no legal right to retain possession of the land. He accordingly decreed the suit. On appeal the learned Additional District Judge held that there was sufficient evidence on the record to prove that Kehru, plaintiff, had mortgaged the land to Bur Singh, defendant, in 1930 but he came to the conclusion that the mortgage was invalid as being against public policy.

The circumstances in which the mortgage was found to have been effected are as follows : In 1927 Kehru was placed on security under S. 110, Criminal P. C. He offered certain sureties and was released. After some time, the Sub-Inspector reported that the sureties were men of no substance and were otherwise undesirable persons and that Kehru be called upon to furnish fresh security. On this, proceedings under S. 122, Criminal P. C., were started against Kehru and warrants for his appearance were issued. He however evaded service of the warrants for some months. Eventually, he was arrested on 16th May 1927, and in execution of a bailable warrant requiring his appearance before the Magistrate at a certain named date, his uncle Bur Singh furnished security for Rs. 500 undertaking to produce him in Court on the date fixed. The bond was duly accepted and Kehru was released. On the date of hearing however Kehru failed to appear before the Magistrate. Efforts were made to secure his attendance, but they were unsuccessful. Proceedings were then taken against Bur Singh, surety, and eventually an order was passed on 18th August 1927 forfeiting the whole amount of the security bond, Rs. 500. This sum was paid by Bur Singh shortly after the order of forfeiture had been passed on 18th August 1927.

Three years later, in 1930, Kehru mortgaged the land in dispute to Bur Singh for Rs. 500, the consideration being the amount which Bur Singh had to pay on forfeiture of his bond by reason of the nonappearance of Kehru before the Magistrate in the aforesaid proceedings under S. 122, Criminal P. C. These are the facts found by the learned Additional District Judge, and are no longer in controversy. On the question of law the learned Additional District Judge has held that the consideration for the mortgage was unlawful being opposed to public policy. The transaction was therefore void and the defendant Bur Singh, was not entitled to continue in possession as mortgagee. In support of this conclusion, the learned Judge relied upon 1 All 751¹ and 32 Bom 449.² On second appeal it is urged by the learned counsel for the defendant-appellant that the rulings relied upon by the learned Additional District Judge are distinguishable, inasmuch as in both of them it was a condition precedent of the surety offering security for the accused that the latter would deposit with him the amount of the security, whereas in the present case no such condition had been entered into at the time when Bur Singh stood surety or later when the security bond was forfeited, and that it was three years later when Kehru out of gratitude for the good turn that Bur Singh had done him voluntarily gave him the land in mortgage.

In 1 All 751¹ the facts were these. The plaintiff in that case was required by the Magistrate to furnish two sureties for good behaviour, each in the sum of Rs. 600. The respondent agreed to become a surety on condition that the plaintiff would deposit with him the sum in which he was required to go bail. The deposit was made and the period of surety expired without any act having been committed by the plaintiff to forfeit the security. Subsequently the plaintiff sued to recover from the surety the amount of the deposit. It was held that the consideration of the agreement was unlawful in that it defeated the object of the law and therefore the plaintiff could not recover. It was observed that if the amount for which the surety is responsible is deposited with him by, or on behalf of, the person for whose conduct he

1. *Fateh Singh v. Sanwal Singh*, (1875-77) 1 All 751.

2. *Laxman Lal v. Mulshankar*, (1908) 32 Bom 449=10 Bom L R 553.

undertakes responsibility, it is obvious that he is responsible only in name and the object of the law in taking security is defeated.

In 32 Bom 449,² while a criminal prosecution was pending against the defendant, his pleader entered into a bail bond for his appearance and to indemnify the pleader against any loss which he might suffer under the bail bond, a nominal sale deed and a nominal rent deed was simultaneously passed by the defendant to the plaintiff. The plaintiff subsequently brought a suit to recover two years' rent on the strength of the rent note. The defendant pleaded that the property did not belong to the plaintiff as there was no valid sale deed in his favour the consideration being opposed to public policy. The plea was upheld and the suit dismissed.

Similarly, in 1 P R 1899,³ it was held by the Full Bench of the Punjab Chief Court that it was against public policy for a surety who had given a bail bond for the appearance of his principal to answer a criminal charge and whose bail bond had been forfeited in consequence of the non-appearance of the principal, to recover the amount forfeited from his principal either on the ground of an express, or an implied, or a quasi-contract under S. 70, Contract Act, by the principal to indemnify the surety, or as an action in tort. This conclusion was reached on the principle that in taking sureties for the appearance of an accused person, the object of the law is to have a guarantee as it were from the sureties at their own risk that the accused will so appear and the pecuniary liability is imposed for the purpose of securing that the sureties will ensure the appearance of the accused. To hold that the surety could recover from an absconding accused, either under an express contract, or an implied, or quasi-contract, or by an action in tort, would be to defeat this object, and therefore contrary to public policy.

The rule laid down in these rulings is well-established and has not been challenged by the learned counsel for the appellant. The present case however does not fall within the mischief of this rule. As has been stated already, in this case there was no agreement, express or implied, made between the parties at the time when the appellant furnished security that Kehru

would subsequently reimburse him for such amount as might be forfeited. Here, the mortgage was effected voluntarily by Kehru nearly three years after the forfeiture, and the appellant has been in undisturbed possession since. To such a case, S. 23, Contract Act, does not apply and it is therefore not open to Kehru and his brother to get back the land without paying him the amount for which the mortgage had been effected.

Further, it seems to me that even if an agreement to reimburse had been made between the parties at that time when the security bond was executed, the plaintiff's suit would still fail on the ground that both parties being *in pari delicto*, the Court will help neither party and will let the estate remain where it falls: 61 I C 985.⁴ It is well settled that a person who has transferred his property to another for an illegal or immoral purpose cannot get the transfer annulled on the ground that the consideration was illegal or immoral. Similarly, it has been held that money paid in furtherance of an illegal object cannot be recovered when the parties to the contract are themselves *in pari delicto*. Whatever the position might have been if the appellant had brought a suit to recover from Kehru the amount forfeited, or if he had sued to enforce the mortgage, there can be no doubt that Kehru or his brother cannot invoke the assistance of the Court to get back the land which they had voluntarily mortgaged to the appellant. I accept the appeal, set aside the judgment and decree of the Additional District Judge and dismiss the plaintiff's suit. Having regard to all the circumstances, I leave the parties to bear their own costs throughout.

D.S./R.K.

Appeal accepted.

4. Bisheswar v. Rachcha Ram, (1921) 8 A I R Oudh 132=61 I C 985.

A. I. R. 1938 Lahore 734

ADDISON AND DIN MOHAMMAD JJ.

Shiromani Gurdwara Parbhandak Committee, Amritsar — Petitioner — Appellant.

v.

Sardar Gurdial Singh and others — Defendants — Respondents.

First Appeal No. 223 of 1937, Decided on 26th January 1938, from decree of Sikh Gurdwaras Judicial Commission, Lahore, D/- 15th May 1937.

3. Sundar Singh v. Kishen Singh, (1899) 1 P R 1899.

(a) Punjab Sikh Gurdwaras Act (8 of 1925), S. 2 (iv)—Office-holder and minister—Difference between, explained—Control denoting domination or command is essential to constitute minister.

While in the case of an 'office-holder,' participation in either the management or performance of public worship in a Gurdwara or in the management or performance of any rituals or ceremonies observed therein is sufficient, in the case of a 'minister' the control not only of the management or performance of public worship in a Gurdwara is essential but also of the rituals and ceremonies observed therein. Secondly, while a person can be called an 'office-holder' if he participates in the management or performance of public worship in a Gurdwara or in the management or performance of any rituals or ceremonies observed therein, he cannot be called a 'minister' unless he is vested with the control of the management or performance of public worship in a Gurdwara and of the rituals and ceremonies observed therein either solely or along with others. When the Legislature used two different terms in two separate definitions, it did intend to distinguish one from the other and in using the word 'control' as distinguished from management, its intention was to import into the term 'control' the idea of domination or command. [P 735 C 2 ; P 736 C 1]

(b) Punjab Sikh Gurdwaras Act (8 of 1925), S. 29—S. G. P. Committee—Unauthorized jurisdiction if exercised can be ignored and is subject to control of Courts.

Unauthorized seizure of jurisdiction would be subject to the control of Courts and an act done which is not within the competence of the Shiromani Gurdwara Parbhandak Committee to do, would be liable to be ignored. [P 736 C 1]

Achhru Ram and Narindar Singh —
for Appellant.

Bhagat Singh — for Respondents.

Din Mohammad J.—This is an appeal from an order of the Sikh Gurdwaras Judicial Commission dismissing an application of the Shiromani Gurdwara Parbhandak Committee, Amritsar. The application was presented under S. 142, Sikh Gurdwaras Act, claiming the following reliefs: (a) the removal of one Gurdial Singh from his office of president as well as from his position as a member of the committee of management, Gurdwara Bhai Karm Singhwala; (b) the reinstatement of one Sher Singh in his office as granthi in the said Gurdwara; (c) for payment of the arrears of Sher Singh's salary in full; and (d) for award of Rs. 500 as damages as well as costs. The Judicial Commission came to the conclusion that Sher Singh was not a 'minister' within the meaning of S. 2 (4) (vii), Sikh Gurdwaras Act, and consequently neither was he competent to appeal to the Shiromani Gurdwara Parbhandak Committee under S. 135 (4) of the same Act, nor was that Committee empowered to make any

order under that sub-section. The president of the Commission however in concurrence with another member, held that Gurdial Singh was not justified in refusing to obey the order of the Shiromani Gurdwara Parbhandak Committee on the ground that it was ultra vires and that he was thus guilty of neglect of duty deserving censure of his conduct and a warning for the future not to conduct himself in that manner. The Parbhandak Committee has appealed.

The sole point urged on behalf of the appellants is that Sher Singh was a 'minister' and not a mere 'office-holder' inasmuch as he played an important role in the management and performance of public worship in the Gurdwara, and had thus, along with others, the control of the management or performance of public worship within the meaning of S. 2 (4) (vii). In order to appreciate the difference between an 'office-holder' and a 'minister,' it is necessary to refer to the meanings assigned to these terms in S. 2, Gurdwaras Act. S. 2 (4) (i) defines the term 'office' as follows:

Office means any office by virtue of which the holder thereof participates in the management or performance of public worship in a Gurdwara or in the management or performance of any rituals or ceremonies observed therein.

In the same clause 'office-holder' has been defined to mean any person who holds an office. Cl. (vii) of the same sub-section defines 'minister' as follows:

Minister means an office-holder to whom either solely or along with others the control of the management or performance of public worship in a Gurdwara and of the rituals and ceremonies observed therein is entrusted.

The distinction is obvious in more than one respect. In the first instance, it would appear that, while in the case of an 'office-holder,' participation in either the management or performance of public worship in a Gurdwara or in the management or performance of any rituals or ceremonies observed therein is sufficient, in the case of a 'minister' the control not only of the management or performance of public worship in a Gurdwara is essential but also of the rituals and ceremonies observed therein. Secondly, while a person can be called an 'office-holder' if he participates in the management or performance of public worship in a Gurdwara or in the management or performance of any rituals or ceremonies observed therein, he cannot be called a 'minister' unless he is vested with the control of the management or performance

of public worship in a Gurdwara and of the rituals and ceremonies observed therein either solely or along with others. On reference to the Oxford Dictionary one finds that though "management" in certain circumstances involves control, the term "control" connotes the idea of exercising restraint or direction upon the free action of others, holding sway over or exercising power or authority over another or dominating and commanding others. The term "manage" means merely to conduct or carry on a business or an undertaking. It is clear that when the Legislature used two different terms in two separate definitions, it did intend to distinguish one from the other and that in using the word 'control' as distinguished from management, its intention was to import into the term "control" the idea of domination or command. In agreement therefore with the Judicial Commission, we find that Sher Singh was a mere 'office-holder' and as such he was not competent to appeal to the Shiromani Gurdwara Parbhandak Committee under S. 135 (4). Consequently, it was ultra vires of the Shiromani Gurdwara Parbhandak Committee to make any order on his appeal or to enforce it against the committee of management. Counsel for the appellants has urged in this connexion that when once the Shiromani Gurdwara Parbhandak Committee assumes jurisdiction in a certain matter the Judicial Commission cannot question it. We however do not agree. Unauthorized seizure of jurisdiction would be subject to the control of Courts and an act done which is not within the competence of the Shiromani Gurdwara Parbhandak Committee to do would be liable to be ignored. On these grounds we uphold the order of the Judicial Commission and dismiss this appeal with costs. The respondents have also put in cross-objections but they are without any force. We dismiss them but make no order as to costs in them.

B.D./R.K.

Appeal dismissed.

* A. I. R. 1938 Lahore 736

ABDUL RASHID J.

Dulla—Judgment-debtor—Appellant.

v.

*Ram Chand, Plaintiff and others,**Judgment-debtors—Respondents.*

Execution Second Appeal No. 964 of 1937, Decided on 27th January 1938, from order of Senior Sub-Judge, Gujranwala, D/- 15th March 1937.

* Civil P. C. (1908), S. 60 (1) (c) (as amended by S. 35 of the Punjab Relief of Indebtedness Act 7 of 1934)—House belonging to judgment-debtor exempted from attachment and sale under S. 60 (1) (c) as amended by S. 35—Mere fact that judgment-debtor has mortgaged house with possession does not disentitle him to protection afforded by S. 60 (1) (c).

Where a house belonging to an agriculturist is exempted from attachment and sale in execution of a decree under S. 60 (1) (c), Civil P. C., as amended by S. 35, Relief of Indebtedness Act, the mere fact that the judgment-debtor has mortgaged the house with possession and taken it on rent from the mortgagees, does not disentitle him to the protection afforded by Sec. 60 (1) (c), as the judgment-debtor never gave up possession of the house and has been using it throughout for purposes subservient to agriculture : *A I R 1938 Lah 893, Rel. on.* [P 737 C 1]

Bashir Ahmed—for Appellant.

Judgment. — Ram Chand obtained a decree against one Dulla and in execution of this decree attached the house in dispute. The judgment-debtor filed objections under S. 60 (1) (c), Civil P. C., to the effect that the house in dispute was not liable to attachment in execution of the decree as he was an agriculturist. The decree-holder admitted that the judgment-debtor was an agriculturist and was in actual possession of the house in dispute. It was however contended by him that the judgment-debtor had mortgaged the house in dispute with possession with Gopal Das and Ram Lal, that the mortgagees had let out the house to the judgment-debtor on lease, that the possession of the judgment-debtor was that of a tenant under the mortgagees, and that the house was therefore liable to attachment in execution of the decree. The trial Court accepted the objection petition of the judgment-debtor and released the house from attachment. On appeal by the decree-holder, the learned Senior Subordinate Judge held that the judgment-debtor was not protected by Cl. (c) of sub-s. (1) of S. 60, Civil P. C. He accepted the appeal and set aside the order of the executing Court. Against this decision the judgment-debtor has preferred a second appeal to this Court.

Under the Civil Procedure Code, as amended by S. 35, Relief of Indebtedness Act, houses and other buildings, belonging to an agriculturist, and not let out on rent or lent to others or left vacant for a period of a year or more, are not liable to attachment or sale in execution of a decree. The house admittedly belongs to an agriculturist; he has not let it out on rent or lent it to anyone; he has been in occupation of the house throughout, and it has never been

left vacant for a period of a year or more. In these circumstances it appears that the house is not liable to attachment and sale. The mere fact that the judgment-debtor mortgaged the house with possession in favour of Ram Chand and Dhanpat Rai, and took it on rent from the mortgagees does not disentitle him to the protection afforded by S. 60 (1) (c), Civil P. C., as the judgment-debtor never gave up possession of the house; and has been using it throughout for purposes subservient to agriculture. Reference may be made in this connexion to (1934) 35 P L R 144.¹ There are some observations in this judgment which support the case of the appellant, and show that Sec. 60, Civil P. C., does not become inapplicable simply because the agriculturist, though in possession of the house, has taken a lease thereof from a mortgagee. This ruling was given before S. 60, Civil P. C., was amended by S. 35, Relief of Indebtedness Act (7 of 1934), but the principle underlying the ruling appears to be applicable to the present case. For the reasons given above, I accept this appeal, set aside the judgment of the learned Senior Subordinate Judge, dated 15th March 1937, and restore that of the executing Court dated 5th December 1936. Having regard to all the circumstances, I leave the parties to bear their own costs throughout.

R.M./R.K.

Appeal allowed.

1. Hasan Mahomed v. Ahmad Bakhsb, (1933) 20 A I R Lah 893=147 I C 285=35 P L R 144.

A. I. R. 1938 Lahore 737

BHIDE J.

Kishan Singh and another—Plaintiffs
—Appellants.

v.

Pritam Singh and others—Defendants
—Respondents.

Second Appeal No. 1274 of 1937, Decided on 31st January 1938, from decree of Dist. Judge, Ludhiana, D/- 4th September 1937.

(a) Registration Act (1908), S. 17 (2), Cl. (6) —Compromise between parties to suit embodied in petition presented to Court — Court passing order recording compromise and also passing decree on basis of compromise—Compromise does not require registration—It can be proved by petition embodying terms thereof.

Where a compromise entered into by the parties to a suit is embodied in a petition which is presented to the Court and the Court passes an order recording the compromise and also passes a decree on basis of the compromise, making a reference to

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it, the compromise does not require registration according to S. 17 (2), Cl. (6), Registration Act, although the terms of the compromise are not actually embodied in the decree. The compromise can be proved by the petition, embodying the terms thereof, presented by the parties, as it forms part of the judicial order made by the Court thereon by virtue of reference made to the compromise: *A I R 1930 Lah 855 and A I R 1932 Lah 24, Rel. on; A I R 1936 Lah 605, Disting.*

[P 738 C 2]

(b) Co-sharers—Right to alienate — Some of co-sharers executing mortgage entering into compromise with mortgagee agreeing to deliver some land to him in consideration of his reducing mortgage charge — Co-sharers are bound by terms of compromise to extent of their share—Compromise is not illegal merely because one of the mortgagors is not party to it.

Even before partition, a co-sharer in possession may mortgage any portion of the joint property not in excess of his share subject to the adjustment of the rights of all the co-sharers at the time of the partition. [P 738 C 2; P 739 C 1]

Where therefore only some of the co-sharers who have executed a mortgage enter into a compromise with the mortgagee, whereby they agree to deliver some land to the mortgagee in consideration of his reducing the mortgage charge and releasing rest of the property from the mortgage, the co-sharers entering into the compromise are bound by it to the extent of their share and the compromise is not illegal merely because one of the mortgagors is not a party to it. [P 738 C 2]

(c) Civil P. C. (1908), S. 64—Attachment in execution of decree made subject to mortgagee rights of mortgagee — Subsequent compromise whereby mortgagors agree to transfer portion of mortgaged land in consideration of mortgagee reducing mortgagee charge is not illegal.

Where an attachment in execution of a decree is made subject to the mortgagee rights of the mortgagee holding a mortgage on the property, a subsequent compromise, whereby the mortgagors agree to transfer a portion of the mortgaged property to the mortgagee in consideration of his reducing the mortgage charge and releasing the rest of the property from the mortgage, is not illegal by reason of S. 64, Civil P. C., more specially so when the mortgagee had already become entitled to possession even prior to the attachment. [P 738 C 1; P 739 C 1]

Achhru Ram and F. C. Mittal —

for Appellants.

D. R. Sawhney and J. L. Kapur —
for Respondents 1 to 3, and 4 and 5 respectively.

Judgment.—The material facts of the case giving rise to this appeal are briefly as follows: On 27th July 1928, Pala Singh and Pritam Singh, two brothers, mortgaged 50 bighas of land in favour of the plaintiffs for the sum of Rs. 4700. The mortgage was without possession but it was agreed that if interest was not paid annually according to the terms of the mortgage, the mortgagees would be entitled to obtain possession.

The sons of Pritam Singh thereafter instituted a suit for a declaration that the mortgage was without necessity and consideration and should not affect their reversionary rights. This suit was compromised on 22nd February 1935, and it was agreed that the original mortgage charge should be reduced to a sum of Rs. 5500 only, that an area of 11 bighas 13 biswas 7 biswansis should be delivered to the mortgagees and the rest of the land considered to be redeemed. The compromise was embodied in a petition which was presented to the Court and the Court thereupon dismissed the declaratory suit. The terms of the compromise however were not fully embodied in the decree. Subsequently the present suit was instituted by the plaintiff-mortgagees as the area of 11 bighas 13 biswas 7 biswansis which was promised to be delivered to them, was not made over to them. The suit was resisted by Pala Singh and the sons of Pritam Singh on the ground that the compromise dated 22nd February 1935 on which the suit was based could not be proved as it was not duly registered. Secondly, it was also urged that the compromise was illegal as Pala Singh who was one of the mortgagors was not a party to it. Lastly, it was contended that the land in question had already been attached by certain decree-holders and the compromise was illegal inasmuch as it involved an alienation contrary to the provisions of S. 64, Civil P. C. The suit was decreed by the trial Court but was dismissed by the learned District Judge on appeal, on the finding that the compromise required registration and could not be proved. The suit being based on the compromise alone, the question whether the plaintiffs could fall back on the original mortgage of 1928 was not considered.

The learned counsel for the appellants has urged that the view taken by the learned District Judge that the compromise of 1928 required registration is not sound. It is contended that the compromise was embodied in a petition which was presented to the Court and the Court passed an order recording the compromise and also passed a decree on the basis of that compromise. The compromise therefore did not require registration, according to Cl. 6 of sub-s. 2 of S. 17, Registration Act. The learned counsel for the respondents urged in reply that the terms of the compromise were not embodied in the decree and therefore the compromise did require registration. In

support of this contention he relied chiefly on A I R 1936 Lah 605.¹ That ruling however appears to be distinguishable inasmuch as the material terms on which reliance was placed in that case were not actually referred to in the statements made in Court, nor were they embodied in the decree. In the present instance there is no such allegation and it appears that the compromise petition was duly verified in Court and a decree was passed on the basis of the compromise. It is true that the terms of the compromise were not actually embodied in any decree but reference was made to the compromise in the order passed on the petition, which was to the following effect: "*Fariquin razinama tasdiq karte hain barue razinama dawa maddaya kharij howe.*" The contention of the learned counsel for the appellants that this order was sufficient to exempt the compromise from the necessity of registration is supported by A I R 1930 Lah 855² and A I R 1932 Lah 24.³ I accordingly hold that the compromise can be proved by the petition embodying the terms thereof presented by the parties in the suit of 1935, as it formed part of the judicial order made by the Court thereon, by virtue of the reference made to the compromise.

The next contention of the learned counsel for the appellants was that the compromise cannot be considered to be illegal merely because Pala Singh was not a party to it. The land was originally held jointly by Pala Singh and Prem Singh, but the area which the plaintiffs are claiming is not in excess of the share of the defendants, Dharam Singh, Tilok Singh and Pritam Singh. I see therefore no reason why the plaintiffs' claim should not be decreed, as against these defendants, at least to the extent of their share in the land in dispute, as contended for the appellants. The learned counsel for the respondents urged that the area to be delivered to the mortgagees was not specified in the compromise by any definite khasra numbers and as Pala Singh was entitled to every bit of the mortgaged land, the compromise should be considered to be illegal. However, even before partition a co-sharer in possession may mortgage any portion of the joint property not in excess of his share subject to

1. *Mehr Chand v. Pritam Singh*, (1936) 23 A I R Lah 605=165 I O 199.

2. *Mt. Jai Lagi v. Alliance Bank of Simla Ltd.*, (1930) 17 A I R Lah 855=128 I O 900.

3. *Mahbub v. Munshi*, (1932) 19 A I R Lah 24=195 I O 203=82 P L R 761.

adjustment of the rights of all the cosharers at the time of partition. There is therefore no reason why the plaintiffs should not claim from the three defendants referred to above, (who at any rate, are bound by the terms of the compromise) an area to the extent of their share.

The last contention of the learned counsel for the appellants that the attachment of the land by the decree-holders prior to the compromise of 1935 did not invalidate the compromise also appears to me to be sound. The attachment was clearly made subject to the mortgagee rights of the plaintiffs. These rights were no doubt based on the mortgage deed of the year 1928 which was superseded by the compromise of the year 1935 but the compromise only served to reduce the encumbrance on the mortgaged property and did not in any way prejudice the rights of the attaching creditors. The mere fact that the plaintiffs were allowed possession of 11 bighas 13 biswas 7 biswansis by the compromise cannot be considered to impose any additional burden, as even according to the terms of the original compromise the plaintiffs were entitled to claim possession of the mortgaged property on the mortgagor's failure to pay interest as agreed. It was not denied that the mortgagors had failed to pay any interest and the mortgagees had already become entitled to possession even before the attachment, which took place in 1934. The present suit being only for possession, it is unnecessary to consider here whether the sons of Prem Singh could be properly held to be liable for the whole of the mortgage charge, when Pala Singh, one of the original mortgagors, was not a party to the compromise. That question can be decided at the time of redemption, if and when the necessity arises. On the above findings, it seems to me that the plaintiffs' claim must be decreed to the extent of the share of defendants 2 to 4 in the land in dispute, i. e. one-half of 11 bighas 13 biswas 7 biswansis. I accordingly accept the appeal and setting aside the order of the learned District Judge, pass a decree for possession of one-half of 11 bighas 13 biswas 7 biswansis out of this joint land specified in the plaint. This decree will be against defendants 2 to 6. The suit against defendant 1 is dismissed with costs. As against defendants 2 to 6, the plaintiffs will get one-half their costs throughout.

R.M./R.K.

*Appeal allowed.***A. I. R. 1938 Lahore 739**

BHIDE J.

Mt. Harbans Kaur — Complainant —
Petitioner.

v.

Lahari Ram and others—Respondents.

Criminal Revn. No. 632 of 1938, Decided on 1st July 1938, from order of the Sess. Judge, Ludhiana, D/- 2nd March 1938.

(a) Criminal Trial—Complaint—Defamatory allegations against minor daughter affecting father — Father and daughter can file separate complaints — Compromise and consequent acquittal of accused in father's complaint do not affect complaint by daughter.

Where a report is made to police by certain persons against another containing defamatory allegations against such person's minor daughter, both the father and the daughter can file separate complaints; and the compromise and consequent acquittal of accused in father's complaint will be no bar to the complaint by the daughter, because the complaint by the father although on same facts could not either have been filed on behalf of his minor daughter or compromised without the Court's permission: 32 Cal 425, *Rel. on*; A I R 1919 All 90, *Disting.* [P 740 C 1, 2]

(b) Criminal Trial—Revision — Acquittal on erroneous view of law can be set aside.

Revision of an order of acquittal may be allowed when the order of acquittal is based on an erroneous view of the law: A I R 1918 Lah 204; A I R 1924 Lah 286 and A I R 1930 Lah 159, *Rel. on.* [P 741 C 1]

R. L. Anand II and Mela Ram Aggarwal — *for Petitioner.*

Des Raj Sawhney — *for Respondents.*

Order. — The facts giving rise to this petition for revision are briefly as follows: The four respondents along with certain other persons presented a petition to the police against Hardit Singh, father of the petitioner Mt. Harbans Kaur, alleging that his house was visited by persons of bad repute who drank liquor and committed debaucheries and were thus a nuisance to the people of the mohalla. One of the allegations in the petition was that one Gurdial Singh also visited the house of Hardit Singh for immoral purposes and that he was in possession of letters from the present petitioner, Mt. Harbans Kaur, who is a young girl aged about 17. Hardit Singh filed a complaint for defamation against the respondents and the other signatories of the application under S. 500, I. P. C., which was eventually compounded upon the accused tendering an apology and withdrawing their allegations. The accused were therefore acquitted.

A second complaint was filed under Sec. 500, I. P. C., by Mt. Harbans Kaur, the present petitioner, with reference to the same application. An objection was raised that the second complaint was barred by the provisions of S. 403, Criminal P. C. This contention was rejected by the trial Magistrate who convicted the respondents and sentenced them to a fine of Rs. 100 each. The respondents appealed, and the learned Sessions Judge has upheld their preliminary objection that this complaint was barred by their acquittal in the previous complaint by Hardit Singh, and has set aside their convictions. Mt. Harbans Kaur has now filed a petition for revision of this order. The learned counsel for the petitioner has contended that the complaint of Hardit Singh did not purport to be on behalf of Mt. Harbans Kaur and that it could not have been filed at all on her behalf without the leave of the Court as she is a minor and permission was neither asked for nor granted: *vide* S. 198, Criminal P. C. It is true that the defamatory application contained matter which cast reflections on the character of Mt. Harbans Kaur and this was also the subject-matter of the complaint. But, the allegations against Hardit Singh's daughter's character might amount to his defamation also, and consequently this fact alone would not show that the complaint was on behalf of the present petitioner. It was further pointed out that had the previous complaint been on behalf of Mt. Harbans Kaur, it could not have been compounded without the permission of the Court: *vide* S. 345 (4), Criminal P. C. No such permission was asked for or given.

The learned counsel for the respondents on the other hand urged that the subject-matter of the second complaint by the present petitioner was in substance the same as that of the previous complaint by the father, that no man can be prosecuted twice for the same offence, that the petitioner had instituted a civil suit for damages also, that the present complaint was vindictive and was brought merely to harass the respondents and that there was no such miscarriage of justice as would justify interference in revision. After carefully considering the facts, I am of opinion that the previous complaint by Hardit Singh was legally no bar to the present complaint by Mt. Harbans Kaur. The previous complaint did not purport to be on her behalf and she being a minor, it could not, according to

law, have been either instituted or compounded without permission of the Court. Admittedly no such permission was asked for or granted. The mere fact that the defamatory application contained reflections on the character of Mt. Harbans Kaur would not justify the conclusion that the complaint was on her behalf. For, the defamatory allegations with reference to Mt. Harbans Kaur were calculated to harm Hardit Singh's reputation also, and could therefore legitimately form the subject-matter of his complaint under S. 500. This view receives support even from 32 Cal 425¹ on which the learned Sessions Judge has relied. It would appear from the above that the application made by the respondents to the police contained matter which defamed Hardit Singh as well as Mt. Harbans Kaur and consequently the latter had an independent right to seek redress therefor in Civil and Criminal Courts. The learned counsel for the respondents referred to 18 A L J 85,² but that case is easily distinguishable as the accused had been previously tried for the offence of rioting, which is an offence against the public peace and for which each individual concerned has not a personal remedy as in the case of defamation.

As regards the allegation that the complaint is vexatious and vindictive, it may be noted that the petitioner readily gave up her complaint against one of the accused Des Raj who apologized. The present respondents however not only did not do so, but produced evidence in support of the defamatory allegations, although they had previously withdrawn them. They utterly failed to establish them and even the learned Sessions Judge did not take a different view on this point. The petitioner, who is a young girl had a right to vindicate her character, and in view of all the circumstances the complaint cannot be treated as merely vindictive. The respondents offered to apologize now at the last stage, but she naturally refused to accept the offer as the respondents had persisted in their allegations and had put her to the trouble and expense of leading a great deal of evidence to clear her character. It has been held in 8 P R 1918³ and

1. Thakur Das v. Adhar Chandra, (1905) 32 Cal 425 = 8 O W N 515.

2. Ram Chander v. Emperor, (1919) 6 A I R All 90 = 54 I C 772 = 21 Cr L J 164 = 18 A L J 85.

3. Chotha Ram v. Mt. Karmon Bai, (1918) 5 A I R Lah 204 = 44 I C 169 = 8 P R 1918.

A I R 1924 Lah 286⁴ that revision of an order of acquittal may be allowed when the order of acquittal is based on an erroneous view of the law. In A I R 1930 Lah 159⁶ an order of acquittal under S. 500, I. P. C., was set aside. In view of the conduct of the respondents, I think, it is in the interest of justice that the petitioner should be given an opportunity to have her character fully vindicated. After undergoing the trouble and expense of a trial, there is no reason why she should be deprived of a decision on merits, on a technical ground, which has been found to be legally untenable. I accordingly accept the petition and setting aside the order of acquittal, remand the case to the learned Sessions Judge for decision on merits. Parties are directed to appear before the learned Sessions Judge on 1st July 1938.

B.D./R.K.

Case remanded.

4. Fakir Chand v. Fakir, (1924) 11 A I R Lah 286 = 69 I C 379.

5. Nathu Mal v. Abdul Haq, (1930) 17 A I R Lah 159 = 1930 Cr C 167 = 123 I C 841 = 31 Cr L J 584.

A. I. R. 1938 Lahore 741

ADDISON AND DIN MOHAMMAD JJ.

Commissioner of Income-tax, Punjab—
Petitioner.

v.

Nawab Shah Nawaz Khan, Assessee —
Respondent.

Civil Ref. No. 30 of 1936, Decided on 14th December 1937, from the Commissioner of Income-tax, Punjab, North West Frontier and Delhi Provinces, Lahore, D/- 9th October 1936.

(a) Income-tax Act (1922), S. 30 — Act is self-contained — Assessee is not at liberty to withdraw appeal presented under S. 30.

The Income-tax Act is a special piece of legislation dealing with a special subject and so far as it goes it is self-contained. Once an assessee presents an appeal against assessment under S. 30, he is not at liberty to withdraw it; (1936) 1 K B D 487, *Rel. on.* [P 742 C 1]

(b) Income-tax Act (1922), Ss. 31, 34 — Power under S. 31 cannot be exercised irrespective of S. 34—Appeal under S. 31—Assistant Commissioner cannot enhance income assessable under S. 34, so as to include sum which has nothing to do with subject-matter of appeal — Nor is fresh assessment in respect of this sum permissible.

No doubt S. 31 empowers an Assistant Commissioner of Income-tax in general terms to enhance an assessment but that power cannot be exercised irrespective of the limitations imposed by S. 34.

On the one hand Sec. 34 arms the Income-tax Officer with a special power to rectify his mistakes and to save the exchequer from any loss accruing from his negligence, and on the other it protects the assessee against the arbitrary use of this Section and sets a limit of time within which such mistakes can be rectified. Again, this Section (S. 34) is confined to the items of income that have escaped and has no reference to the total income of the assessee. Thus, the Assistant Commissioner is not empowered so to enhance the income assessable under S. 34 as to include a sum which has nothing to do with the subject-matter of the appeal before him. Similarly the Assistant Commissioner of Income-tax cannot make any direction under S. 31 (3-b) so as to enable the Income-tax Officer to make a fresh assessment in relation to this sum: A I R 1927 Lah 248 and A I R 1929 All 919, *Rel. on*; *Case law referred.* [P 742 C 2; P 743 C 1, 2]

S. M. Sikri and J. N. Aggarwal —
for Petitioner.

Malik Barkat Ali — *for Respondent.*

Din Mohammad J. — This is a case stated by the Commissioner, Income-tax, under S. 66 (1), Income-tax Act. The question propounded by him reads as follows:

Can interest-income as described in the case be brought into charge: either by enhancement under S. 31 (3-a) of the S. 34 assessment which does not include any such interest-income; or in fresh assessment to be directed under S. 31 (3-b)?

To this, another question dealing with the withdrawal of the appeal before the Assistant Commissioner was added by this Court at the request of the assessee on which a supplementary statement of the case has been submitted by the Commissioner. The facts are these: On 23rd June 1933, an assessment was made on the Mamdot Estate for the year 1933-34, the accounting year being 1932-33. On 16th February 1935, an additional assessment was made under S. 34, Income-tax Act, in respect of a sum of Rs. 8675 which the assessee was said to have earned from interest on securities. The assessee appealed against this order to the Assistant Commissioner of Income-tax, and while that appeal was pending, the Assistant Commissioner of Income-tax came to know that another item of income derived by the assessee from a certain mortgage transaction had also escaped assessment in respect of which a fresh notice was issued verbally on the 10th and in writing on 12th February 1936. On 10th February, when the Assistant Commissioner of Income-tax gave vent to his thoughts that he was considering this additional item for assessment, the attorney for the assessee verbally asked for the withdrawal of the appeal and later implemented

his verbal request by presenting an application in writing. On 12th February 1936 however, the Assistant Commissioner holding that the appeal could not be legally withdrawn, ordered that the assessee's appeal would remain pending till it was decided whether he could enhance the assessable income by a sum of Rs. 88,796. It is in this connexion that the reference has been made.

Three questions arise for decision : (1) Whether an appeal presented under S. 30, Income-tax Act, can be withdrawn ; if so, whether the notice for enhancement could be legally given after the appeal had been withdrawn ? (2) Is the Assistant Commissioner legally competent to add a new item of income, after the expiry of the limitation prescribed in S. 34, when an appeal against an assessment made under that Section is pending before him ? (3) Is the Assistant Commissioner competent to set aside the assessment made under S. 34 and direct the Income-tax Officer to make a fresh assessment including a fresh item of income after the period of limitation prescribed in S. 34 has expired ? Questions 2 and 3 are the same as propounded by the Commissioner, though expressed in different words. In our view all these questions must be answered in the negative.

We take up question 1 first. The Income-tax Act is a special piece of legislation dealing with a special subject and so far as it goes it is self-contained. It will be seen that whereas the powers of a Civil Court are vested in the Income-tax authorities by virtue of S. 37, Income-tax Act, they have been restricted to the particular matters dealt with in the body of the Section itself. This clearly shows that in all other matters the Income-tax authorities cannot exercise the power ordinarily vested in a Civil Court. Similarly, they are under no obligation to conform to the procedure laid down in the Civil Procedure Code in respect of matters not expressly mentioned in S. 37. A right of appeal under the Act has been conferred by S. 30, Income-tax Act, and the method of disposing of appeals and the powers to be exercised in connexion therewith have been clearly defined in Sec. 31, Income-tax Act. These powers, among others, include enhancement of the assessment. Nowhere, however, has it been mentioned that an assessee is at liberty to withdraw an appeal which has once been presented under S. 30, Income-tax Act. If it were assumed that

the power of withdrawal of an appeal vested in an assessee on the general principles of law governing appeals, it would clearly nullify the powers of the Assistant Commissioner to enhance an assessment inasmuch as at any time that an assessee would be convinced that the Assistant Commissioner was disposed to enhance the assessment, he would withdraw the appeal and thus prevent him from proceeding any further with the matter. In other words, this would obviously lead to an absurd result. It is to avoid such an absurdity and similar other complications which might arise that no power of withdrawal has been vested in the assessee. We are supported in our conclusion by (1936) 1 K B D 487,¹ which lays down that an appeal against an assessment cannot be withdrawn. It is true that that judgment has been given under a statute which is not in force here, but the principles governing the question are the same. In the words of Lord Wright at pp. 500-501 :

It would indeed be a curious position if notice of appeal having been given by the tax-payer in the hope of reducing his assessment, he should be able, when the information elicited shows quite conclusively that the assessment, so far from being an overcharge, was an undercharge, to prevent the Commissioners from estimating or valuing or assessing his liability according to the true facts which have been elicited, or that they should be debarred from proceeding further to develop the facts so as to ascertain the true position. . . . Having a duty to examine the facts, they are bound to give effect to what appears to them to be the proper assessment to be made in view of those facts.

We accordingly hold that the assessee was not competent to withdraw his appeal and in this view of the matter the second part of question 1 does not arise. Coming now to question 2. The material portion of S. 34 reads as follows :

If for any reason income, profits or gains chargeable to income-tax has escaped assessment in any year . . . the Income-tax Officer may, at any time within one year of the end of that year, serve on the person liable to pay tax on such income, profits or gains . . . a notice containing all or any of the requirements which may be included in a notice under sub-s. (2) of S. 22 and may proceed to assess or re-assess such income, profits or gains. . . .

It is obvious that under this Section no income, if it has escaped, can be touched after the period of limitation prescribed therein. On the one hand, this Section arms the Income-tax Officer with a special power to rectify his mistakes and to save the exchequer from any loss accruing from

1. *The King v. Income-tax Special Commissioner*, (1936) 1 K B D 487.

his negligence and on the other it protects the assessee against the arbitrary use of this Section and sets a limit of time within which such mistakes can be rectified. Again, this Section is confined to the items of income that have escaped and has no reference to the total income of the assessee. A notice issued under this Section therefore pertains to those items only which have escaped assessment and to no others. If it were permissible to the Assistant Commissioner of Income-tax to add fresh items of income under different heads to the items already detected by him as having escaped, even though the limitation prescribed by S. 34 had expired, it would deprive the assessee of the protection afforded by S. 34. No doubt S. 31 empowers an Assistant Commissioner of Income-tax in general terms to enhance an assessment but we do not consider that that power can be exercised irrespective of the limitations imposed by S. 34. One of the cardinal principles of the interpretation of statutes may be given in the words of Maxwell as follows:

It is an elementary rule that construction is to be made of all the parts together, and not of one part only by itself... for the true meaning of any passage is that which (being permissible) best harmonizes with the subject, and with every other passage of the statute. Perhaps as a general proposition the words of a statute should be construed in accordance with the dictum of Lord Watson, who says with regard to deeds, in an unrecorded case, the deed must be read as a whole in order to ascertain the true meaning of its several clauses, and the words of each clause should be so interpreted as to bring them into harmony with the other provisions... if that interpretation does no violence to the meaning of which they are naturally susceptible.

In 38 P L R 1107² a Division Bench of this Court held that the Commissioner when dealing with an appeal under S. 32 can pass orders only with respect to the subject-matter of the appeal and cannot *suo motu* proceed to enhance an assessment. It would be a curious state of affairs if what a Commissioner cannot do under S. 32, an Assistant Commissioner may be able to do under S. 31. In 41 C W N 905³ a Special Bench of the Calcutta High Court held that when an assessee rightly objects to an assessment or reassessment, the powers of the Assistant Commissioner are

limited to annulling it and do not extend to enhancing an assessment which the Income-tax Officer had no jurisdiction to make. In 4 Pat 385⁴ a Division Bench of the Patna High Court held that under S. 31, Income-tax Act, an Assistant Commissioner of Income-tax has power to enhance an assessment made by an Income-tax Officer, but he is not empowered to make a new assessment in appeal by adding new sources of income which were not the subject-matter of the appeal. On these grounds we have no hesitation in holding that in the circumstances of the present case the Assistant Commissioner is not empowered so to enhance the income assessable under S. 34, Income-tax Act, as to include the sum of Rs. 88,796 which has nothing to do with the subject-matter of the appeal before him.

Similarly, the Assistant Commissioner of Income-tax cannot make any direction under S. 31(3-b) so as to enable the Income-tax Officer to make a fresh assessment in relation to this sum. If in such cases an Assistant Commissioner of Income-tax can be considered to be empowered to do so, this would mean that he is empowered to override the express provisions of law as regards limitation provided for in S. 34, Income-tax Act. Had this been the intention of the Legislature, it should have expressed itself in clearer terms. An income which has once escaped cannot be assessed or reassessed after the expiry of the period of limitation: see 8 Lah 354⁵ and A I R 1929 All 919.⁶ We therefore answer the third question also in the negative. The assessee will get his costs from the Commissioner.

V.B.B./R.K. *Answer in the negative.*

4. Jagarnath Therani v. Commissioner of Income-tax, (1925) 12 A I R Pat 403=86 I C 777=4 Pat 385=6 P L T 166.
5. In re Assessment of Ganes Das of Amritsar, (1927) 14 A I R Lah 248=100 I C 675=8 Lah 354=28 P L R 694.
6. Ganga Sagar v. Emperor, (1929) 16 A I R All 919=1929 Cr C 647=120 I C 435=31 Cr L J 88=1930 A L J 26.

A. I. R. 1938 Lahore 743

ADDISON AND DIN MOHAMMAD JJ.
Seth Lookmanji Adamji & Co.—

Plaintiff—Appellant.

v.

Mangal Sain and others —

Defendants — Respondents.

First Appeal No. 160 of 1937, Decided on 14th February 1938.

2. Nawal Kishore-Kharaiti Lal v. Commissioner of Income-tax, (1936) 23 A I R Lah 897=168 I C 181=38 P L R 1107.

3. In the matter of North British and Mercantile Insurance Co. Ltd., (1937) 41 C W N 905=I L R (1937) 2 Cal 540 (S B).

Transfer of Property Act (1882), S. 55 (1) (g) — Sale of immovable property — Vendors agreeing to indemnify vendees, if they suffer loss or damage on account of any person laying claim to property sold — Mortgagee from original owner of property bringing suit on his mortgage — Vendees not properly defending suit and unnecessarily paying large sum to save property are not legally entitled to recover amount so paid from vendors.

Where the vendors of certain immovable property undertake to indemnify their vendees, if they suffer any loss or damage on account of any person putting forward a claim to the property sold, and subsequently a mortgagee from the original owner of the property brings a suit on the mortgage and the vendees pay a certain sum of money to the mortgagee to save the property sold to them, they are not legally entitled to recover the amount so paid and the expenses of the litigation from their vendors, where it is found the plaintiffs were negligent in their defence of the mortgage suit and did not raise proper pleas available to them and that there was really no cloud on the title of their vendors and with a little diligence exercised on the part of the vendees the cloud that was sought to be cast on the title of the vendors could have been cleared and the vendees unnecessarily paid an exorbitant sum to the mortgagees, without even consulting the vendors: *A I R 1929 Lah 388; A I R 1922 P C 176 and A I R 1933 Nag 364, Expl.* [P 746 C 2; P 747 C 1]

Achhru Ram and Amar Nath Mehta —
for Appellant.

D. R. Sawhney, Amolak Ram Kapur and
Hans Raj Sawhney —
for Respondents 1 to 3.

Din Mohammad J. — The facts of the case out of which this appeal has arisen may shortly be stated. On 10—9—1908 one Mian Abdul Karim executed a mortgage deed in favour of Lala Bulaqi Mal and Lala Ram Das of certain properties situate at Rawalpindi for a sum of Rs. 10,000. The rate of interest which the mortgagor agreed to pay was 2 per cent. compound interest per mensem with monthly rests. On 22nd April 1909, the said Mian Abdul Karim executed a deed (Ex. D. 8) in favour of his father Mian Nabi Bakhsh, wherein, after acknowledging that the whole of the immovable property situate at Rawalpindi City and Cantonment and at other places was the self-acquired property of his father and was owned and possessed by him, he stated that the properties comprised in part I of that document had been given to him by his father by way of absolute ownership and that so far as properties comprised in part II were concerned, his father had conferred on him the right of realizing their rent by way of maintenance during the lifetime of the father, but that no right of sale or mortgage of the proper-

ties vests in him. On 12th May 1909, Mian Abdul Karim settled upon his wife, Mt. Zohra Jan Akhtar, the rights which he had acquired in the properties comprised in part II of the document mentioned above (Ex. D. 9). On 16th July 1909, Mian Abdul Karim made a gift (Ex. D. 10) of the entire property alluded to above in favour of Mt. Zohra Jan in lieu of her dower. On 7th March 1910, Mian Nabi Bakhsh conferred upon Mt. Zohra Jan the right to mortgage or sell all the properties mentioned in part II of Ex. D. 8. On 7th April 1910, Mt. Zohra Jan sold the shops now in suit along with some other property to Lala Ram Das and Lala Gauri Das for Rs. 15,000. On 23rd November 1914, the said vendees sold the shops only to the present plaintiffs, Messrs. Seth Lukmanji-Adamji and Company. In the sale deed executed by them, they undertook to indemnify their vendees if they suffered any loss or damage on account of any person putting forward a claim to the property sold. On 11th February 1920, Lala Bulaqi Mal and Lala Ram Das instituted a suit for the recovery of their mortgage money by sale of the entire property comprised in parts I and II of Ex. D. 8 against Mian Abdul Karim and along with him impleaded all the subsequent alienees including the present plaintiffs and their predecessors-in-title as defendants in the suit. On 29th March 1920, ex parte proceedings were taken against Lala Ram Das and Lala Gauri Das on account of their absence in spite of service. On 24th November 1920, the present plaintiffs put in their pleas professing ignorance of most of the allegations made in the plaint and alleging that they had purchased the shops in suit in good faith and for valuable consideration. They further stated that the property purchased by them was not mortgaged to the then plaintiffs and that consequently they could not proceed against that property.

On 18th June 1921, Mt. Zohra Jan pleaded that the entire property had been acquired by Mian Nabi Bakhsh himself, that no partition of any kind had been effected between him and her husband, Mian Abdul Karim, that the property given to her by Mian Abdul Karim was not mortgaged to Lala Bulaqi Mal and Lala Ram Das and that therefore that property could not be made to bear the burden of their charge. The Subordinate Judge who decided that suit did not differentiate between one kind of property or the other

and allowed the mortgagees to recover the amount of Rs. 9700 found due by him from all the properties comprised in parts I and II of Ex. D-8. None of the defendants made an appeal against that decree and the only appeal that was put in was on behalf of the mortgagees. By its judgment dated 27th April 1933, this Court raised the decretal amount to Rs. 70,000 as claimed by the mortgagees and further allowed them interest from the date of the institution of the suit till the realization of the decretal amount at 6 per cent. per annum. It appears from that judgment that the question whether the property now in suit could be made liable for the mortgage decree was raised, but the learned Judges, while making some remarks in connexion with that contention, did not finally decide the matter in view of fact that no appeal or cross-objections had been presented by the present plaintiffs, Messrs. Lukmanji Adamji and Company. The eyes of the defendants were opened when the decretal amount was raised from Rs. 9700 to Rs. 70,000 with interest as stated above, and on 25th July 1933 the present plaintiffs applied to this Court for leave to appeal to His Majesty in Council. There they raised all those points which they should have taken by way of appeal or cross-objections against the decree of the Subordinate Judge, but which they had failed to take, possibly on account of the decretal amount being at a very low figure. On 29th January 1934, the present plaintiffs and the mortgagees entered into a compromise by which the mortgagees relinquished their claim to the property in suit on payment of Rs. 11,500. On 22nd February 1934, counsel for the present plaintiffs put in an application for permission to withdraw the petition for leave to appeal and the petition was consequently dismissed. On 16th August 1934, the plaintiffs instituted the present suit against the three sons of Lala Ram Das who had died in the meantime for the recovery of Rupees 14,500 by way of damages. This sum was made up of Rs. 11,500 which as stated by the plaintiffs they had paid to the mortgagees and Rs. 3000 which was said to have been spent on the previous litigation.

Various pleas were raised in defence. It was contended inter alia that the plaintiffs had been negligent, first, in not raising proper pleas in the Court of the Subordinate Judge who disposed of the mortgage suit and, secondly in not presenting any

appeal or cross-objections to the High Court against the decree made in that suit and that if a proper defence had been raised or proper steps taken at the proper stage, the plaintiffs would not have suffered any loss whatsoever. It was further urged that the defendants were not bound by any arrangement arrived at between the mortgagees and the present plaintiffs and that in fact it was not necessary to have paid Rs. 11,500 to the mortgagees: the title that vested in the defendants was free from any defect and that that being so, if any cloud was allowed to be cast on it or any loss was suffered by the plaintiffs on that score, the plaintiffs were themselves to blame. The Subordinate Judge framed several issues in the case, most of which are not material for the purposes of this appeal. So far as the present appeal is concerned, he found that the defendants were not guilty of any fraudulent misrepresentation regarding their title, that they were not necessary parties to the mortgage suit, that the plaintiffs who were necessary parties did not prosecute that suit with due diligence, that it was not necessary for the plaintiffs to pay a sum of Rs. 11,500 to the mortgagees for the protection of their rights and that consequently the plaintiffs were not entitled to any decree against the defendants. The plaintiffs have appealed.

After hearing counsel of the parties at length in this matter we have arrived at the conclusion that the findings recorded by the Subordinate Judge cannot be disturbed on appeal. From the recital of the facts given above, it would be abundantly clear that although Mt. Zohra Jan had raised proper pleas which if pursued by the present plaintiffs would have secured a complete discharge of the properties owned by them from all sorts of obligations, the plaintiffs did not use any diligence whatsoever in prosecuting their case. They knew that ex parte proceedings had been recorded against their vendors and that in these circumstances it would not be possible for their vendors to clear up their title. They were also aware of the fact that Mt. Zohra Jan did not stand to lose in any manner if she did not choose to substantiate her pleas inasmuch as she was not in possession of any property. With a little amount of care and attention, the plaintiffs could have brought on the record all those documents which have been referred to above, the cumulative effect of which

would have been to establish that the mortgagees could not proceed against that property at least which had been purchased by the plaintiffs. It appears that the plaintiffs did not take any active interest even in the course of arguments in the previous suit and the result was that the Subordinate Judge did not consider it necessary to discriminate between the various kinds of properties involved therein. Even assuming that inasmuch as the amount of the charge was insignificant as compared with the property on which it was charged, it was not necessary for the plaintiffs to prefer an appeal from the order of the Subordinate Judge; they should have preferred cross-objections at least when they knew that the mortgagees were insisting on the amount being raised to the original figure sued for. It was their laches therefore which was responsible for the matter of the liability of the plaintiffs' property being left undecided by this Court.

Counsel for the appellants however has contended that in view of the fact that (i) the defendants had assured the plaintiffs that the property was free from encumbrances and (ii) the undertaking given by the defendants was by way of indemnity and not a mere covenant for title and quiet possession, the plaintiffs are in any circumstances entitled to damages, inasmuch as by being dragged into litigation they actually suffered a very heavy loss and had to defend themselves against the attack made on the property purchased by them. In support of his contention he has referred to A I R 1929 Lah 388,¹ 66 I C 107² and A I R 1933 Nag 364.³ In A I R 1929 Lah 388¹ it was held that the clause in a registered sale deed that "if upon the objection of anyone any damage or loss accrues to the vendee, the vendor will be liable" amounts to a contract of indemnity and is not a mere covenant for title and quiet possession. In 66 I C 107² their Lordships of the Privy Council held that where a sale deed contains an express declaration that the property is sold free from encumbrances, the vendor by reason of S. 55 (1) (g) and sub-s. (2), T. P. Act, is deemed to contract with the buyers that he has power to transfer the property so sold and that

the property is free from burdens. A purchaser of a property is deemed to be compelled to pay off mortgagees who have obtained decrees for sale of the property purchased by him, even though a sale is not immediately threatened. Their Lordships further added that where a vendor of immovable property binds himself to deliver the property free from encumbrances but the purchaser has to pay either for redemption of the mortgages existing on the property purchased by him at the date of such purchase, or for purchase of the property on sales under such mortgages or to prevent sales, he is entitled to a refund of all moneys so paid by him. In A I R 1933 Nag 364³ the Additional Judicial Commissioner held that where there is over and above the implied warranty under S. 55 (2) an express warranty of title given by the vendor to the vendee, the vendor is responsible in law to make good the loss which accrued to the vendee when he lost half the land in the third party's litigation with him. He further remarked that where the vendor himself is fully cognizant of the litigation regarding the title of the property sold that his own brother had started against the vendee, it is the duty of the vendor to suggest to the vendee to put forward the proper pleas which he says the vendee failed to take in that litigation and therefore he cannot say that the vendee's conduct in not raising proper pleas disentitles him to claim any damages or at any rate the costs of the suit for damages brought by the vendee against the vendor. We are in respectful agreement with the principles enunciated above, but they do not help the plaintiffs in this case. In the first instance as stated above there was no cloud on the title of the plaintiffs' vendors and with a little diligence exercised on the part of the plaintiffs the cloud that was sought to be cast upon it would have been cleared up. Secondly by withdrawing their application for leave to appeal to His Majesty in Council, the plaintiffs lost a valuable opportunity for having the liability imposed on their property removed. They were unnecessarily scared out of their wits and they paid an abnormally large sum to secure their freedom. The properties on which the burden of the mortgagees had been placed were of considerable value and this being so we are of opinion, in agreement with the Subordinate Judge, that there was no necessity for the plaintiffs to pay such an exorbitant

1. Mangladha Ram v. Ganda Mal, (1929) 16 A I R Lah 388=120 I C 424.

2. Nathu Khan v. Burto Nath, (1922) 9 A I R P C 176=66 I C 107 (P C).

3. Kashirao Gondaji v. Zabu Pandu, (1933) 20 A I R Nag 364=147 I C 842.

sum to the mortgagees as the plaintiffs did. No attempt whatsoever has been made even on this record to show as to how that figure was arrived at and why it was considered necessary to pay such a heavy sum. Moreover, it is not even alleged that the defendants were ever consulted before this sum was paid. We do not consider therefore that the plaintiffs can legally call upon the defendants to indemnify them for the loss they have thus incurred.

Counsel for the respondents further supported the decision of the Subordinate Judge on the ground of limitation and relied on A I R 1934 Lah 305⁴ and A I R 1918 P C 151⁵ in that connexion. But we do not consider that it is necessary to go into the question of limitation in face of the finding arrived at above. We accordingly dismiss this appeal, but in view of the peculiar circumstances of the case we leave the parties to bear their own costs of this appeal.

R.M./R.K.

Appeal dismissed.

4. Chuni Lal v. Hari Chand, (1934) 21 A I R Lah 305=148 I C 825=35 P L R 179.

5. Hukum Chand Boid v. Pirthichand Lal, (1918) 5 A I R P C 151=50 I C 444=46 Cal 670=46 I A 52 (P C).

A. I. R. 1938 Lahore 747

YOUNG C. J. AND RAM LALL J.

Mian Singh Nand Lal and others
Convicts — Appellants.

v.

Emperor.

Criminal Appeal No. 56 of 1938, Decided on 1st March 1938, from order of Sess. Judge, Amritsar, D/- 7th January 1938.

Penal Code (1860), Ss. 34, 302 and 323 — Common intention — Common intention of accused only to abuse opposite party—Fight ensuing on mutual exchange of abuse—Common intention cannot be said to be one to commit murder although death is caused during fight—Accused can be convicted under S. 323—Each participant is responsible only for his own acts.

Where the common intention of the party of the accused appears to have been merely to abuse and possibly to use fists on the opposite party for an alleged insulting behaviour on their part, and there was mutual exchange of abuse before the fight ensued, a common intention to commit a murder cannot be inferred, even though death is caused in course of the fight. The whole affair is one of sudden fight in which each particular individual is responsible only for the individual acts which can be proved against him. The accused cannot in such a case be convicted for any offence other than one under S. 323, I. P. C. [P 748 C 2; P 749 C 1]

J. G. Sethi — *for Appellants.*

M. Sleem, Advocate-General —

for the Crown.

Young C. J.— In this case Rajindar Singh, a retired military doctor, aged 70 years, his two sons Hardayal Singh aged 16 or 17, and Hardit Singh aged 12 or 13, and his son-in-law Mian Singh aged 30, were tried by the learned Sessions Judge of Amritsar under S. 302 read with S. 149 in respect of the alleged murder of Gulzar Singh and under S. 307 read with S. 149, I. P. C., with respect to an alleged murderous assault on Amar Singh. The learned Sessions Judge acquitted Rajindar Singh and Hardit Singh, but convicted Mian Singh under S. 302 read with S. 34 and also under S. 307 read with S. 34, I. P. C., and sentenced him to death on the murder charge and to transportation for life on the charge for attempt to murder. He also convicted Hardayal Singh under S. 307 read with S. 34 and sentenced him to transportation for life. We have heard Mr. Jai Gopal Sethi for the appellants in this Court and the learned Advocate-General in support of the conviction.

The occurrence took place on 26th June 1937, at about 7.15 P. M., near the railway station, Amritsar. The allegation of the prosecution was that on the morning of that day Mian Singh had booked a seat in a lorry that was going from Amritsar to Dera Babananak. As he sat in the lorry his shoulder rubbed against a woman, who was also seated in the lorry, and on her complaint the lorry owners asked Mian Singh to take another seat. Mian Singh said that he would only change his seat if he was allowed to sit in the front seat next to the driver. This was not agreed to by the owners of the lorry unless he paid two annas extra. On the refusal of Mian Singh to pay this surcharge there was a wordy altercation, the fare was returned to him and the lorry left without him. It is alleged that on account of this unpleasantness the four accused persons accompanied by two others came together at about sunset and began to abuse and assault the owners of the lorry. In this assault it is stated that they fatally injured Gulzar Singh and inflicted serious injuries with a kirpan and a dang on the person of his brother Amar Singh. The injured persons were taken to the hospital nearby by a constable on traffic duty, who telephoned from the hospital to the thana saying that a fight had taken

place between the drivers at a motor-lorry stand. Thereafter the police at 8-30 P. M. recorded the statement of Sardara Singh, father of the two injured men, who is also the proprietor of the lorry in question and this has been treated as the official first information report in the case. Meanwhile Rajindar Singh, Hardial Singh and Mian Singh were apprehended on the spot and a small bloodstained kirpan was taken from Hardayal Singh. Hardit Singh apparently slipped away and so also did the two other persons whose names were disclosed by one of the witnesses as having joined in the assault, but as these two were discharged by the committing Magistrate, their case need not be considered further. The story for the prosecution is supported by the statements of Sardara Singh, Amar Singh, Indar Singh and Sher Singh, P. Ws. 5, 6, 7 and 8, who professed to be the eye-witnesses of this occurrence, Amar Singh being one of the two men seriously injured. Two other persons, Bal Singh and Nathu Ram, were mentioned in the early stages of the investigation as having also witnessed the occurrence and though they are either employees of or connected with the proprietors of the lorry in question they have turned hostile and have supported the version of the defence.

The defence version is that there was a fight between lorry-drivers and Rajindar Singh. Mian Singh and Hardayal Singh tried to intervene and stop the dispute and Rajindar Singh got injured. The real assailants escaped and Rajindar Singh reprimanded the policeman on traffic duty for not having arrested them, and thereafter got into a tonga with his son and son-in-law. The policeman on being annoyed at the reprimand administered to him by Rajindar Singh made a false report against them. We have no hesitation in rejecting this version as it appears to us that it was not till a very late stage that this version was mentioned by the accused. This version seems to us to have been suggested by a somewhat vague message sent by Atma Ram, constable on traffic duty, on the telephone to the thana. We refuse to believe that Rajindar Singh intervened in a dispute with which he had no concern and was falsely implicated for his pains by the complainants, who must have known who their real assailants were.

We consider that what actually occurred was that when Mian Singh mentioned to his father-in-law, who is apparently an

irritable old gentleman of 70, that he had been insulted in the morning by the lorry drivers or owners, Rajindar Singh, his sons and Mian Singh all marched together to the lorry stand to demand an explanation of what they considered to be insulting behaviour. Their common intention could not have been more than merely to abuse and it is only on this hypothesis that we can understand the presence of a decrepit old man of 70 and a child of 12 or 13. When this party got to the lorry stand there was mutual exchange of abuse and a fight ensued. We do not agree with the learned Sessions Judge that in such circumstances a common intention to commit murder can be inferred, even though death is caused in the course of the fight. The whole affair seems to us to be one of a sudden fight in which each participant is responsible only for the individual acts, which can be proved against him. So far as Mian Singh is concerned some witnesses have stated that Mian Singh caught hold of Gulzar Singh while one of the two unidentified persons, who may possibly have been one of the two men discharged by the committing Magistrate, inflicted injuries with a kirpan. It is clear and in fact it is the case for the prosecution that on that day a very large crowd had collected and though it was still not dark it would be difficult to locate the particular blow which each of the accused delivered in this fight. The story is that Mian Singh was grappling with Amar Singh, when Hardial Singh and one of the unknown or unidentified men inflicted kirpan blows on the back of Amar Singh who fell down and was later beaten with sotas by Rajindar Singh and Mian Singh. At this stage Gulzar Singh deceased came to the rescue of his brother Amar Singh and Mian Singh caught hold of Gulzar Singh this time while one of the unknown men stabbed him in the abdomen. This story is repeated by Sardara Singh, P. W. 5, by Amar Singh, P. W. 6, by Indar Singh, P. W. 7, and by Sher Singh P. W. 8.

It appears to us difficult to believe that each of the four eye-witnesses produced by the prosecution should have witnessed all these incidents in the course of an assault which took place in the middle of a crowd of persons. It further appears to us that it is exceedingly unlikely that Mian Singh was carrying a sota. A man with a sota would prefer to use his sota rather than grapple with an adversary. Assuming, however, that he did grapple as alleged, it

is difficult to believe that he still preserved the sota to beat Amar Singh with, when the latter fell down. But assuming even this, it is still more difficult to believe that he would discard the use of his sota when Gulzar Singh appeared to rescue Amar Singh and grapple with Gulzar Singh. The story that Mian Singh contented himself with catching hold of his adversaries while his friends stabbed them and of his using his sota, which mysteriously appears and disappears, is too artificial to believe. The story appears to us to show careful traces of preparation and is apparently designed to identify Mian Singh with the attack by the unknown men with kirpans and to account for the lathi blows that the doctor found on the person of Amar Singh. It is not without significance in this connexion that in the statement of Sher Singh, P. W. 8, no sota is placed in the hand of Mian Singh.

We hold therefore that it has not been proved that Mian Singh has been proved to have had a sota or to have used it. It is not alleged that he was carrying any other weapon and therefore no injury found by the doctor on any of the two injured men can be held to have been caused by him. We have already held that in this case there never was a common intention to do more than abuse and possibly use fists. In these circumstances Mian Singh cannot be convicted for any offence other than one under S. 323, I. P. C. He was arrested on 26th June 1937, and has been in custody since. We consider that for this offence he has been adequately punished. We therefore set aside the conviction under Ss. 302 and 307, I. P. C., and the sentence of death passed on Mian Singh under Sec. 302 and the sentence of transportation under S. 307 and alter his conviction to one under S. 323, I. P. C., and sentence him to imprisonment for the period already undergone.

The case of Hardial Singh presents no difficulty in this aspect. S. 34 not being applicable, the only thing proved against him is that he inflicted a kirpan blow in the back of Amar Singh. He only inflicted one injury out of the three found on the person of Amar Singh. The other two were apparently inflicted by the unknown assailant. Two out of these three injuries are grievous but the injury inflicted by Hardial Singh cannot be definitely identified. In the circumstances he can reasonably argue that he can be held responsible only

for the simple injury and can be convicted only under S. 324, I. P. C. This injury was caused in the course of a sudden quarrel, with a weapon which is not formidable and is one which is generally carried by all Sikhs. Taking these factors into consideration, and also having regard to his extreme youth we consider that a sentence of one year's rigorous imprisonment would satisfy the ends of justice. We accordingly set aside the conviction under S. 307 and alter it to one under S. 324, I. P. C., and sentence Hardial Singh to one year's rigorous imprisonment under S. 324, I. P. C.

R.M./R.K.

Order accordingly.

*** A. I. R. 1938 Lahore 749**

ADDISON AG. C. J. AND

DIN MOHAMMAD J.

Vir Bhan-Bansi Lal — Assessee —
Petitioners.

v.

Commissioner of Income-tax, Punjab —
Respondent.

Civil Ref. No. 8 of 1938, Decided on 7th July 1938, referred by Commissioner of Income-tax, Punjab, North Western Frontier and Delhi Provinces, Lahore, D/- 25th April 1938.

*** Income-tax Act (1922), S. 28 (1)—Proceedings under, started—Even after assessment is made and tax is paid penalty order can be made.**

Once the Income-tax Officer starts proceedings under sub-s. (1) of Sec. 28 within the time prescribed there, he is empowered to make an order imposing a penalty under that sub-section, even after the assessment order has been finally made and the tax been paid. [P 749 C 2]

C. L. Aggarwal — *for Petitioners.*

J. N. Aggarwal — *for Respondent.*

Din Mohammad J. — This is a case stated by the Commissioner on the following question formulated by this Court under sub-s. (3) of S. 66, Income-tax Act, 1922 :

Whether, although notice issued under S. 28 of the Act a day before the assessment order was made by the Income-tax Officer, that officer had power on a date subsequent to the date of the assessment order to impose a penalty under S. 28.

The Commissioner contends that if once the Income-tax Officer starts proceedings under sub-s. (1) of S. 28 within the time prescribed there, he is empowered to make an order imposing a penalty under that sub-section even after the assessment order has been finally made and the tax been paid. On behalf of the assessee on the other hand it is urged that the Income-tax

Officer becomes *functus officio* after making the assessment order and that inasmuch as he is required to be satisfied and make his direction in the course of any proceedings under the Act, he can only impose a penalty at the time when he makes the assessment and not at any subsequent period, especially after the tax as assessed has already been paid. Unfortunately sub-s. (1) of S. 28 is not happily worded and it is on account of want of clearness and precision in the language employed there that this dispute has arisen. That sub-section runs as follows :

If the Income-tax Officer, the Assistant Commissioner or the Commissioner, in the course of any proceedings under this Act, is satisfied that an assessee has concealed the particulars of his income or has deliberately furnished inaccurate particulars of such income, and has thereby returned it below its real amount, he may direct that the assessee shall, in addition to the income-tax payable by him, pay by way of penalty a sum not exceeding the amount of the income-tax which could have been avoided if the income so returned by the assessee had been accepted as the correct income.

As regards the limit of time when the income-tax authorities are to be satisfied that any concealment has taken place or any particulars have been deliberately furnished inaccurate, there appears to be no ambiguity and consequently no dispute. It is common ground that this satisfaction must take place in the course of any proceedings relating to the assessee, whatever the nature of those proceedings may be. The difficulty arises only in the matter of determining the point of time when the direction as contemplated by that sub-section is to be given. The assessee draws our attention particularly to the word "payable" as used in the sub-section and urges that by the use of this term the Legislature intended to restrict the exercise of the power conferred by this sub-section to the period when the liability of an assessee was determined and before the tax was paid, and consequently this power cannot be exercised at a time when the tax has already been paid. The language as used in this Section may be susceptible of this interpretation, but it cannot be denied that the interpretation sought to be put upon it by the Commissioner is not impossible. Considering that the former interpretation may lead to absurd results and that the latter is more in consonance with reason, we have no hesitation in adopting the interpretation suggested by the Commissioner. There is no magic in the word

"payable." It is true that it has been frequently used in the Act to denote 'liability to assessment,' but had the word "paid" been used here as suggested by the assessee, it might have led to many complications in the matter of imposing penalties under sub-s. (1). In our view the words "payable by him" without any unnecessary straining of language can be taken to mean "to which he has been assessed" whether the amount has been paid or not, and taken in that light, it cannot be urged that the order contemplated by sub-s. (1) cannot be made after the assessment order has been made and the tax has been paid. We see no justification for holding that the order should either be contemporaneous or simultaneous with the order of assessment. Neither is it intended to delay the assessment proceedings in order to enable the Income-tax Officer to make up his mind as to the imposition of penalty, nor is the order of imposition to be accelerated merely to synchronize it with the assessment order. To insist on the order of penalty being simultaneous with the order of assessment is to ask for a physical impossibility : one is bound to precede or follow the other and if once it is conceded that the order of penalty may be made after the order of assessment has been made, there is nothing in the Act which would tend to restrict that period in any manner.

There is no direct authority in support of our view but we consider that the construction proposed by us to be put upon the sub-section is the only reasonable construction that can be put both in the interests of the department and of the assessee. The department will not be compelled to delay the assessment proceedings with a view to determine whether to prosecute an assessee under S. 52 or to impose a penalty on him under sub-s. (1) of S. 28 or to do neither and the assessee will not run the risk of being victimized by any rash or hasty order. We accordingly answer the question propounded above in the affirmative. We however in the circumstances of the case leave the parties to bear their own costs. We further draw the attention of the Commissioner to the desirability of approaching the Central Legislature with a view to remove the ambiguity that exists in the language of S. 28 as the matter of amending the Income-tax Act is already on the tapis.

B.D./R.K.

Answer in affirmative.

A. I. R. 1938 Lahore 751**BHIDE J.***Partap Singh—Defendant—Appellant.*
v.*Ganesh Das Bhatia — Plaintiff —*
Respondent.

Second Appeal No. 687 of 1937, Decided on 22nd November 1937, from decree of Addl. Dist. Judge, Rawalpindi, D/- 1.4.1937.

(a) Evidence Act (1872), Sec. 35 — Khasra pamaish is relevant document and admissible.

Khasra pamaish is a document prepared under the orders of the Government and as such it is relevant under S. 35 and is admissible, though the weight to be attached to it is a different matter : *A I R 1934 Lah 885, Expl.* [P 751 C 2]

(b) Easement—Additional burden separable from original burden imposed — Easement is not extinguished altogether.

Where an additional burden is imposed on the servient tenement but such burden is separable from the original burden, the imposing of the additional burden does not altogether extinguish the easement : *A I R 1922 All 28, Rel. on.*

[P 751 C 2]

Shamair Chand — *for Appellant.*J. L. Kapur — *for Respondent.*

Judgment. — The plaintiff sued in this case for a permanent injunction against the defendant restraining him from discharging the water from his roof and a latrine thereon to the roof of the plaintiff. The trial Court granted the injunction with respect to the water from the latrine only, holding that the right of easement claimed by the defendant had been established with respect to the ordinary water from the roof. Both parties appealed to the District Judge and he decreed the suit in full on the ground that the discharge of water from the latrine was an additional burden imposed by the defendant and the effect of this additional burden was to extinguish the right of easement altogether. In support of this view he relied on *A I R 1920 Pat 689*.¹ From this decision the defendant Partap Singh has preferred a second appeal.

The finding of the learned District Judge that the right of easement was established with respect to the discharge of ordinary water from the roof of the defendant is one of fact and cannot be challenged in second appeal. The learned counsel for the plaintiff-respondent argued that the finding was based on inadmissible evidence in the shape of a copy of khasra pamaish. No objection to the admission of this document how-

ever appears to have been taken in the Courts below. It is a document prepared under the orders of the Government and the right of easement on which the defendant relied was specifically mentioned in a column provided in the document. I do not therefore see why it should not be held to be relevant under S. 35, Evidence Act. The learned counsel referred to 16 Lah 313² in which it was held that there was no presumption of correctness attaching to the khasra pamaish but that is not the point which needs consideration in the present case. The document was admitted in the Court below without any objection and the only question which requires consideration is whether it is legally admissible or not. The weight to be attached to the document is a different matter. In my opinion, the document was relevant under S. 35, Evidence Act.

The next point urged on behalf of the appellant was that the question of the effect of the imposition of an additional burden in the shape of discharge of water from the latrine was not allowed by the learned District Judge to be argued when the appeal was heard and he was therefore not justified in relying on this point in his judgment. An affidavit in support of this argument made by the counsel who argued the case before the learned District Judge was produced. No counter-affidavit was produced on behalf of the respondent, although he had sufficient time for the purpose. I also find that an application with respect to this very point was made to the learned District Judge soon after the decision of the appeal. It was placed by him on the record without any remarks. I therefore assume for the purpose of this appeal that the point was not allowed to be argued at the hearing by the learned District Judge. He was therefore not justified in relying on this point and decreeing the plaintiff's claim in full. Moreover the view taken by the learned District Judge does not appear to me to be sustainable in law. The additional burden was in this case separable from the original burden and there is no reason why the right of easement should not have been upheld at least with respect to the discharge of ordinary water : see *A I R 1922 All 28*.³

2. *Kartar Singh v. Mehr Nishan*, (1934) 21 *A I R Lah* 885=16 *Lah* 313=37 *P L R* 592.

3. *Rameshwar Dayal v. Maharaj Charan*, (1922) 9 *A I R All* 28=65 *I O* 643=44 *All* 343=20 *A L J* 202.

1. *Keshri Sahay Singh v. Hitnarayan Singh*, (1920) 7 *A I R Pat* 689=58 *I O* 967.

Lastly, it was urged that there was no specific issue with respect to the discharge of water from the latrine and herein the defendant-appellant was misled. The issue framed in the case was: "Has the defendant a right of easement as claimed?" A reference to the plaint shows that the plaintiff distinctly claimed an injunction both with respect to the ordinary water and the water from latrine, and the wording of the issue was wide enough to cover both. The parties were apparently cognizant of this fact and the defendant led some evidence which related specifically to the discharge of water from the latrine. It cannot therefore be said that he was misled or prejudiced. I therefore accept the appeal only to the extent of setting aside the decree of the learned District Judge restoring that of the trial Court. The plaintiff will get half his costs throughout.

K.S./R.K. *Appeal partly accepted.*

A. I. R. 1938 Lahore 752

ADDISON C. J. AND DIN MOHAMMAD J.

Thakarji Maharaj — Plaintiff —
Appellant.

v.

Khushi Ram and another — Defendants
— Respondents.

Letters Patent Appeal No. 7 of 1938, Decided on 6th June 1938, against Judgment of Abdul Rashid J., reported in *A I R 1938 Lah 470*.

Limitation Act (1908), Art. 134-A — Suit by Hindu idol for injunction alleging transfer to defendant by previous mahant — Relief held was for setting aside transfer and Art. 134-A, applied — Time however does not run against defence.

Where a suit was instituted by *A*, a Hindu idol, for injunction against *B* restraining him from disturbing *A* in his possession, on the basis of an alleged transfer to *B* by a former mahant of the plaintiff:

Held that what *A* asked for was not only an injunction but for setting aside the transfer to *B* and the suit was governed by Art. 134-A.

Held further that if however *B* filed a suit against *A*, no period of limitation would run against *A* in his defence. [P 752 C 2; P 753 C 1]

N. C. Pandit—*for Appellant.*

D. N. Aggarwal—*for Respondents.*

Din Mohammad J. — The plaintiff-appellant, Thakarji Maharaj, a Hindu idol instituted a suit against the defendants for an injunction restraining them from inter-

fering with the plaintiff's possession of the land in suit on the basis of a permanent lease alleged to have been executed in their favour by one Kundan Anand, a former mahant of the plaintiff. Various defences were raised to the suit of which at present we are only concerned with the plea of limitation. The trial Court decreed the suit holding that it was not time-barred. The lower Appellate Court allowed the appeal and dismissed the suit on the ground that it was barred by Art. 134-A, Limitation Act. On second appeal to this Court, Abdul Rashid J. maintained the judgment of the lower Appellate Court and dismissed the appeal.

Counsel for the appellant has contended that the suit is not covered by Art. 134-A, inasmuch as it is only a suit for a permanent injunction and that its decision does not involve the setting aside of the alleged transfer by Kundan Anand. We are not however disposed to agree with him. In para. 3 of the plaint, it is clearly stated that the defendants rely on a patta granted to them by Kundan Anand on 8th January 1909, on the basis of which they have even obtained decrees for the ejectment of the tenants and that the patta in question, if proved, was ultra vires of the grantor and was also ineffectual for want of consideration and necessity. It is obvious therefore that the object of this suit is to set aside the transfer alleged to have been made by Kundan Anand in favour of the defendants in 1909 and this being so it cannot be urged that Art. 134-A does not govern the suit. Counsel for the appellant has urged that inasmuch as Thakarji Maharaj has throughout been in possession of the land in suit, no period of limitation would run against it. This principle grounded on reasons other than those advanced by the appellant's counsel may hold good in certain cases, but in the present case it does not. To the suit as instituted, Art. 134-A clearly applies and it is not denied by the appellant that under that Article, the suit is time-barred, inasmuch as the terminus a quo there is the date of the knowledge of the plaintiff and the plaintiff through its Mahant Atma Nand had knowledge of the lease much longer than 12 years prior to the institution of the suit.

This decision however does neither prejudicially affect the idol's possession of the land in suit nor will it bar the defence which may be raised by the idol if an

attempt is made to dispossess it, as it is well established that no period of limitation governs the defence. In other words, if a new suit is instituted against the idol, it will be open to it to raise all those points which have been taken by the idol in this case and to claim adjudication upon them without being met by the plea of *res judicata*. With these remarks we dismiss this appeal but make no order as to costs before us.

B.D./R.K.

*Appeal dismissed.***A. I. R. 1938 Lahore 753**

BHIDE J.

Bua Ditta and others — Defendants—
Petitioners.

v.

Sahib Diyal — Plaintiff—Respondent.

Civil Revn. No. 588 of 1938, Decided on 14th July 1938, from order of the Dist. Judge, Gurdaspur, D/. 19th May 1938.

(a) Succession Act (1925), S. 192—Revision from decision under S. 192 is allowed.

Although no appeal or review is allowed from an order in summary proceedings by a District Judge under S. 192, yet there is nothing in the Section or the Act which takes away the right of revision by High Court : 66 P R 1882 (F B), *Rel. on.* [P 753 C 2]

(b) Succession Act (1925), Ss. 192 to 194—Joint Hindu family — Property passing by survivorship—Ss. 192 to 194 have no application—“Chundavand” rule of division does not bring case under Ss. 192 to 194.

Sections 192 to 194 will not apply to a case where joint Hindu family property passed by survivorship. And although parties may be governed by the “chundavand” rule which is a rule of division of property, mere mention of that rule will not bring the case under Ss. 192 to 194, because the “chundavand” rule will operate only when the property is to be divided and not when it is undivided : 12 C L J 8, *Disting.*; 34 Cal 929, *Rel. on.* [P 754 C 1]

Mehr Chand Mahajan and H. R. Mahajan — *for Petitioners.*

C. L. Aggarwal and Durga Das Jain —
for Respondent.

Order. — This is a petition for revision of an order passed by the District Judge, Gurdaspur, under the provisions of Ss. 192 to 194, Succession Act, relating to the protection of the property of a deceased person, when the succession is in dispute. A preliminary objection is raised that no petition for revision is competent, as under S. 209, Succession Act, the decision of the District Judge in a summary proceeding 1938 L/95 & 96

under Part 7, Succession Act, (which includes Ss. 192 and 210) is final and no appeal or review is allowed. But the Succession Act does not say that no revision is competent. By virtue of S. 141, Civil P. C., the procedure of that Code would, in absence of a provision to the contrary, govern these proceedings and I do not see why revision should not be competent under S. 115 Civil P. C. It was held by a Full Bench of the Punjab Chief Court in 66 P R 1882¹ with reference to the corresponding provisions of Act 19 of 1841 (which have been now incorporated in the Indian Succession Act with some modifications), that revision was competent under S. 672 of the old Civil P. C. of 1877 and the same reasoning on which that decision was based applies to the present case also.

It was next contended that the order in question is an interlocutory one, and hence revision is not competent. But the contention of the learned counsel for the petitioners is that on the very facts alleged in the respondent's application, the District Judge had no jurisdiction to take any action under Part 7, Succession Act. The learned District Judge in issuing notice to the petitioner and appointing a commissioner to make a list of the deceased's property has certainly decided that the case came within the purview of Part 7. If the contention of the learned counsel for the petitioners is correct, it will be obviously abuse of the processes of Court and waste of time to allow these proceedings to continue. In my opinion, the learned District Judge's decision that the case is governed by Ss. 192 to 194, Succession Act, is open to revision in the circumstances. It may be mentioned here that when the present petitioners appeared in the Court below they raised the objection as to jurisdiction but the learned District Judge seems to have gone on with the proceedings relating to the preparation of an inventory without considering the petitioners' objection.

According to the respondent Sahib Diyal, the deceased Punnu Shah, his father, was the manager of a joint Hindu family consisting of himself and his sons. The petitioners are his sons by one wife while the respondent is his son by another wife. The respondent alleged that the petitioners had forcibly seized his share of the property and were making alienations to his preju-

1. Gorakh Nath v. Bishember Nath, (1882) 66 P R 1882 (F B).

dice and he therefore moved the Court to take action under the provisions of Secs. 192 to 194, Succession Act.

It would be clear from the above that the dispute related to the property of a joint Hindu family. In the case of such a family, the co-parceners are all entitled to the possession of the whole of the property and no co-parcener has any definite share in the property. The whole of the family, of which Punnu Shah was the manager, was therefore in possession and on Punnu Shah's death, his interest merely passed to the other members of the family by survivorship. In the circumstances, it seems clear that the provisions of S. 192 which relate to disputes relating to cases of succession and not of survivorship were not applicable: *cf.* 34 Cal 929.² The learned counsel for the respondent had to concede that Ss. 192 to 194 will not apply to a case where joint Hindu family property passes by survivorship but he contended that the parties were governed by the 'chundavand' rule of division according to which the property is divided per stirpes and not per capita and hence the Act applies. But chundavand is only a rule of division and will have to be enforced (if the respondents' allegation is correct) when the property is to be divided. At present, the property is undivided and the mention of the above rule in the petition does not seem to me to affect the question of jurisdiction. The learned counsel next referred to 6 I C 259.³ But that ruling only lays down that the Succession Act (Property Protection) is not limited in its application to cases when the dispute arises between persons each of whom claims title to the entire estate, but it also covers a case in which the claim relates to an undivided share of the estate of the deceased. The ruling relates to a family governed by Dayabhaga rule of succession and according to that rule property does not pass by survivorship.

Lastly, it was urged that the present petitioners alleged in their written statement that the property belonged to Punnu Shah and he had made a will. But this was not the respondents' case and the question of jurisdiction must be decided on the allegations made by him in his application.

2. *Satokoer v. Gopal Sahu*, (1907) 34 Cal 929 = 12 C W N 65.

3. *Gopi Krishna Rai v. Raj Krishna Rai*, (1910) 12 C L J 8 = 6 I C 259.

On these allegations it seems to me clear that Part 7, Succession Act, was not applicable to this case. I accordingly set aside the order of the learned District Judge and dismiss respondents' application with costs throughout.

B.D./R.K.

Order set aside.

* A. I. R. 1938 Lahore 754

TEK CHAND J.

Simla Banking and Industrial Co. Ltd.
Lahore — Decree-holder — Petitioner.

v.

Indo Swiss Trading Co. Ltd. Calcutta,
and another — Decree-holder and
another — Judgment-debtor —

Respondents.

Civil Revision No. 459 of 1937, Decided on 17th June 1938, from order of the Sub-Judge, First Class, Lahore, D/- 8th May 1937.

(a) Companies Act (1913), S. 171 — Appeal or application for revision arising out of action by company—Leave of Liquidation Court is not necessary.

An appeal or an application for revision arising out of an action brought by a company does not come within the purview of Sec. 171 and such appeal or application can be instituted, or proceeded with, without the leave of the Liquidation Court: *A I R 1918 Lah 181 (F B)*; (1901) 85 LT 141 and *A I R 1936 Pesh 97, Foll.* [P 755 C 2]

* (b) Civil P. C. (1908), Ss. 63 and 73 — Same property of judgment-debtor attached by two Courts of same grade and sold by one — Court selling is deemed to hold assets on behalf of other Court — Creditor in such other Court is entitled to rateable distribution without application for execution in Court holding assets.

Section 73 is to be read together with S. 63. Where the property of a judgment-debtor has been attached by two Courts of the same grade but the property has been sold by one of them, the proceeds so received shall be deemed to have been received by it on behalf of all the Courts in which there have been attachments in execution of the decrees, prior to the actual receipt of the assets, and the decree-holders in all such Courts are entitled to rateable distribution under S. 73. In such cases no application for execution is necessary to be made to the Court which held the assets, before the receipt of the assets: *Case law referred.* [P 756 C 1]

Mela Ram — for Petitioner.

Girdhari Lal Malhotra (for Indo-Swiss Trading Co.), Bhagwat Dayal (for Peoples Bank of Northern India) and M. L. Puri (for Simla Banking and Industrial Co. Ltd.) — for Respdts.

Order. — This is a petition for revision of the order of Mr. Mulkh Raj Bhatia, Subordinate Judge, First Class, Lahore, dated 8th May 1937, holding that the petitioner, the Simla Banking and Industrial Company Ltd. is not entitled to rateable distribution with the Indo-Swiss Trading Company Ltd., Calcutta and the Peoples Bank of Northern India (in liquidation), in the sale proceeds of a house in Lahore belonging to Mr. K. L. Gauba which had been sold in execution of a decree obtained by the Indo-Swiss Trading Company against him. The facts, so far as they are material for the disposal of this petition, are as follows:

In 1933 the Indo-Swiss Trading Company obtained a money decree against Mr. Gauba. Some time later, this decree-holder applied for execution by attachment and sale of a house belonging to the judgment-debtor. The house was attached on 24th July 1935, by order of Mr. Mulkh Raj Bhatia, Subordinate Judge, First Class, in whose Court those proceedings were going on. On 13th November 1935, the Simla Banking and Industrial Company also obtained a money decree against Mr. Gauba from the Court of Mr. Maharaj Kishore, Subordinate Judge, First Class, Lahore. This decree-holder applied to Mr. Maharaj Kishore for execution of its decree by sale of the same house. The application was granted, and the house was attached on 8th July 1936. A third creditor, the Peoples Bank of Northern India, had a decree against Mr. Gauba and proceedings in execution of its decree were pending in the Court of Mr. Bhatia.

On 1st August 1936, the house was sold in execution of the decree obtained by the Indo-Swiss Company. One-fourth of the sale-price was deposited by the auction-purchaser in Mr. Bhatia's Court on 5th August 1936, and the remaining three-fourths on 14th August 1936. On 24th August 1936, the Simla Banking and Industrial Company applied for the transfer of execution proceedings from the Court of Mr. Maharaj Kishore to that of Mr. Bhatia with a view to get rateable distribution of the sale proceeds of the house. This application was granted on 25th August 1936 and the record of this case received by Mr. Bhatia on 27th August. The learned Judge has held that the Peoples Bank and the Indo-Swiss Trading Company are entitled to rateable distribution, as applications for attachment

had been made by them in his Court before the date of the sale; but that the Simla Banking Company is not entitled to share rateably in the sale-proceeds as no application for rateable distribution had been made by this decree-holder in his Court before the receipt of the assets. He has held that the attachment of the house by order of Mr. Maharaj Kishore, before the sale, is of no avail to the petitioner, and S. 63, Civil P. C., was inapplicable as the Courts of Mr. Bhatia and Mr. Maharaj Kishore were Courts of concurrent jurisdiction. The Simla Banking and Industrial Company has applied for revision of this order contending that the lower Court has declined jurisdiction on an erroneous view of the law.

A preliminary objection is taken on behalf of the respondents that this petition is not competent, as one of the respondents (the Peoples Bank of Northern India) is a company which is being wound up by the Lahore High Court and no proceedings against it can be taken without the previous sanction of the "Liquidation Court" under S. 171, Companies Act. This objection is in my opinion without force. In this case the Peoples Bank of Northern India had itself started proceedings in the executing Court claiming rateable distribution of the sale proceeds of the house in question. This application has been granted by the Court below. The petitioner, who is a rival decree-holder has preferred to this Court a petition for revision arising out of this order. It was held by a Full Bench of the Chief Court in 62 P R 1918,¹ following the decision of the House of Lords in (1901) 85 L T 141,² that an appeal or an application for revision arising out of an action brought by a company does not come within the purview of S. 171 and that such appeal or application can be instituted, or proceeded with, without the leave of the Liquidation Court: *see also* to the same effect 162 I C 416.³ I overrule the preliminary objection. On the merits, the order of the learned Judge appears to me to be erroneous. He has failed to take note of the important fact that the house in question had been attached in execution of the

1. *Kishen Singh v. Industrial Bank of India*, (1918) 5 A I R Lah 181=47 I C 392=62 P R 1918=32 P L R 1918 (F B).

2. *Humber v. Griffiths*, (1901) 85 L T 141.

3. *Bundhelkhand Motor and Cycle Agency v. Peoples Bank of Northern India Ltd.*, (1936) 23 A I R Pesh 97 =162 I C 416.

decree of the petitioner by the Court of Mr. Maharaj Kishore on 8th July 1936, before it was sold in execution of the decree of the Indo-Swiss Trading Company by order of Mr. Bhatia and before the sale-proceeds were received by that Court. In the circumstances, it was not necessary for the petitioner to have his decree transferred to Mr. Bhatia's Court and make a formal application to that Court for execution, before the receipt of the sale-proceeds.

Section 73 of the Code no doubt lays down that where assets are held by a Court and more persons than one have before the receipt of such assets made application to the Court for execution of their respective decrees the assets shall be rateably distributed among all such persons. But this Section is to be read together with S. 63, which is to the effect that where property, not in the custody of any Court, is under attachment in execution of decrees of more Courts than one, the Court which shall receive or realize such property and shall determine any claim thereto shall be the Court of highest grade, and where there is no difference in grade between such Courts, the Court under whose decree the property was first attached. The combined effect of these two provisions as pointed out by Wallis C. J. of the Madras High Court in 23 I C 909⁴ is that all the holders of money decrees, who have attached the property of their judgment-debtor in execution in several Courts before the actual receipt of the assets by the Court of the highest grade are entitled to share in the rateable distribution on application to such Court without getting their decrees transferred to it. Similarly, it has been held in A I R 1936 Cal 723⁵ that where the property of a judgment-debtor has been attached by two Courts of the same grade but the property has been sold by one of them, the proceeds so received shall be deemed to have been received by it on behalf of all the Courts in which there have been attachments in execution of the decrees, prior to the actual receipt of the assets, and that the decree-holders in all such Courts are entitled to rateable distribution under S. 73 : *see also* 61 Cal

240⁶ at p. 244 and 56 Mad 692.⁷ The question was discussed at great length by the Bombay High Court in 59 Bom 310⁸ at p. 315, where the learned Chief Justice observed :

that in a case in which the Court is determining under S. 63 the right to rateable distribution, the true construction of S. 73 is that an application need only have been made to the Court which granted the decree before the receipt of the assets and need not be made to the Court which holds such assets.

The Allahabad High Court in 55 All 622,⁹ and the Rangoon High Court in 6 Rang 131¹⁰ have also taken the same view, and have held that in such cases no application for execution was necessary to be made to the Court, which held the assets, before the receipt of the assets. In our own Court, the latest decision is A I R 1936 Lah 519¹¹ by Jai Lal J. where the rulings cited above were followed, and it was held that in such cases no fresh application for execution was necessary. It will thus be seen that the consensus of opinion in all the High Courts is in favour of the view put forward by the petitioner. It is therefore not necessary to discuss the earlier rulings (some of which have been relied upon by the lower Court) in which the contrary had been held.

The learned Subordinate Judge sought to distinguish some of the recent rulings on the ground that in those cases the Courts were of different grades and observed that S. 63 had no application where the Courts were of concurrent jurisdiction. There is no doubt that this view of the learned Judge is erroneous, and Mr. Puri for the respondent frankly admitted that he could not support it. S. 63 covers all cases in which the same property is under attachment in execution of decrees of more Courts than one, whether they be of the same grade or of different grades. The only distinction is that where the Courts

4. *Narasimha Charlar v. Krishnamachariar*, (1914) 1 A I R Mad 454=23 I C 909=26 M L J 406.

5. *Surendra Kumar Guha v. Jamini Kumar Guha*, (1936) 23 A I R Cal 723=166 I C 178=40 C W N, 1307 = I L R (1937) 1 Cal 391.

6. *Gour Gopal De Sarkar v. Kamal Kalika Datta*, (1934) 21 A I R Cal 559=152 I C 69=61 Cal 240.

7. *Modali Ademma v. Venkata Subbayya*, (1933) 20 A I R Mad 627=144 I C 923=56 Mad 692=65 M L J 137.

8. *Dhirendra Krishnarao v. Virbhadrappa*, (1935) 22 A I R Bom 176=159 I C 505=59 Bom 310=37 Bom L R 78.

9. *Sarjoo Ram Sahu v. Partap Narain*, (1933) 20 A I R All 563=146 I C 575=55 All 622=1933 A L J 921.

10. *Kwai Tong Kee v. Lim Chaung Ghee*, (1928) 15 A I R Rang 157=110 I C 744=6 Rang 131.

11. *Balmokand v. Ram Saran Das*, (1936) 23 A I R Lah 519=163 I C 59=38 P L R 281.

are of different grades, the assets are to be received and the distribution is made by the Court of highest jurisdiction, and where they are of the same grade then this is done by the Court in whose decree the property was first attached. It must therefore be held that as the property in this case had been attached by the petitioner before it was sold in execution of the decree of the Indo-Swiss Trading Company and before the sale proceeds had been received in the Court of Mr. Bhatia, the petitioner is entitled to claim rateable distribution.

As a last resort, Mr. Puri contended that this Court should not interfere in revision as there was a divergence of judicial opinion on the legal point involved. But I am unable to accept this argument. As has been stated above, the recent decisions of all the High Courts are in favour of the view put forward by the plaintiff and the Court below has, on the authority of obsolete decisions, declined jurisdiction to entertain the petitioner's prayer for rateable distribution. I accordingly accept the petition for revision, set aside the order of the Court below and remand the case to it with the direction that the sale proceeds be rateably distributed among the Indo-Swiss Trading Company, the Peoples Bank of Northern India Limited (in liquidation), and the Simla Banking and Industrial Company Limited. Having regard to all the circumstances I leave the parties to bear their own costs.

N.S.D./R.K.

Case remanded.

A. I. R. 1938 Lahore 757

BECKETT J.

Kishen Lal — Defendant — Appellant.
v.

Gohli — Plaintiff — Respondent.

Second Appeal No. 166 of 1938, Decided on 31st May 1938, from decree of Senior Sub-Judge, Rohtak, D/- 6th January 1938.

(a) Contract Act (1872), S. 25 (3)—Acknowledgment is promise to pay within meaning of S. 25 (3)—It is valid agreement for purpose of suing irrespective of whether debts covered thereby are time-barred.

When a promise falls under S. 25 (3), it constitutes a valid agreement for the purpose of suing, whether there is a fresh consideration for the promise or not, and it is immaterial whether the debts covered thereby are within limitation or not. Acknowledgment is one of the usual forms

which is usually treated in the Punjab as a promise to pay within the meaning of S. 25 (3).

[P 757 C 2 ; P 758 C 1]

(b) Contract — Novation — Parties entering into new agreement to discharge debt—Right to revert to original position reserved if debtor fails to complete new agreement — Debtor failing to complete transaction — Creditor can sue on original cause of action.

Where an original debt is due and subsequently an agreement is made for the purpose of discharging it, and the parties contemplate that there should be a reversion to the original position if the debtor failed to complete the transaction, there is no true novation and there is no bar to a suit on the original cause of action.

[P 758 C 1]

Faqir Chand Mittal — *for Appellant.*

Qabul Chand — *for Respondent.*

Judgment.—It is alleged that the defendant had money dealings with the plaintiff. In 1934 the defendant made the usual acknowledgment of a balance due in the plaintiff's bahi, the sum acknowledged being Rs. 632-5-9. Subsequently, it is said that the parties entered into an agreement by which the defendant paid a certain sum of money and either mortgaged or agreed to mortgage some land in discharge of the remainder of his debt. When the parties appeared for mutation the defendant backed out of this part of the agreement and the plaintiff now sues for the balance due on the former acknowledgment. The suit was rejected by the trial Court on the ground that the plaintiff could no longer sue on the basis of the original acknowledgment but could only sue on the basis of the subsequent agreement. It has further held that the plaintiff had failed to show that the balance struck in 1934 was in respect of debts which were not yet time-barred. On appeal the Senior Subordinate Judge has held that the plaintiff was entitled to sue on the balance due in respect of the earlier acknowledgment. He was accordingly granted a decree for this balance, but without interest, as he had failed to comply with the statutory requirements governing the regulation of accounts. The defendant has appealed against this decree.

The arguments advanced before me are much the same which were advanced before the Courts below. As regards the question of limitation, it is to be observed that the acknowledgment is one of the usual forms which is usually treated in this province as a promise to pay within the meaning of S. 25 (3), Contract Act, 1872. When a promise falls under this Section it constitutes a valid agreement for the

purpose of suing, whether there is a fresh consideration for the promise or not, and it is immaterial whether the debts covered thereby are within limitation or not. With regard to the existence of the original debt, there can be no doubt from the evidence that this debt was due and it is confirmed by the subsequent conduct of the defendant, who relies upon the agreement which is made for the purpose of discharging it. It is again clear from the conduct of the defendant that he did not consider that the new agreement was to be final until the time came for mutation and it is in evidence that the parties contemplated that there should be a reversion to the original position if the defendant failed to complete the transaction. If there is a proposal to discharge a debt in this way, but the right of reverting to original position is reserved unless the new transaction is complete, there is no true novation and there is no bar to a suit on the original cause of action. In my opinion, the judgment of the lower Appellate Court is in accordance with law and the appeal must be dismissed with costs.

D.S./R.K.

Appeal dismissed.

* A. I. R. 1938 Lahore 758

BECKETT J.

Ram Sukh Mal—Plaintiff—Appellant.

v.

*Har Sahai Mal — Defendant —**Respondent.*

Second Appeal No. 200 of 1938, Decided on 29th June 1938, from decree of Senior Sub-Judge, Amritsar, D/- 1st February 1938.

* Partnership Act (1932), S. 46 — Suit for accounts—Retiring partner inspecting accounts—Right to suit is not affected — Procedure for suit is governed by O. 20, R. 15, Civil P. C. — Decree to be passed is same as given in Form 21 Appendix D in Civil P. C.—Acceptance by partner of existing accounts — Accounts could however be examined from earlier date.

A suit to enforce the right provided in S. 46 is generally called a suit for an account, which means an account taken by a Court. The right is not affected by the fact that the retiring partner may have already inspected the accounts of the firm, for, it could be claimed by a partner who had kept the account himself. The procedure for such a suit is governed by O. 20, R. 15, Civil P.C., and the ordinary form for the preliminary decree is given as Form No. 21 in Appendix D. This form should ordinarily be followed unless there is any special reason for modifying it. Although the

heading describes it as a form for a preliminary decree in a suit for dissolution of partnership and the taking of partnership accounts, yet, it is just as much applicable when the Court is asked to declare that a dissolution has taken place and an account is still required. In the standard form of preliminary decree, in the part relating to accounts, the third entry provides that an account will be taken of all dealings and transactions between the parties from the foot of the settled account exhibited in the suit and not disturbing any subsequent settled account. But if it is necessary to examine the account books of the firm from an earlier date in order to discover what credits are still due to the partnership, the examination of these accounts would not be barred out by the suing partner's acceptance of the existing accounts as correct. [P 758 C 2; P 759 C 1, 2]

S. N. Bali — *for Appellant.*

M. L. Sethi for J. G. Sethi —

for Respondent.

Judgment. — The parties are two brothers who formed a partnership under a written agreement. This provided for the termination of the partnership on notice, which was duly given by the defendant. The plaintiff then claimed an account, which was refused on the ground that he had accepted the accounts of the firm up to a date not long preceding the termination of the partnership. The plaintiff then came to Court to claim the same relief. He has been granted a preliminary decree by the Courts below, but he is not satisfied with the form of this decree and has come up in second appeal. Before we deal with the particular grievance of the plaintiff, it is necessary to observe that the Courts below have entirely misunderstood the nature of the relief claimed, and have confused the right of a retiring partner to have an account taken with the right of the principal to have account submitted by an agent under S. 213, Contract Act. The rights of a retiring partner are given in S. 46, Partnership Act 1932, which runs as follows:

On the dissolution of a firm every partner or his representative is entitled, as against all the other partners or their representatives, to have the property of the firm applied in payment of the debts and liabilities of the firm, and to have the surplus distributed among the partners or their representatives according to their rights.

A suit to enforce the right provided therein is generally called a suit for an account, which means an account taken by a Court. The right is not affected by the fact that the retiring partner may have already inspected the accounts of the firm, for it could be claimed by a partner who had kept the account himself. The form of suit is rendered necessary by the fact that

one partner cannot sue another in respect of individual items unless an account is first taken. The procedure for such a suit is governed by O. 20, R. 15, Civil P. C., and the ordinary form for the preliminary decree is given as Form No. 21 in Appendix D. This form should ordinarily be followed unless there is any special reason for modifying it. It is true that the heading describes it as a form for a preliminary decree in a suit for dissolution of partnership and the taking of partnership accounts, while the firm in the present instance has already been dissolved; but it is just as much applicable when the Court is asked to declare that a dissolution has taken place, and an account is still required. In the present instance, the trial Court has not attempted to follow the usual form of decree but has simply granted a decree "for rendition of accounts" without specifying any of the other details which are necessary when the affairs of partnership are to be wound up. The first thing necessary therefore is that the decree should now be drawn up in the proper form. This brings us to the particular difficulty that has given rise to the present appeal, which would probably have been unnecessary if the trial Court had clearly kept in view the ordinary form of preliminary decree which has to be passed in a suit of this kind. The partnership is to be deemed to be terminated with effect from 26th May 1936. On 22nd March of that year the plaintiff went through certain accounts and signed an entry to the effect that he had received a sum of Rs. 506-3-0 on account of his share in the brokerage transactions for the firm. The entry also contains a statement that the accounts had been settled up to that date. This entry had been taken by the Courts below as precluding any inquiry into accounts of an earlier date and the plaintiff is afraid that this finding will be treated as depriving him of any share in the profits which may have been earned before a certain date but which had not been collected by that time.

In the standard form of preliminary decree, in the part relating to accounts, the third entry provides that an account will be taken of all dealings and transactions between the plaintiff and defendant from the foot of the settled account exhibited in the suit and not disturbing any subsequent settled account. From the nature of the other entries it is clear that this entry refers only to profits which had

already accrued and been divided, though it might include an adjustment made between partners by which one partner received a portion of the accepted profits in advance. Any credits which are still outstanding are covered by the first entry; and unless there is any evidence to the contrary it is not to be presumed that the plaintiff intended to surrender his claim for a share of any subsequent profits which might accrue in respect of earlier transactions when he accepted the amount mentioned above as the amount due to him on account of profits. If it is necessary to examine the account books of the firm from an earlier date in order to discover what credits are still due to the partnership, the examination of these accounts would not be barred out by the plaintiff's acceptance of the existing accounts as correct, as certain remarks made in the judgment of the trial Court (but not incorporated in the decree) seem to suggest.

For these reasons I accept the appeal, set aside the existing decree and remand the suit to the trial Court under O. 41, R. 23, Civil P. C., in order that the trial Court may pass a preliminary decree in the proper form, with reference to the remarks made above in respect of the settled accounts. In view of the fact that the appeal has arisen out of the defective nature of the decree passed by the trial Court, the parties will bear their own costs in this appeal and in the lower Appellate Court, while costs so far incurred in the trial Court will form costs in the suit. Parties to appear before the lower Court on 21st July 1938.

B.D./R.K.

Appeal allowed.

A. I. R. 1938 Lahore 759

BECKETT J.

Bachittar Singh and others —

Plaintiffs — Appellants.

v.

Rahim Bakhsh and others —

Defendants — Respondents.

Second Appeal No. 271 of 1938, Decided on 7th June 1938, from decree of Senior Sub.Judge, Hoshiarpur, D/- 17th November 1937.

(a) Provincial Small Cause Courts Act (1887), Art. 35 (ii)—Property removed in assertion of right—Offence under Sec. 378, I. P. C., is not committed—Suit for recovery of price does not come under Art. 35 (ii).

Where the property is removed in the assertion of a contested claim or right, the removal would not constitute theft as defined in Sec. 378, I. P. C. Therefore a suit for recovery of price of property is not covered by Art. 35 (ii): *A I R 1933 Lah 172 and A I R 1921 Lah 72, Not foll.* [P 760 C 1]

(b) Provincial Small Cause Courts Act (1887), Art. 4—Suit for price of fruits removed from trees.

A suit for the value of fruits removed from trees is not covered by Art. 4 : 3 All 168, *Rel. on.*
[P 760 C 2]

Gullu Ram — *for Appellants.*

Barkat Ali — *for Respondent 1.*

Judgment.—A preliminary objection has been raised that no second appeal lies, on the ground that the suit is of a nature cognizable by a Court of Small Causes and that the value is less than Rs. 500. The plaintiffs are suing for the price of fruit removed by the defendants from certain trees which both parties claim to be growing on their own land. In support of his right to appeal, counsel for the plaintiffs relies on *A I R 1921 Lah 72*,¹ in which a suit for the price of fruit removed was held to be excluded from the cognizance of a Small Cause Court by Art. 35 (ii), Provincial Small Cause Courts Act. The judgment is brief and it is not clear what were the particular facts of the case which would have constituted an offence punishable under Ch. 17, I. P. C. In the present instance it is clear that the property was removed in the assertion of a contested claim or right so that the removal would not constitute theft as defined in S. 378 of the Code. It is not taken out of the scope of Ch. 17 by any of the provisions of Ch. 4, but does not constitute an offence under Ch. 17, simply because it does not fall within the wording of S. 378. In these circumstances, Art. 35 (ii) does not apply. Reference has also been made to *A I R 1933 Lah 172*² where Art. 35 was held to apply to the wrongful removal of grass. If this decision is to be taken as implying that the wrongful removal of property must be taken as falling under Ch. 17 of the Code even though there is no dishonest intention, I find myself with all respect unable to accept a proposition so widely worded.

An attempt has also been made to justify the appeal as one falling under Art. 4, which excludes a suit for the possession of

immovable property or for the recovery of an interest in immovable property. Since the Provincial Small Cause Courts Act appeared before any definition of immovable property was included in the General Clauses Act, there have been conflicting decisions with regard to trees. But there never appears to have been any doubt that a suit for the value of fruit removed from trees is not covered by Art. 4. In this connexion reference may be made to 3 All 168,³ a case decided under the earlier Act, 11 of 1865. For these reasons, I hold that no appeal lies, and no sufficient grounds have been made out for treating the appeal as a petition for revision. The memorandum of appeal is accordingly rejected with costs.

B.D./R.K.

Appeal rejected.

3. Nasir Khan v. Karamat Khan, (1881) 3 All 168.

* A. I. R. 1938 Lahore 760

BECKETT J.

Har Chand — Plaintiff — Appellant.
v.

*Hira Lal, Decree-holder and another,
Judgment-debtor — Defendants —
Respondents.*

Second Appeal No. 169 of 1938, Decided on 9th May 1938, from decree of Dist. Judge, Hissar at Gurgaon, D/- 8th October 1937.

(a) Civil P. C. (1908), O. 21, R. 63—Property subject to mortgage attached in execution of decree—Objection by mortgagee under O. 21, R. 58 dismissed—Suit by mortgagee having merely right to sue for possession on footing of alleged mortgage does not fall under O. 21, R. 63.

Order 21, R. 63 is intended to apply only to claims and objections which can properly be preferred under the provisions of O. 21. A mortgagee cannot come to Court under O. 21, R. 58 and argue that the mortgaged property is not liable to attachment, all the more so, when he is not a mortgagee in possession but merely has a right to sue for possession. Where such a mortgagee, after an unsuccessful objection under O. 21, Rule 58 institutes a suit on the footing of the alleged mortgage impleading the decree-holder as defendant along with the mortgagor, the suit cannot be said to be one under O. 21, R. 63 : *A I R 1922 Pat 408, Rel. on.* [P 761 C 2]

(b) Registration Act (1908), S. 17—In Punjab, report made to subordinate land revenue officer relating to changes in land revenue record does not operate to create title.

In the Punjab, a report made to a subordinate land revenue officer under the statutory provision

1. Nabl Bakhsh v. Mahomed Ali, (1921) 8 A I R Lah 72=76 P L R 1922.

2. Attar Singh v. Nuru, (1938) 20 A I R Lah 172=145 I O 155.

relating to changes in the land revenue records does not operate to create a title, for the purposes of S. 17, Registration Act. [P 762 C 1]

* (c) Civil P. C. (1908), O. 21, R. 63, Sec. 100—Principle that in suit under O. 21, R. 63 onus of establishing consideration etc., is on plaintiff who had raised unsuccessful objection before executing Court does not apply to plaintiff who claims under mortgage and who has adopted wrong method of establishing his right by suit under O. 21, R. 63—Court viewing evidence in such suit as if such burden is on plaintiff—Its judgment is vitiated on point of law.

The principle that in a suit under O. 21, R. 63 the onus of establishing both consideration and good faith lies upon the plaintiff, who had raised unsuccessful objection before the executing Court, does not apply to the case of a plaintiff who claims certain rights under a mortgage and has adopted a mistaken and infructuous method of establishing those rights by way of an objection under O. 21, Rule 58 and subsequent suit under O. 21, Rule 63. Where in such a suit, the lower Court views the evidence as if the plaintiff lay under the necessity of dispelling a suspicion of fraud, it is sufficient to vitiate its judgment on point of law: *A I R 1932 Lah 174, Expl.*

[P 762 C 1, 2]

Shamair Chand — *for Appellant.*

D. N. Aggarwal — *for Respondent (Decree-holder).*

Judgment.—The property in suit belongs to Sabaj Ram hereinafter called the judgment-debtor. The property is shown in the land revenue records as under mortgage with Har Chand, the plaintiff, the terms being that the property was to remain with the judgment-debtor but that the mortgagee would be entitled to obtain possession if interest was not duly paid. This transaction dates from 1929. Subsequently certain money decrees were obtained against the judgment-debtor by one Hira Lal. These decrees were obtained in 1930, 1932 and 1934 and Hira Lal then sought to bring the property to sale. The mortgagee unsuccessfully applied to have the property declared not liable to attachment, and then instituted the present suit for possession under the terms of the mortgage, impleading Hira Lal as defendant along with the judgment-debtor.

The suit has been described as one under O. 21, R. 63, Civil P. C., but this description is misleading. So far as the judgment-debtor himself is concerned, the suit is simply one for possession under the terms of the alleged mortgage arising out of the judgment-debtor's failure to pay the interest. So far as Hira Lal is concerned, the suit arises out of the fact that he is seeking to bring the property to sale and

to this extent it may be said that he is concerned with execution proceedings. At the same time however it does not belong to general class of cases which arise in consequence of the provision of Rule 63, which is clearly intended to apply only to claims and objections which can properly be preferred under the provisions of O. 21. In the present instance, the objection was taken to attachment under R. 58. As held in 1 Pat 159¹ a mortgagee cannot come to Court under R. 58 and argue that the mortgaged property is not liable to attachment. This decision was given with reference to an application by a usufructuary mortgagee in possession, and it was held that the provisions of R. 63 did not apply to dismissal of such an application. The same principle applies with even greater force to the mortgagee who is not in possession of the property but merely has a right to sue for possession. The present suit is simply one for possession on the footing of the alleged mortgage, Hira Lal being impleaded in consequence of his denying the plaintiff's right to obtain possession.

This view of the case is sufficient to dispose of a preliminary objection with regard to court-fee. It is now admitted that the appeal had been properly stamped in the first instance, as the suit was for possession of the mortgaged property. The remarks made above also have a bearing on the disposal of the suit itself. The trial Court held that the mortgage had been proved, that there was no reason to suspect that the property had been mortgaged in order to defeat or delay the claim of Hira Lal and that the plaintiff was entitled to possession. On first appeal, the District Court reversed this decision, holding in effect that the plaintiff had failed to prove that the transaction had been carried through in good faith. It has been claimed that this is a finding on the question of fact which is sufficient to bar a second appeal. It seems clear however from a perusal of the judgment that the learned District Judge was under the impression that the burden of proving good faith lay heavily on the plaintiff. He refused to accept the evidence of the plaintiff or the defendant or even that of the patwari before whom the parties appeared as a preliminary to mutation. He also rejected the relevant entry in the patwari's diary

1. *Biswanath Patra v. Lingaraj Patra*, (1922) 9 A I R Pat 408=70 I C 306=1 Pat 159.

on the ground that this was a document of title requiring registration. It has now been generally recognized in the Punjab that a report made to a subordinate land revenue officer under the statutory provision relating to changes in the land revenue records does not operate to create a title for the purposes of S. 17, Registration Act 1908, so that this objection was not correct.

The rest of the evidence appears to have been viewed by the learned District Judge on a mistaken application of the principle laid down in A I R 1932 Lah 174,² in which it is said that in suit under O. 21, R. 63, the onus of establishing both consideration and good faith lies upon the plaintiff who had raised an unsuccessful objection before the executing Court. As already pointed out, the present suit cannot be properly described as one under Order 21, R. 63. The decision just mentioned proceeds from the judgment of the Privy Council in A I R 1930 P C 255.³ In that case the plaintiff objected that part of the property was wakf and part was her own property, which would be a good ground for objecting to attachment. The executing Court held that the deeds on which she relied were merely fictitious documents created with fraudulent intention. She then brought a suit for a declaration that the deeds were valid. It was held that the findings of the executing Court were sufficient to throw on her the burden of proving good faith when her claim was renewed by means of a regular suit.

There is nothing in the principle thus enunciated which would apply to the case of a plaintiff who claims certain rights under a mortgage and has adopted a mistaken and infructuous method of establishing those rights beforehand. If he raises an objection which he was not entitled to make, it seems to me that his legal position remains unaltered. The plaintiff has produced a copy of an entry from the revenue records which shows that he held a mortgage on the land, and which is to be regarded under the statutory law as carrying with it a presumption of truth. It is then for the opposite party to rebut that presumption. There are no circumstances in the present case which raise any definite

suspicion of fraud. It seems to me that the evidence has been viewed in the lower Appellate Court as if the plaintiff lay under the necessity of dispelling a suspicion of fraud which arose out of the dismissal of the infructuous application in the execution proceedings, and that this is sufficient to vitiate the judgment on point of law. For these reasons, I agree with the view taken by the trial Court. I accept the appeal, and restore the decree of the trial Court, with costs throughout.

R.M./R.K.

Appeal allowed.

A. I. R. 1938 Lahore 762

BLACKER J.

Sayad Pir Mohi-ud-Din Lal Badshah
Petitioner.

v.

Emperor.

Criminal Misc. No. 170 of 1938, Decided on 15th June 1938.

(a) Criminal Trial—Concurrent jurisdiction—Lower Court should be moved first particularly in case of application for bail — Exception to general rule.

Although there is no hard and fast rule, it is desirable when the Sessions Court and High Court have concurrent jurisdiction that the ordinary practice should certainly be that the lower Court should first be moved and this is particularly desirable in a bail application where the appropriate Court to deal with the matter is the Court which is going to try the case and where an expression of opinion by a superior Court is likely to prejudice the trial in the lower Court. But where the lower Court's judgment is likely to be affected by some remarks made by the superior Court during the proceedings in that case, then the superior Court can be moved but only as an exception to the general rule. [P 763 C 1]

(b) Criminal Trial — Bail — Power of High Court to grant — Accused committed by competent Magistrate on serious charge — High Court should not lightly release accused on bail.

Although the High Court could admit to bail a person, who has been committed on serious charges yet in a case where after an exhaustive enquiry the accused has been committed by a competent Magistrate on grave and serious charges relating to non-bailable offences, the High Court should not lightly enlarge him on bail.

[P 763 C 2]

J. G. Sethi, M. L. Sethi and K. S. Thapar
— *for Petitioner.*

Mohammad Monir, Assistant Advocate-
General — *for the Crown.*

Dr. Khalifa Shuja-ud-Din —
for Complainant.

2. Jankidas v. Gulzar, (1992) 19 A I R Lah 174 = 131 I C 883 = 12 Lah 763 = 32 P L R 350.

3. Mahomed Ali Mohammad Khan v. Mt. Bismillah Khan, (1930) 17 A I R P C 255 = 128 I C 647 (P C).

Order. — A preliminary objection was raised to this petition that as the High Court and the Sessions Judge had concurrent jurisdiction, the petition should have been presented in the first place to the Court of the Sessions Judge. No direct authority was quoted in support of this objection and counsel was unable to refer to any rule on the subject. He relied however upon the analogy of other petitions such as petitions for revision and petitions for transfer in which the High Court has concurrent jurisdiction where the rule is that the lower Court should be moved first. I consider that although there is no hard and fast rule, it is desirable that the ordinary practice should certainly be that the lower Court should first be moved and this is particularly desirable in a bail application, where the appropriate Court to deal with the matter is the Court which is going to try the case and where an expression of opinion by a superior Court is likely to prejudice the trial in the lower Court. But there are peculiar circumstances in this case which take it out of the ordinary and they are that I have already dealt myself on a previous occasion with this matter when it came before me during the pendency of the committal proceedings in shape of a petition for the revision of the order of the learned Sessions Judge of Rawalpindi enlarging the petitioner on bail. I accepted that petition and cancelled the petitioner's bail and in doing so I had occasion to make some adverse remarks upon the behaviour of the petitioner before the case came into Court. Counsel for the petitioner has urged that the existence of these remarks would be likely to prevent the Sessions Judge from giving a wholly free and independent consideration to that aspect of the case. This argument appears to me to have considerable force and as therefore I am satisfied that there is no bar to my entertaining the application direct, I do so.

Before coming to the actual merits of the petition, I wish to refer to one legal argument raised by the learned Assistant to the Advocate-General. He pointed out that an order of commitment once made cannot be quashed by the High Court except on a point of law. He therefore argued that, as in the circumstances of this case, when the petitioner has been committed to the Sessions by a competent Court on charges of non-bailable offences of considerable seriousness, any order by

the High Court would inevitably be taken by the learned trial Court as an indication that the High Court believed the case to be groundless. In such circumstances the subsequent Sessions trial would be a farce as the Sessions Judge would feel himself bound to acquit the petitioner. Counsel contended that any such action by the High Court would be tantamount to an evasion of the statutory provision which bars the High Court from interfering with a commitment order on questions of fact. While I am not prepared to go so far as the learned Assistant to the Advocate-General and to hold that the High Court could never admit to bail a person who has been committed on such charges, I certainly think that in a case like the present where after an exhaustive enquiry the petitioner has been committed by a competent Magistrate on grave and serious charges relating to non-bailable offences, the High Court should not lightly enlarge him on bail. In view of these considerations I am of opinion that in spite of the lengthy arguments which he has addressed to me on the point, counsel for the petitioner has not succeeded in showing that there are sufficient grounds in this case for releasing the petitioner on bail. The petition is accordingly dismissed.

B.D./R.K.

Petition dismissed.

* A. I. R. 1938 Lahore 763

ADDISON AG. C. J. AND
DIN MOHAMMAD J.

*Chaudhri Ganesh Dass and another —
Plaintiffs — Appellants.*
v.

*Malik Mohammad Hussain and others
— Defendants — Respondents.*

Second Appeal No. 101 of 1938, Decided on 13th June 1938, from decree of Dist. Judge, Multan, D/. 30th October 1937.

* Registration Act (1908), S. 73 — Application under S. 73 by agent — For Registrar to have jurisdiction to order registration, agent must have been authorized under Ss. 32 and 33.

The words "as aforesaid" in the phrase "or agent authorized as aforesaid" in S. 73 (1) of the Act are not mere surplusage and they can only refer to the special agent mentioned in S. 32 and S. 33 of the Act. For the Registrar to have jurisdiction under S. 73 to order registration, it is necessary that the application should be presented in the manner laid down by S. 73 and if it is not

so presented or made, the Registrar's order directing registration is illegal and invalid and nothing done upon it can be valid or legal: *A I R 1938 Lah 255, Rel. on; A I R 1933 Mad 407, Not approved.* [P 764 C 2]

Mehr Chand Mahajan—for Appellants.

Achhru Ram — for Respondent 1.

Addison Ag. C. J. — The facts relating to this second appeal are as follows: On 31st March 1928, Karim Bakhsh mortgaged some land to Sidhu Ram for Rs. 1000, the deed being presented for registration the same day. The registration was refused as Karim Bakhsh denied execution of the document. Karim Bakhsh then sold the land to another person on 10th April 1928, the transfer-deed being registered the same day. The original deed of mortgage was compulsorily registered on 30th October 1928. Thereafter the mortgagee transferred his rights under the mortgage deed in favour of the plaintiffs. On 13th February 1936, they brought the usual mortgage suit for sale of the land. The representative of the original vendee pleaded that the mortgage deed was invalid as it was improperly registered. The trial Court decreed the suit in part but on appeal the learned District Judge held that the mortgage deed had been improperly registered and, accepting the appeal he dismissed the suit, leaving the parties to bear their own costs throughout. Against this decision the plaintiffs have appealed.

Under S. 32, Registration Act every document to be registered shall be presented: (a) by some person executing or claiming under the same or (b) by the representative or assign of such person, or (c) by the agent of such person, representative or assign duly authorized by power of attorney executed and authenticated in manner hereinafter mentioned. S. 33 lays down the manner in which the powers of attorney of such agents shall be executed and authenticated. When the document was first presented under S. 32, Sidhu Ram was himself present and no question of an agent arose then. Under S. 73, Registration Act, when a Sub-Registrar has refused to register a document on the ground that any person by whom it purports to be executed, or his representative or assign, denies its execution, any person claiming under such document, or his representative, assign or agent authorized as aforesaid, may, within thirty days after the making of the order of refusal, apply to the Registrar in order to establish his right to have the document registered.

The application contemplated by S. 73 was not put in by Sidhu Ram but by an ordinary agent, Manohar Lal. Admittedly his power of attorney was not executed and authenticated as required by S. 33 of the Act. It was for this reason that the District Judge held the document to have been improperly registered.

Some attempt was made to argue that the words "as aforesaid" in the phrase "or agent authorized as aforesaid" in S. 73 (1) of the Act were mere surplusage, but this is obviously not so and they can only refer to the special agent, mentioned in S. 32 and S. 33 of the Act. As Manohar Lal was not such an agent there is no doubt that his application to the Registrar under Sec. 73 (1) did not lie. The Registrar therefore had no power to order registration of the document. Though it was admitted before us that a document, registered under Sec. 32 of the Act, which was presented by an agent not of a class recognized by S. 33, could not be said to be registered at all, it was sought to distinguish the case of an application to a Registrar under the provisions of S. 73 on the ground that after his order was obtained the document was later properly presented before the Sub-Registrar, but this is a distinction without a difference. For the Registrar to have jurisdiction to order registration it was necessary that the application should have been presented in the manner laid down by Sec. 73, and it was not so presented or made. The Registrar's order was therefore illegal and invalid and nothing done upon it could be valid or legal. No such distinction therefore can be drawn. The same view appears to have been taken obiter by a Division Bench of this Court in *A I R 1938 Lah 255*,¹ at the bottom of the first column of page 257 and top of the second column, where it was said:

Hence I have no hesitation in holding that the first presentation by Mohammad Ismail of the document was not valid and the appeal filed before the Registrar was also not a validly filed appeal.

By appeal here of course is meant application under S. 73. I am not impressed with the view expressed by a single Judge in *A I R 1933 Mad 407*.² I might here refer to S. 77, Registration Act which enacts

1. *Madan Lal v. Ganga Bishen*, (1938) 25 A I R Lah 255.

2. *Chittoori Chinnammi v. Venkayamma*, (1933) 20 A I R Mad 407 = 142 I C 646 = 64 M L J 449.

that where the Registrar refuses to order the document to be registered, under S. 72 or S. 76, any person claiming under such document, or his representative, assign or agent, may within thirty days after the making of the order of refusal, institute in the Civil Court, a suit for a decree directing the document to be registered. It will be noticed that the word "agent" is here used, not the words "agent authorized as aforesaid" and the reason is obvious, as an ordinary agent is allowed to bring a suit in the Civil Courts. For the reasons given, I would dismiss this appeal with costs.

D.S./R.K.

Appeal dismissed.

A. I. R. 1938 Lahore 765

JAI LAL AND DALIP SINGH JJ.

Sham Singh — Plaintiff — Appellant.
v.

Jagat Singh and another — Defendants
— Respondents.

First Appeal No. 453 of 1936, Decided on 5th January 1938, from decree of Senior Sub-Judge, Jullundur, D/- 6th March 1935.

Appeal — Jurisdiction — Suit for declaration by collateral that alienation, consideration for which was alleged to be Rs. 13,000, was without consideration and legal necessity and therefore not binding on him—Suit dismissed by trial Court—District Judge, on appeal, holding that consideration to extent of Rs. 6608 was for valid necessity, but refusing to pass decree on ground that Rs. 6608 was outside his appellate jurisdiction — District Judge held had jurisdiction to pass decree.

A suit for declaration by a collateral that an alienation, the consideration for which was alleged to be Rs. 13,000, was without consideration and legal necessity and therefore did not affect the plaintiff's reversionary rights was dismissed by the trial Court, which held that the alienation was made for consideration and valid necessity except for a sum of Rs. 1500 or thereabouts. On appeal the District Judge held that consideration to the extent of Rs. 6608 was alone proved to be for legal necessity but refused to pass a decree in favour of the plaintiff on the ground that the sum of Rs. 6608 was outside his appellate jurisdiction and returned the appeal for presentation to the High Court :

Held that the District Judge had jurisdiction to pass a decree setting aside the sale and fixing the charge on the property at the sum of Rs. 6608 : A I R 1936 Lah 133, Rel. on; A I R 1934 Lah 545 (F B), Disting. [P 765 C 2]

Bawa Sant Singh — for Appellant.

F. C. Mital — for Respondents.

Dalip Singh J.—In this case the plaintiff brought the usual declaratory suit alleging

that a certain alienation made was without consideration and legal necessity and therefore should not affect his reversionary rights. The trial Court held on the pleadings of the parties that the plaintiff was a collateral of the vendor, that the property was ancestral but that the alienation was made for consideration and valid necessity except for a sum of Rs. 1500 or thereabouts, and as the total consideration was Rs. 13,000 he refused to set aside the sale and dismissed the plaintiff's suit with costs. On appeal to the learned District Judge, he held that consideration to the extent of Rs. 6608 was alone proved to be for necessity and that if he had jurisdiction to pass a decree he would have decreed the plaintiff's suit and held that the land was subject only to a charge of Rs. 6608 *qua* the plaintiff's reversionary rights. But the learned District Judge was of opinion that as the sum of Rs. 6608 was outside his appellate jurisdiction therefore he was not entitled to pass such a decree on the authority of 15 Lah 512,¹ and therefore he returned the appeal to the plaintiff for presentation to the High Court.

The plaintiff has now presented this appeal in the High Court as a first appeal but he challenges the order of the learned District Judge and contends that the jurisdictional value being fixed under the Suits Valuation Act at thirty times the jama of the land, 15 Lah 512¹ has no application and the learned District Judge had jurisdiction to pass a decree setting aside the sale and fixing the charge on the property at the sum of Rs. 6608. It is conceded by the learned counsel for the respondents that 15 Lah 512¹ does not apply to the case, that being a case of a suit for accounts in which a tentative value is first fixed by the plaintiff and the decretal amount may vary considerably from the tentative value fixed by the plaintiff. The learned counsel for the appellant has cited A I R 1936 Lah 133² as an authority for the proposition that the learned District Judge had jurisdiction. In the circumstances I am of opinion that the contention of the learned counsel for the appellant is correct and the learned District Judge had jurisdiction to pass the decree which he would have passed but for his finding that 15 Lah 512¹ barred

1. *Ganga Ram v. Hakim Rai*, (1934) 21 A I R Lah 545 = 151 I C 703 = 15 Lah 512 = 36 P L R 361 (F B).

2. *Jagdish Ram v. Mt. Chinto*, (1936) 23 A I R Lah 133.

the passing of such a decree. I would therefore accept the appeal and remand the case to the learned District Judge to pass such decree as he considers fit in the case. Parties have been directed to appear before the learned District Judge on 1st February 1938 and obtain a date. Stamp on the appeal will be refunded and other costs will abide the event.

Jai Lal J.—I agree.

R.M./R.K.

Appeal allowed.

A. I. R. 1938 Lahore 766

DIN MOHAMMAD J.

Jarnail Singh — Plaintiff — Appellant.
v.

Mt. Narain Kaur and others, Defendants and others, Plaintiffs —
Respondents.

Second Appeal No. 209 of 1938, Decided on 12th May 1938, from decree of Senior Sub.Judge, Amritsar, D/- 13th November 1937.

Civil P. C. (1908), O. 23, R. 3, O. 43, R. 1 (m)—Appeal from order under O. 23, R. 3 is not incompetent merely because preferred after decree is passed.

An appeal from an order under O. 23, R. 3 recording a compromise is not incompetent merely because it is preferred after a decree is made. It is not necessary to prefer an appeal both from the order and the decree passed in pursuance of the order. So also, where the appeal is from an order recording compromise, no question of filing a copy of the decree along with the memorandum of appeal arises: *A I R 1933 Cal 94 and A I R 1938 Lah 350, Rel. on.* [P 766 C 2; P 767 C 1]

Shamair Chand — *for Appellant.*

Rup Chand — *for Respondent*

(*Harnam Singh*).

Judgment.—This appeal has arisen in the following circumstances. A suit was instituted by four plaintiffs, namely Karnail Singh and Jarnail Singh, as majors, and Atma Singh and Gian Singh as minors, against Mt. Narain Kaur, Harnam Singh and three others for possession of 21 kanals 4 marlas of land. They alleged that they had purchased mortgagee rights of the land in suit from Mt. Narain Kaur, to whom the land had been mortgaged by one Mohan Singh. This suit was resisted by the defendants. On the pleadings of the parties three principal issues were framed. The trial Court decided all the three issues in favour of the plaintiffs holding *inter alia* that Mt. Narain Kaur and not Har-

nam Singh was the real mortgagee and that full consideration had passed for the sale of mortgagee rights. Harnam Singh alone made an appeal against that order impleading all the other parties to the suit as respondents. On 13th November 1937 a statement appears to have been made by one Hazara Singh, pleader, to the effect that if Rs. 200 were paid to his clients, they would relinquish the land in suit in favour of the appellant. This statement bears the signature of Hazara Singh pleader and the thumb mark of Karnail Singh. On the basis of this statement the lower Appellate Court accepted the appeal and dismissed the plaintiffs' suit. Jarnail Singh has appealed.

Counsel for the respondent has raised two preliminary objections: (1) that no appeal lay from a consent decree, and (2) that the appeal was time-barred inasmuch as a copy of the decree of the lower Appellate Court was not put in within time. I do not however consider that there is any force in these objections. By O. 43, R. 1 (m) an appeal is allowed from an order under R. 3 of O. 23 recording or refusing to record an agreement, compromise or satisfaction. As observed by a Division Bench of the Calcutta High Court in 141 I C 732¹ an appeal from an order under O. 23, R. 3, Civil P. C., recording a compromise is not incompetent merely because it was preferred after a decree had been made. It is not necessary to prefer an appeal both from the order and decree passed in pursuance of the order. In a recent case, when an appeal had been preferred in similar circumstances, Tek Chand J. made similar observations and, although the memorandum of appeal showed that the appeal had been presented under S. 41, Act 9 of 1919, he treated the appeal as an appeal under O. 43, R. 1 (m) and, setting aside the judgment of the Courts below based on the alleged compromise, remitted the case back to the Court of first instance for trial of the suit on the merits: Regular Second Appeal No. 834 of 1937, reported in *A I R 1938 Lah 350*.² I am in respectful agreement with the course adopted by Tek Chand J. and consider that it was quite justified by law. I hold therefore that the appeal is competent. This automatically disposes of the second objection inasmuch as the appeal being one from

1. Haridas Sadhu Khan v. Iswar Ratneswar, (1933) 20 A I R Cal 94=141 I C 732=57 O L J 26=36 C W N 1013.

2. Mt. Ohawli v. Kidar Nath, (1938) 25 A I R Lah 350=40 P L R 138.

an order recording a compromise, no question of the filing of a copy of the decree arose along with the memorandum of appeal.

On the merits I consider that this order cannot be maintained. It is admitted that there is no power of attorney on the record in favour of Hazara Singh, pleader, and in the absence of any such authority he was not competent at all to effect a compromise so as to bind Jarnail Singh. It is not known even which respondents were represented by him. It is true that the statement of Hazara Singh bears also the thumb mark of Karnail Singh, but that does not advance the case of the respondents any further. Besides, in my view, the alleged compromise was clearly to the detriment of the minors' interests inasmuch as it had been held by the trial Court that full consideration which amounted to Rs. 689, had passed and the compromise was being effected on Rs. 200 only. On the grounds stated above, I set aside the order of the lower Appellate Court and remand the case to it for disposal in accordance with law. The appellant will have his costs from Harnam Singh, respondent.

R.M./R.K.

Case remanded.

A. I. R. 1938 Lahore 767

SKEMP J.

Chhagan Lal — Plaintiff — Appellant.
v.

Firm Mangal Sain Raj Narain and others — Defendants — Respondents.

Second Appeal No. 1152 of 1937, Decided on 16th May 1938, from decree of Dist. Judge, Hissar, D/- 31st May 1937.

Partnership Act (1932), S. 69 (2)—Suit by unregistered firm is invalid—Subsequent registration does not make such suit valid.

A suit by an unregistered firm is invalid. Registration of the firm after the suit has been instituted does not relate back so as to make the suit valid: *A I R 1937 Mad 767, Not foll.*; *A I R 1936 Mad 991*; *A I R 1935 All 898 and A I R 1935 Lah 893, Foll.* [P 768 C 1]

N. C. Pandit and Prem Chand Pandit —
for Appellant.

Shamair Chand and Parkash Chand —
for Respondents.

Judgment. — The main question in this appeal is whether the suit is barred by the provisions of S. 69, Partnership Act. On 21st January 1935 Chhagan Lal as a partner in the firm known as Hira Lal.

Bhanwar Lal sued the firm Mangal Sain-Raj Narain for Rs. 1300 as damages arising from a forward contract for the purchase of 500 bags of wheat entered into on 19th July 1933. The plaintiff in his plaint named six other persons as partners in the plaintiff firm and joined them as pro forma defendants. The contesting firm was not served for a long time and a written statement was only filed on 23rd December 1935, when the point was taken that the suit was barred by virtue of S. 69, Partnership Act. The point was not at first put in issue, but in October 1936 the trial Judge dismissed the suit on this ground. The plaintiff appealed but the learned District Judge upheld the finding. The plaintiff has come here in second appeal through Mr. Nanak Chand Pandit. S. 69 (2), Partnership Act, runs:

No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the register of firms as partners in the firm.

Mr. Nanak Chand's first point is that the suit was not by a firm but by a partner of the firm no longer in existence and thus it escaped the operation of S. 69 under the terms of S. 69 (3). As pointed out by the Judges below, the plaint nowhere stated that the plaintiff was suing as the partner of a dissolved firm. A somewhat similar point was that two of the partners of the firm had died and that the firm was dissolved by operation of S. 42, Partnership Act. This point also is not taken in the plaint and probably nothing would have been heard of either of these points if the firm had been registered before suit. In point of fact the firm was registered on 18th October 1935, the partners being described as Sujanmal, Chhaganmal, Indraj and Bhairun Das. The final point urged was that taking it as good law that the suit could not have been instituted, nevertheless registration on 18th August 1935 validated the suit with effect from the date of registration which was within time. *A I R 1937 Mad 767*,¹ a Single Bench judgment of the Madras High Court, supports this view. It is however the only ruling to this effect, and *A I R 1936 Mad 991*,² another Single

1. *Varadarajulu Naidu v. Rajamanika Mudaliar*, (1937) 24 A I R Mad 767=(1937) 2 M L J 273.

2. *Subramania Mudaliar v. East Asiatic Co. Ltd.*, (1936) 23 A I R Mad 991=165 I O 939=71 M L J 663.

Bench judgment, took the opposite view on the same point and it was held that any subsequent amendment of petition after getting the firm registered under the Partnership Act could not relate back to the date of institution so as to cure the defect. Similarly it was held in A I R 1935 All 898³:

Before instituting a suit by a partner against a firm, the firm must be duly registered Subsequently registering the firm and amending the plaint does not make a valid institution.

This case is under S. 69 (1) and not under S. 69 (2), but the principle is the same. Finally in A I R 1935 Lah 893,⁴ a Division Bench judgment of this Court, it is also held:

Section 69 clearly says that no suit falling within its purview shall be instituted. It is the institution of the suit that is barred. Hence an unregistered firm cannot file a suit nor can it after filing get the suit stayed till it gets itself registered.

To me the wording of the Section itself seems very clear and it is supported by all the authorities except A I R 1937 Mad 767.¹ There is a special reason for not following that judgment in the present case, because even now the certificate has not been placed on the record of the civil suit. The date is given in the District Judge's judgment, but the certificate was actually placed on criminal proceedings which were instituted against the mukhtar-i-am of the plaintiff firm on the allegation that he had falsely stated that the firm was registered. He produced the certificate in his defence. On the main point I concur with the findings of the lower Courts and with the reasoning given in those judgments. This appeal must be dismissed with costs.

D.S./R.K.

Appeal dismissed.

3. Ram Prasad Thakur Prasad v. Kamta Prasad Sitaram, (1935) 22 A I R All 898=157 I C 154=1935 A L J 1243.

4. Krishen Lal Ram Lal v. Abdul Ghafur Khan, (1935) 22 A I R Lah 893=160 I C 513=17 Lah 275=38 P L R 633.

A. I. R. 1938 Lahore 768

TEK CHAND J.

*Rati Ram and another — Defendants—
Appellants.*

v.

*Balwant and others — Plaintiffs —
Respondents.*

Second Appeal No. 770 of 1937, Decided on 6th December 1937, from decree of Senior Sub.Judge, Rohtak, D/- 28th April 1937.

Custom (Punjab)—Shamilat—Khasra number shown as a pond reserved for common purposes of village—No proprietor can encroach on any portion of khasra without consent of others.

Where a khasra number is a pond and is reserved for common purposes of the village and is not an ordinary shamilat field, no proprietor is entitled to encroach upon any part of the khasra or cut trees growing on it without the consent of the other proprietors. [P 768 O 2]

Faqir Chand Mital — *for Appellants.*

Shamair Chand — *for Respondents.*

Judgment.—The parties to this dispute are the proprietors of mouza Khizapur, tahsil Sonapat, Rohtak District. The dispute relates to khasra No. 1429 which is admittedly a portion of the shamilat. The defendants have lately brought 3 bighas out of this khasra number under cultivation. The plaintiffs have sued under O. 1, R. 8, Civil P. C., as representing the rest of the proprietary body, for a permanent mandatory injunction directing the defendants to restore this plot of 3 bighas, to its original condition by removing their possession and restraining them from cultivating any portion of the land in this khasra number or cutting trees which stand thereon. The defendants admitted that khasra No. 1429 was shamilat, but denied that it was a pond and that they were entitled to appropriate their pro rata share of this khasra number out of the shamilat. The main issue in the case was whether field No. 1429 was a pond and reserved for the common purposes of the village, as alleged by the plaintiffs, or whether it was an ordinary shamilat field which could be taken possession of by some of the proprietors until partition. On this issue both the Courts below have concurrently found, after a detailed examination of the revenue entries and other evidence on the record that the whole of this khasra number is a pond and was reserved for the common purposes of the village. This a finding of fact which cannot be assailed on second appeal. On this finding, there can be no doubt that no proprietor is entitled to encroach upon any part of this khasra number or cut trees without the consent of the other proprietors. No question of law really arises in this second appeal. The appeal fails and is dismissed with costs.

R.M./R.K.

Appeal dismissed.

* A. I. R. 1938 Lahore 769

BHIDE AND BECKETT JJ.

Nathu Mal — Plaintiff — Appellant.

v.

*Gokal Chand and others — Defendants
— Respondents.*

First Appeals Nos. 383 of 1936 and 384 of 1937, Decided on 17th June 1938, from preliminary decree of Sub.Judge, First Class, Amritsar, D/- 26th June 1936.

* (a) Debtor and Creditor—Composition—Arrangement to accept part of whole—Rights and liabilities of creditors—Creditor not being party to composition whether bound by it—Creation of trust—Rights of creditor when lost explained.

A composition is an agreement between the compounding debtor and all or some of his creditors, by which the compounding creditors agree with the debtor, and (expressly or impliedly) with each other, to accept from the debtor payment of less than the amounts due to them in full satisfaction of the whole of their claims. The consideration which in such a case enables the acceptance of part of a debt to operate as a discharge of the whole debt is the mutual agreement of the creditors to forgo parts of their claims. One method of arrangement of an insolvent debtor's affairs which the law recognizes is an assignment of the debtor's property to a trustee for realization and distribution of the proceeds rateably amongst all the debtor's creditors, or amongst those who assent to and take the benefit of the assignment. Such an assignment operates in effect to place the administration of the debtor's estate in the hands of a trustee for the benefit of the creditors. The assignment is the voluntary act of the arranging debtor, and the trusts to which the assignment is subject are those which the debtor himself creates. The deed becomes operative to release or suspend the operation of creditors' claims by virtue of the assent of the creditors thereto; and it only binds those creditors who in writing or otherwise expressly or impliedly assent to it. Until the deed of assignment to a trustee has been executed by or come to the knowledge of the creditors, the trustee is an agent only for the debtor under a revocable authority to deal with the estate. When the instrument expresses the arrangement to be with the creditors generally, or all creditors who assent to it, any creditor who actually or by his conduct assents to and elects to take the benefit of the arrangement within the proper time is entitled to share in the benefits of the arrangement, although he has not signed the deed; and in some cases the Courts will allow a creditor to come in under the arrangement and share in its benefits notwithstanding that the proper time for accession has elapsed. On the other hand, a creditor entitled to the benefit of an arrangement must perform fairly all the conditions of the arrangement which apply to the creditors. If he takes any step which is inconsistent with or opposed to those conditions, as, for instance, by bringing an action against the debtor to recover his debt, he will be liable to be excluded from the benefit of the arrangement. This obligation is binding not only on creditors who execute a deed of arrangement or expressly assent to it, but also on those who by their conduct put them-

selves in the same situation as if they had executed it. The principle is that if a creditor puts himself in the situation of having the benefit of the deed, he must bear its obligations although he has not literally executed the deed. There is however one benefit to which a secured creditor is entitled. If the composition deed reserves to creditors their rights over securities held by them on the property of the debtor, as by a mortgage charge, the terms of a general release contained in the deed of agreement will not prevent those creditors from realizing or dealing with and obtaining the benefit of their securities in reduction of the debts due to them. But this provision is limited to the extent of their securities, which must be clearly reserved by the deed. [P 771 C 2; P 772 C 1, 2]

* (b) Mortgage—Mortgagee accepting composition of mortgagor's debts under deed cannot fall back on original deed.

Mortgagee having once accepted the trust-deed by which a composition of debt was made between the debtors and creditors, cannot again fall back on any remedy on the footing of the original mortgage. [P 776 C 2]

J. N. Aggarwal, Yashpal Gandhi and Vir Sen Sawhney for Dev Raj Sawhney —
for Appellant.

M. C. Mahajan, Indar Deva for R. C. Soni and S. N. Bali — *for Respondents.*

Beckett J.—This suit arises out of a composition between a firm and its creditors. Early in 1922, the firm of Jowala Nath Kanshi Ram, trading in pashmina goods at Amritsar and Benares, found itself in financial difficulties. The proprietors of the firms, Nathu Mal, Hari Kishen Das and Bishen Das alias Bhola Shah, then entered into a deed of arrangement with their creditors. The deed was dated 27th January 1922 but was not registered until 20th March. Kishen Chand and Gokal Chand were appointed trustees from among the creditors for the purpose of winding up the affairs of the firm. The property made over to them included the old stock of the firm and some outstanding debts. It is stated in the deed that the debts of the firm amounted at this time to about Rs. 1,20,000. Nearly half this sum was due to a secured creditor Nathu Mal, who held a mortgage over two shops and three houses in Amritsar. Nathu Mal was not one of the creditors signing the deed and it is said that the arrangement was made without his knowledge. In spite of this, it was provided in the deed that the trustees were to sell the two shops and two of the houses just mentioned and were to apply the proceeds in clearing off the mortgage-debt. The remaining house was then to be made over to one

of the members of the debtor firm together with a small sum of money. After this had been done, the creditors were to share the proceeds of the winding up pro rata.

The old stock of the firm was sold off by auction. Certain ornaments were also sold. Nothing much was done towards the collection of most of the outstanding debts, which the trustees did not consider worth the cost of realization, but a suit was brought for the recovery of one of the more important debts at Benares and a decree was obtained. Apart from this debt, the only property of any considerable value left with the firm consisted of the shops and houses, of which the shops were the more valuable. An attempt was at first made to sell the shops by private treaty, but it was eventually decided to sell them at auction. The sale was finally concluded on 7th August 1922 in favour of Sham Das, who offered the sum of Rupees 63,200, of which Rs. 15,800 was paid a few days later. Had the whole of the purchase money been promptly paid, the proceeds of this sale would probably have been sufficient to cover the whole of the mortgage charge outstanding at the time, leaving the proceeds of the two houses for rateable distribution among the other creditors.

Unfortunately a hitch occurred over the sale of the shops. It had been provided in the deed of arrangement that the debtors would sign any documents that were required if a demand was made. Sham Das asked the trustees to obtain the signatures of the debtors to the deed, although this had not been originally included in the terms at all, and the trustees agreed to accommodate him. When arrangements had been made to obtain these signatures, however, Sham Das insisted that the deed must be signed not only by the debtors who had been parties to the deed of arrangement but also by the various other members of the joint Hindu family to which they belonged, and this gave rise to further difficulties. Eventually, Sham Das sued the trustees for rescission of the contract of sale and the return of the money already paid, on the ground that he had not received a marketable title within a reasonable time. It is suggested that his reluctance to conclude the bargain was due to the fact that there had been a considerable fall in the value of real property since the auction. This view was accepted by the trial Court, which rejected the claim as put forward by Sham Das, but passed a decree requiring

the trustees to obtain the signatures of the other members of the family within a certain time. Sham Das appealed to the High Court, which held that Sham Das had been within his rights in refusing to accept the conveyance which was not signed by the members of the family in accordance with the deed of trust, and granted a decree rescinding the sale and ordering return of the money paid. The result was that the trustees lost the benefit of the sale which had been concluded and further had to pay a large sum by way of costs, apparently out of their own pocket. These proceedings did not come to an end until 31st May 1927. In the meantime, no effective steps had been taken for the sale of the houses. The reasons given by the trustees for this delay are that the houses were occupied by the debtors who gave no assistance in the matter of selling them and that prospective purchasers were scared away by the prolonged litigation which had arisen over the sale of the shops. It may here be observed that these houses as well as the shops were held by the debtors under a deed of rent which had been executed for one year in 1919 but had not been renewed since then, so that the debtors were in the position of tenants holding over at the time when the composition took place. It has been suggested that the trustees should have realized rents for these properties after the composition; but the trustees took the view that the right to receive rents for the shops had passed to Sham Das after the sale and that they could not realize rent for any part of the house property without the assistance of the debtors.

While the litigation over the shops was in progress, the mortgagee brought a suit on the basis of his mortgage deed, for the realization of the sum due to him, with accrued interest, by sale of the two shops and all three houses, impleading the original mortgagors and their representatives together with the trustees. This suit, out of which the present appeal has arisen, was instituted on 6th October 1926. After the usual recitals suitable to a mortgage suit, the plaintiff stated in para. 4 of his plaint that the business of the original mortgagors had failed, that the two trustees had been appointed to manage their property and money dealings and that the property of the mortgagors had thus come into their hands. In para. 8, this statement was repeated. It was further stated that the

trustees had "purposely neglected their duty which they did not perform," and that they were accordingly responsible for payment of the principal and interest due on the mortgage. In the last paragraph, it was prayed that a decree for sale of the mortgaged property might be passed and that a decree might also be passed against the persons of the defendants and their property. The trial Court granted the usual decree for the sale of the mortgaged property with a personal decree against the debtors but refused to grant a personal decree against the trustees on two grounds: first, that the plaintiff could not claim the benefit of a trust deed which he did not sign, and secondly, that relief under the deed of arrangement could not be combined with a claim based on the original deed of mortgage.

On appeal to this Court, it was held that the additional relief claimed by the plaintiff could not be summarily rejected in this way. In the first place, it is open to a creditor, who has not signed the deed of arrangement, to come in afterwards, if he chooses to do so within a reasonable time. In the second place, it may be possible for a secured creditor to combine the benefits of such an arrangement with his rights over the secured property. The suit was accordingly remanded for a decision on the merits with regard to this part of the plaintiff's claim. After the order of remand, the principal parties or their counsel were briefly examined. The case as stated for the plaintiff was that the trustees had been dilatory and negligent in disposing of both the immovable property and the moveable property of the debtors. The trustees denied that they had been negligent or guilty of undue delay in realizing the property. A single issue was accordingly struck on the question whether the trustees had been guilty of negligence, breach of the terms of the trust deed and misconduct, and if so, whether they were personally liable for the payment of the money due to the plaintiff. The finding of the lower Court was that the trustees might have been guilty of some negligence in realizing such assets as the outstandings due to the debtor firm, but that there had been no negligence in carrying out the terms of the deed of arrangement so far as it related to the claim of the plaintiff. The additional prayer against the trustees was accordingly dismissed and the plaintiff has again appealed against this decision.

The appeal has been argued principally upon the grounds that the trustees were in fact grossly negligent in disposing of the real estate and that their manner of dealing with the rest of the estate has had a prejudicial effect upon the legal interests of the plaintiff. But before it can be determined whether the trustees have been guilty of any breach of trust in relation to the plaintiff, it is necessary first to determine to what extent, if any, the plaintiff stood in a fiduciary position towards them. This, in turn, makes it necessary to consider to what extent the position of the plaintiff with regard to the deed of arrangement has already been determined by the previous order of this Court. As I read that order, it does not appear to me to have been intended to give any final decision on the rights of the plaintiff under the deed of arrangement; and I understand from my learned brother, who was a party to the judgment, that it was not meant to be conclusive. The additional claim of the plaintiff against the trustees had been summarily dismissed on the ground that it could not be entertained. The effect of the order was to direct that the claim should be entertained and should then be decided on the merits. It is only after the obligation of the trustees towards the plaintiff has been determined that it can be decided whether they have failed to carry out those obligations and what is the extent of the loss, if any, suffered by the plaintiff in consequence. In other words, the second part of the issue framed by the lower Court requires to be decided first.

The general nature of compositions and arrangements outside an Insolvency Court has been explained in Vol. II, Edn. 2 of Halsbury's Laws of England, under Part II of the Section relating to Bankruptcy and Insolvency. A composition is an agreement between the compounding debtor and all or some of his creditors, by which the compounding creditors agree with the debtor, and (expressly or impliedly) with each other, to accept from the debtor payment of less than the amounts due to them in full satisfaction of the whole of their claims. The consideration which in such a case enables the acceptance of part of a debt to operate as a discharge of the whole debt is the mutual agreement of the creditors to forgo parts of their claims. One method of arrangement of an insolvent debtor's affairs which the law recognizes is an assignment of the debtor's property to a trustee for

realization and distribution of the proceeds rateably amongst all the debtor's creditors, or amongst those who assent to and take the benefit of the assignment. Such an assignment operates in effect to place the administration of the debtor's estate in the hands of a trustee for the benefit of the creditors. The assignment is the voluntary act of the arranging debtor, and the trusts to which the assignment is subject are those which the debtor himself creates. The deed becomes operative to release or suspend the operation of creditors' claims by virtue of the assent of the creditors thereto; and it only binds those creditors who in writing or otherwise expressly or impliedly assent to it. Until the deed of assignment to a trustee has been executed by or come to the knowledge of the creditors, the trustee is an agent only for the debtor under a revocable authority to deal with the estate. When the instrument expresses the arrangement to be with the creditors generally, or all creditors who assent to it, any creditor who actually, or by his conduct, assents to and elects to take the benefit of the arrangement within the proper time is entitled to share in the benefits of the arrangement although he has not signed the deed; and in some cases the Courts will allow a creditor to come in under the arrangement and share in its benefits notwithstanding that the proper time for accession has elapsed.

On the other hand, a creditor entitled to the benefit of an arrangement must perform fairly all the conditions of the arrangement which apply to the creditors. If he takes any step which is inconsistent with or opposed to those conditions, as, for instance, by bringing an action against the debtor to recover his debt, he will be liable to be excluded from the benefit of the arrangement. This obligation is binding not only on creditors who execute a deed of arrangement or expressly assent to it, but also on those who by their conduct put themselves in the same situation as if they had executed it. The principle is that if a creditor puts himself in the situation of having the benefit of the deed, he must bear its obligations although he has not literally executed the deed. There is however one benefit to which a secured creditor is entitled. If the composition deed reserves to creditors their rights over securities held by them on the property of the debtor, as by a mortgage charge, the terms of a general release contained in the deed of agree-

ment will not prevent those creditors from realizing or dealing with and obtaining the benefit of their securities in reduction of the debts due to them. But this provision is limited to the extent of their securities, which must be clearly reserved by the deed.

The questions which fall to be determined in the light of these principles are whether the plaintiff has, either expressly or by his conduct, put himself in a position by which he has become entitled to share in the benefits of the deed of arrangement, or whether he has excluded himself from those benefits; and if he is entitled to share in the benefits of the deed, what are the benefits which he should have received, and if he has failed to receive them in full, what is the extent of the loss, if any, which he has sustained through the failure of the trustees to carry out their obligations. The first of these questions to be decided is whether the plaintiff should be regarded as a party to the arrangement. On the one hand, the course of plaintiff's actions up to the institution of the present suit would lead one to believe that he had accepted the deed. I should myself prefer to describe his action as one of acquiescence; but he appears to have accepted the proposal that the property should be sold free of encumbrance, which might be regarded as concession on his part so as to entitle him to any benefits which might arise from the arrangement. On the other hand, there is the plain fact that the plaintiff has instituted the present suit on pleadings which are hardly to be distinguished from those which should be submitted in an ordinary suit on the footing of a mortgage deed and he has asked for personal relief against the defendants, not in an alternative form but against all the defendants alike. This does not seem to be consistent with the surrender of his security or with the most important feature of the deed of arrangement, which is that the debtors should be free of further personal claim.

The original attitude of the plaintiff is best expressed in his own statement, which was made by him to the Court as a witness on 11th June 1935. He then stated that he accepted anything in the deed of arrangement which was in his own favour but that he did not consider himself bound by anything which was in favour of any one else. When a party adopts an attitude like this, it becomes difficult to grant him any form of equitable relief. Since then however the plaintiff has definitely taken

up the attitude that he is seeking relief on the footing of the deed of arrangement. He has already come up in appeal on this very ground, and has had his appeal accepted. In those circumstances, it is no longer open to him to deny that he is a party to the arrangement. But one difficulty which again arises is that the property has been sold through the Court, which could not have been done if the security had been released. There is no appeal against the order for sale, which it is now too late to accept. In these circumstances my learned brother has suggested that the sale through the Court should be treated as if it had been conducted by the trustees, which seems the only solution. This is not a course which could be adopted in any ordinary circumstances; but as matters now stand, it seems to be the only way of squaring the claim against the trustees with the existing sale, unless it could be held that the plaintiff was entitled to resile from the agreement and then sue the trustees for the damages arising from undue delay. But this is not the case stated by the plaintiff himself who claims still to be a party to the agreement; and it is to be observed that the plaintiff brought the present suit before it was known whether the earlier sale by the trustee was to be treated as valid or not.

If the sale by the Court is treated as a sale on behalf of the trustees and if it can be held that the plaintiff is still entitled to seek relief on the footing of the deed of arrangement, it is then to be decided what relief he would be entitled to claim under the deed. The first difficulty is that the deed itself is silent on the very point which has now arisen. I accept the plaintiff's proposition that the original parties to the arrangement (who did not include the plaintiff) intended that the plaintiff should be paid his existing claims in full; but it was also clearly contemplated that the sale of part of the mortgaged property would be sufficient to meet the whole of these charges and no provision was made for what was to happen if the proceeds proved to be insufficient. The references in later parts of the deed to payments to creditors out of the rest of the estate obviously refer only to the unsecured creditors, for they provide for payments pro rata, which is inconsistent with the plaintiff's own contention that it was intended that he should be paid in full. When a deed is silent on a point like this, it is difficult to say how the deficiency should be supplemented. If it is

clear that the immovable property was expected to raise the necessary sum to pay up the mortgage, it is also clear that the unsecured creditors expected to be paid something out of the rest of the estate and it is by no means certain that they would have accepted the provision that the plaintiff's charges would extinguish their claims against the moveable property, should any unforeseen eventuality arise. This would in effect mean extending the plaintiff's security to the whole of the moveable property, against which he would otherwise be entitled to proceed only on the same footing as the unsecured creditors.

If we assume that it was intended that the plaintiff should be paid in full and that he should be paid out of the proceeds of the moveable property in preference to the unsecured creditors, he would still only be paid to the extent of the estate. The trustees cannot be taken as having assented to the proposition that they should pay the whole of the plaintiff's claim whether the estate was sufficient for this purpose or not. It would have to be determined therefore how much the trustees could have realized and the plaintiff could claim damages only to the extent to which the sum realized by him out of the mortgaged property (and also apparently out of the personal property of the debtors) falls short of this amount. The principal accusation of negligence laid against the trustees is that they were guilty of undue delay in bringing the mortgaged property to sale. So far as the shops are concerned, I have no hesitation in agreeing with the lower Court that negligence has not been proved. The deed of arrangement was not registered until 20th March 1922; and in view of the objections which were raised afterwards with regard to title, it was certainly advisable for the trustees to guard against any similar difficulties that were likely to arise before taking the sale in hand. The sale of the shops was concluded a few months later. If the price had then been realized, the mortgagee would have received his money in full, so that he clearly suffered no loss from delay in bringing the property to sale.

An objection has been raised that the earnest money should have been collected at the time of auction; but here again it is obvious that the mortgagee suffered no loss when the amount was collected a few days later. In the subsequent negotiations over the conclusion of the sale, the trustees appear to have acted with the same amount

of prudence as would have been exercised by an ordinary man in the conduct of his own business. In view of the provision in the deed of trust, it was not unreasonable for them to agree that they would try and obtain the signatures of the debtors. Although all these signatures were not obtained, it is in evidence that they produced the debtors for the purpose, and the negotiations eventually broke down because the signatures of other members of the family were not obtained. In seeking to enforce this sale, it is said that the trustees were acting in accordance with the wishes of the creditors, and I see no reason to disbelieve this statement.

The delay in the sale of the houses is another matter. The excuse given for this delay is that prospective purchasers were scared away by the litigation over the shops, which may well be possible. It certainly seems probable that they would have fetched a better price if the mortgage debt could first be cleared, so that there would be some justification for postponing the sale of the houses for a time, though this might not be sufficient justification for waiting until the litigation over the shops was concluded. It is also said that the debtors did not give reasonable help and were actually obstructing in the matter of selling the houses. These are matters which depend on oral evidence, the value of which is difficult to assess after a considerable time has elapsed. Had the mortgagee been serious in his claim that he intended to accept the arrangement, relying upon the trustees, and if he was of opinion in those days that it was the duty of the trustees to bring the shops to sale at once, one would have expected him to seek the aid of the Courts at an earlier date for the purpose of securing compliance with the terms of the trust. As it is, it seems to me doubtful whether there was any real negligence over the sale of the houses.

There is however another aspect of the matter which would be sufficient to debar the plaintiff's claim in the present suit. He has not only to show that there must have been negligence, but also that he has suffered some definite loss thereby. There is only oral evidence with regard to the value of property at different times, and there is no sufficiently certain evidence to show that there had been any serious depreciation in the value of the houses before he took matters into his own hand by bringing the present suit for realization of the property

through the Court. The valuation given by the debtors themselves is obviously exaggerated; for the effect of accepting their valuation would be to hold that the value of their property exceeded the amount of their debts at the time of the arrangement, whereas the references to rateable distribution indicate that they considered themselves to be insolvent. At the time when the mortgagee decided to realize his securities through Court, there was still a possibility that the original sale would go through, for the vendee's appeal had not yet been accepted. If the appeal was rejected, as the trustees might reasonably hope would happen in view of the decision of the trial Court, it would also be reasonable for the trustees to expect that the price of the shops added to the price which the houses would then realize would be amply sufficient to pay off the whole mortgage debt.

The alleged negligence of the trustees in disposing of the rest of the property is only relevant if it is considered that the deed of arrangement should be read as implying that the secured creditor was to share in the distribution of proceeds realized by the sale of the property in the unlikely event of a failure to clear off the mortgage debt by sale of the immovable property. There is no express provision in the deed for any such failure; but if a right to participate in the distribution of other profits can be held to be implied, similar considerations would again apply. Even if it could be held that there was any negligence on the part of the trustees, it is impossible to ascertain the exact loss to the estate. The stock-in-trade of the firm was valued by the debtors at Rs. 15,000, but this seems to have been a mere book valuation. For example, a yard or two of old viyalla is valued at Rs. 2-4-0. It is obvious that such scraps of material cannot be expected to fetch their book value at a sale of old stock; and if they fetch a mere fraction of their original price, there is nothing surprising in this. No other estimate of the value of these goods has been given, so that it is impossible to say what loss, if any, was caused to the estate by the sale of these goods at auction. There is again no reliable estimate of the true value of the ornaments which were sold, and there is no particular reason to suppose that full value was not obtained.

Much stress has been laid upon the failure of the trustees to collect outstanding debts which were supposed to be due

to the firm. The reason given by the trustees is that the debts were either time-barred or that insufficient particulars were given or that they were small debts due from persons residing at distant places and that generally they were not worth the cost of collection. It is again obvious that when a firm is forced into a deed of arrangement, the nominal outstandings are not likely to be worth very much, if they are worth anything at all. Proceedings of this kind are similar to proceedings in liquidation; and my own experience of liquidation work in this country has been that more is spent on collecting dues of the kind shown in the list supplied to the trustees than is brought in for the benefit of the estate. The pleas put forward by the trustees are for the most part borne out by the nature of the original entries. Steps were taken to obtain a decree in respect of the only large debt, and in the absence of further evidence I think that the trustees are correct in saying that it was not worth their while to incur the expenses which would have been necessary for the purpose of calling in these debts with very little prospect of realization.

Another charge was with regard to the rents which fell due in respect of the house property under the complicated arrangement by which the debtors were supposed to be tenants holding over under the plaintiff. The legal position is far from clear and the trustees did not apparently consider that it was for them to collect most of the rents. Even if this should be considered to be negligence on their part, the plaintiff's claim would again fail, for there is no material on which any definite estimate of the losses to the estate could be framed. In this respect, it is to be observed that the trustees appear to have considered themselves as being to some extent mere agents of the debtors, rather than trustees in the strict sense of the term. This doubt as to their true position is to some extent justified by the terms of the deed of arrangement itself. When referring to the sale of the houses, the deed runs as follows:

Trustees shall be competent to execute deeds of sale in respect of the said houses themselves, or get the same executed by us.

Had the deed of arrangement been a deed of trust in the strict sense of the term, it would no longer have been competent to the debtors to execute any further transfers in respect of this property. The position of the trustees was then left

undetermined, and there is evidence to indicate that the debtors continued in possession of the house property in much the same way as before. As already remarked however nothing could be decided with regard to the claim in respect of rents when it is not known what rents were due. Had the mortgagee regarded himself from the first as a beneficiary under an ordinary deed of trust and had he considered that the trustees were not carrying out their duties properly, it seems to me that the proper course for him would have been either to seek the aid of the Courts at an early stage for the purpose of securing prompt disposal of the property or else to sue the trustees for an account with regard to the estate as a whole, in which case each item of the account could have been considered on a properly framed objection. As matters stand now, when the mortgagee has himself repudiated the arrangement by suing the original debtors in addition to the trustees, and has come up with a vague claim of negligence unsupported by any reliable evidence which would make it possible to frame a precise estimate of the loss caused to the estate, if any loss has in fact been caused, I do not see how it is possible to grant him any relief on the basis of the deed of arrangement. I would therefore dismiss the appeal with costs. Although there has been no appeal by the debtors against the decree granting personal relief against them, counsel has appeared and raised a claim on their behalf. His contention is that, since the mortgagee is now claiming under the deed of arrangement, this is sufficient to absolve his clients from personal responsibility and that, although they have not appealed, it is still open to this Court to pass a decree in the correct form, even though it involves the grant of relief to parties who have not appealed. I think that there is a certain amount of force in this contention and I gather that it has also found favour with my learned brother. As already observed, the plaintiff has now come up to this Court twice on the definite allegation that he is a party to the deed of arrangement and all concerned have been put to the trouble and expense of having this aspect of the case examined. The result of this examination undertaken at the instance of the plaintiff is that he must now be taken as a party to the arrangement but that he has failed to prove that he is entitled to any damages from the trustees.

The only logical conclusion from this finding is that the plaintiff is not entitled to any personal relief against the debtors who were released from their personal obligations by his acceptance of the deed of arrangement. The alteration of the decree against the appellant is again not a course to which I should be inclined in any ordinary circumstances; but the terms of O. 41, R. 33, Civil P. C., are very wide and the plaintiff has in both appeals insisted that he must be granted relief on the footing of the deed. For these reasons, I would alter the decree of the trial Court as a result of the appeal by omitting any personal relief against the debtors, and passing a decree in the form suggested by my learned brother in his judgment and since the proceedings are partly due to the somewhat haphazard arrangement made by the trustees (although it has not been possible to prove any definite loss arising therefrom) and as the other defendants are obtaining a relief in respect of which they have not appealed, I would leave the parties to bear their own costs throughout.

Bhide J. — The facts of the case have been given in the judgment of my learned brother Beckett J. and need not be repeated. The main points which require decision in this appeal appear to be as follows: (1) Did the plaintiff assent to the scheme of "arrangement" made by the mortgagors for the payment of their debts by the deed of trust dated 27th January 1922? (2) If so, can he now sue on the footing of the original mortgage? and (3) if not what relief is he entitled to under the deed of trust?

As regards the first point, the plaintiff did not actually sign the deed of trust, as many of the creditors did, but he has definitely taken up the position that he accepted the arrangement and I see no reason to doubt it. The plaintiff was the principal creditor and it is very unlikely that the mortgagors would have made any scheme for payment of their debts if the plaintiff had not or was not expected to assent to it. It must be remembered that the assignment of properties to the trustees amounted to an act of insolvency (*vide* S. 6, Provincial Insolvency Act), and if the plaintiff had not cared to accept it, he could have at once applied for the mortgagors being declared insolvents or instituted a suit on the basis of his mortgage and recovered his dues. As matters stood at the time, he had nothing to lose by the arrangement, for the deed provided for the payment of

his debts in full. Besides, being related to the mortgagors, he was probably inclined to help them in paying off their creditors. Two of the shops were even sold by the trustees without any objection being raised by him. But when the sale of those shops gave rise to protracted litigation and owing to the delay in the sale of the houses etc. he apprehended loss, he seems to have instituted the present suit on 6th October 1926 on the basis of the mortgage as well as the trust deed.

(2) The trial Court at first dismissed summarily the claim on the footing of the trust deed on the ground of misjoinder of causes of action, but this was held to be not justifiable and the case was remanded for re-decision on merits, for reasons given in the remand order dated 1st June 1934. The remand order did not purport to decide the merits of the claim either on the footing of the mortgage or the trust deed and hence the whole case was ordered to be decided on merits. It may be noted here that the case was originally decided on the footing of the mortgage, but the plaintiff was not satisfied with this and he came up in appeal because he wanted to rely on the trust deed.

The first question which has now to be determined is whether the plaintiff, having once accepted the trust deed, can again fall back on any remedy on the footing of the original mortgage. In my opinion he cannot do so. The trust deed provided for the repayment of the debts of the creditors generally in a certain manner and for the mortgagors being absolved from their personal liability. Consequently, the plaintiff having by his assent or acquiescence led the other parties concerned, to act upon the deed he was in my opinion estopped from resorting to his remedies under the mortgage deed. The mere fact that the plaintiff sued on the footing of his mortgage as well as the trust deed seems to be immaterial as he can only get such relief as he may be legally entitled to. By accepting the trust deed, he seems to me to be legally debarred from seeking any relief on the basis of the original mortgage. The mortgagors strenuously opposed the plaintiff's suit so far as their personal liability was concerned. The trial Court has however again granted a decree on the footing of the mortgage, with liberty to the plaintiff to apply for a personal decree for the balance. This appears to be erroneous, as the plaintiff's rights on the basis of the

mortgage had in my opinion merged in these under the trust deed.

(3) The next point for consideration is the position of the plaintiff as regards the trust deed. It is true that the plaintiff did not sue for "specific performance" of the trust but sued the mortgagors as well as the trustees jointly for realization of his debt. In (1841) 1 Dr & War 227¹ it was held that if a creditor takes any step inconsistent with the deed of arrangement he would be debarred from seeking any benefit under the deed. But in that case the creditor had brought an independent action against the debtor alone. In the present case, the plaintiff has sued the mortgagors as well as the trustees and it is for the Court to give him such relief against either or both of them as he may be legally entitled to. In these circumstances I do not think it would be equitable to hold that the plaintiff cannot get the benefit of the trust deed, merely because he has filed a suit of this description against the mortgagors as well as the trustees instead of suing for 'specific performance' of the trust. As I shall show presently, the plaintiff seems to be entitled to claim full satisfaction of his claim on the footing of the mortgage even under the trust-deed and it cannot therefore be said that anyone has been prejudiced by his instituting a suit in the present form.

Coming now to the provisions of the trust deed, we find that it provided that the present plaintiff's claims on the basis of the mortgage should be first satisfied by the sale of the mortgaged properties with the exception of one house which was to be given to one Bulle Shah. This was apparently because the value of the properties to be sold was considered to be more than sufficient to satisfy the mortgagee's claim. The deed did not provide for the contingency arising in the event of the proceeds of the sale of these properties proving insufficient for the satisfaction of his claim. But this was apparently because such a contingency was never expected. It may be noted in this connexion that only two shops were sold at first for a sum Rs. 63,200 and this sum alone was admittedly sufficient to meet the mortgagee's claim as it stood at the time. There is nothing in the trust deed to suggest that it was ever intended that the mortgagee

should not be paid in full. If any such situation was apprehended, the mortgagee would certainly have never agreed to the arrangement, as he did, or failed to sue for a period of about 4 years. Unfortunately the sale of the shops eventually fell through and this was responsible for the present litigation. In view of all the circumstances it seems to me that the reasonable interpretation to be placed on the trust deed is that the claim of the plaintiff was to be satisfied in full at first from the mortgagors' properties—immovable or moveable—and then the other creditors were to be paid pro rata.

The properties mortgaged in favour of the plaintiff have now been already sold and part of the plaintiff's claim has been thereby satisfied. The properties were apparently sold in execution of the decree, but this sale has been accepted by all the parties concerned and the only dispute now is as regards the responsibility for the payment of the balance. The plaintiff also admitted that he has realized about Rs. 19,000 or Rs. 20,000 on the footing of a decree which the trustees had obtained against one Lachmi Narain of Madhoban on the basis of a pronote. Besides the above, the trustees seem to have realized the following amounts viz. :

		Rs.	a.	p.
Sale of Pashmina goods	...	4992	0	0
Sale of ornaments	...	1350	6	0
From Hari Kishen Das	...	84	15	3
Total		6427	5	3

Out of this amount they paid Rs. 2100 to a firm Bhai Gurmukh Singh-Thakar Singh who had not accepted the trust deed and had therefore to be paid in full (*vide* concluding portion of the trust-deed dated 27th January 1922) while the rest of the amount realized was apparently swallowed up in litigation and other expenses incurred by trustees, which came to over Rs. 7000 (*see* Ex. K C/1 the account printed at pages 119 to 136 of the printed record). The trustees, who were themselves creditors, say that they have suffered heavy loss and have not only not been able to realize over Rs. 10,000 which were due to them but had to spend about Rs. 6000 out of their own pocket (*see* statement of Kishen Chand dated 10th December 1935).

The plaintiff on the other hand contended that the trustees have been grossly negligent and they are therefore personally liable to pay the balance which is still due

1. *Field v. Donoughmore*, (1841) 1 Dr & War 227=58 R R 253.

to him. There can be no doubt that if the plaintiff could prove his allegations that the trustees were negligent and that their negligence had resulted in loss to him, he would be entitled to a personal decree against them; but the evidence on the record does not seem to be either sufficiently clear or adequate for the purpose. It is true that the trustees have not been business-like in keeping a regular account of all their transactions at the proper time, but the plaintiff has not been able to prove that they have falsified or suppressed accounts. It is noteworthy that the trustees have been accused only of negligence and not of dishonesty. My learned brother Beckett J. has discussed in his judgment the question of the trustees' alleged negligence in connexion with the various items which the trustees had to dispose of and I agree with him that it has not been established that they were negligent and that the plaintiff suffered any loss as a result of the negligence. The trial Court had also absolved them from blame except in regard to their dealings in connexion with the outstandings of the debtor firm and realization of rents. As regards the outstandings, the lists Exs. D/1 and D/2 show that these were mostly petty debts. The most important item was that of Rupees 3736.13.6. Defendant Kishen Chand deposed that this had become barred by time and it has not been shown that this was not so. The trustees have deposed that most of the other items had also become time-barred or that it was not worth while to attempt to realize them as more would have been spent than the amount due. There seems to be no good reason to disbelieve their statements in this respect—especially in view of the fact that the debtor firm was on the verge of insolvency and it is not likely that they would have omitted to realize any debts which were worth realizing and realizable. As regards the rents, the position was not very clear. The mortgage in favour of the plaintiff was 'with possession' and the property had been leased out by the plaintiff himself to the mortgagors. It was therefore necessary for him to get the mortgagors and their sub-tenants to attorn to the trustees and give the tenants notice to pay rent to them. But he does not appear to have taken any such step. He too thus appears to have been negligent in the matter.

The trustees were working without any remuneration. Unfortunately, the first sale

of two shops—for which they had obtained a good price—involved them in costly litigation and eventually the transaction fell through and they had to suffer heavy loss. Some other creditors also filed suits and they had to fight these suits as well. Neither the debtors nor the plaintiff appear to have taken much trouble to help them. The accounts produced show that they have incurred legitimate expenditure which exceeded the amount realized by about Rs. 7000 as already pointed above.

On the findings arrived at above, the decree passed by the trial Court on the basis of the mortgage does not appear to me to be correct. But the properties were sold long ago in the year 1928 in execution of the decree and this sale of the mortgaged properties is not being challenged by any of the parties concerned. The mortgaged properties had to be sold, whether in the hands of the mortgagors or of the trustees and as the execution sale is not objected to, it may be treated as though it had been carried out by the trustees themselves. The proper course for the plaintiff was perhaps to institute a suit for specific performance of the trust as against the trustees, but although he did not sue in the proper form, there is no doubt (on the finding arrived at above) that the whole of the mortgaged property was liable to be sold in his favour. As matters stand at present, it seems equitable to accept the sale of these properties in execution as though it had been effected by the trustees, as no objection has been now raised to the sale.

The only dispute now is as regards the personal liability of the trustees for the balance. As to this, as pointed out above, the plaintiff has already realized about Rs. 19,000 or Rs. 20,000 according to his own statement from the decree against Lachmi Narain, which the trustees had obtained. It is very significant that none of the creditors objected to this and this fact also supports the interpretation placed above upon the deed of trust that the plaintiff, as a mortgagee, was to be paid in full from the immovable as well as the moveable properties and then the other creditors were to be paid pro rata. As regards the balance, which the plaintiff still claims to be due, the plaintiff has failed to prove clearly that he had suffered any loss, which could be definitely attributed to the negligence of the trustees and hence his

claim against the trustees personally was rightly dismissed.

It has been pointed out above that the decree passed against the mortgagors was not legally justifiable as the plaintiff having accepted the trust deed, the mortgagors were absolved from all liability. Although the mortgagors have not appealed, this Court has power under Order 41, Rule 33, Civil P. C., to pass any decree in appeal, which the trial Court ought to have passed or made. In view of the above findings the preliminary as well as the final decrees on the footing of the mortgage which the trial Court has passed and from which two different appeals have been filed (Regular First Appeals Nos. 383 of 1936 and 384 of 1937) do not appear to be legally justifiable.

The plaintiff has already realized in the course of the suits the amounts realized by the sale of the immovable properties and also from the decree against Lachmi Narain which the trustees had obtained. He has failed to prove that he is entitled to any other relief. I would therefore accept the appeal only to the extent of setting aside the decrees on the footing of the mortgage and formally substituting therefor a decree as against the trustees for the amount already realized by the plaintiff by the sale of the immovable properties and from the decree against Lachmi Narain. In view of the conduct of the parties and the peculiar circumstances of the case, I would leave the parties to bear their costs throughout.

B.D./R.K.

Decree modified.

A. I. R. 1938 Lahore 779

BECKETT J.

Baru Mal — Plaintiff — Appellant.

v.

Rala Ram and others — Defendants — Respondents.

Second Appeal No. 198 of 1938, Decided on 6th June 1938, from decree of Senior Sub-Judge, Karnal, D/- 27th November 1937.

Injunction—Suit for—Joint owners—Certain site, joint property of parties used as lane leading to property of one of them — One party roofing over part of lane adjoining his property—Other party is ordinarily entitled to sue for injunction for removal of structure—He is not however so entitled to sue where he makes similar use of lane opposite to his own property so long as his own structure remains — He is only entitled to damages.

Where certain site is the joint property of two parties and is used as a lane leading to the property of one of them and the other party roofs over the part of the lane which adjoins his property by means of chattra, over which a room is built, the party to whose property the lane is needed as a means of access is ordinarily entitled to sue for injunction for the removal of the structure, even though the damage be only very slight or hypothetical. [P 779 C 2; P 780 C 1]

Where however the party suing for injunction has made an exactly similar use of the lane opposite his own property, he is not entitled to ask the other party to remove his structure, so long as his own structure remains, even though the former encroachment may be greater than the latter. All the same, a legal right having been infringed, the plaintiff is entitled to a decree for damages: *A I R 1938 Lah 208 and A I R 1928 Mad 810, Rel. on.* [P 780 C 1]

F. C. Mittal — *for Appellant.*

C. L. Aggarwal and Durga Das Jain —
for Respondents.

Judgment. — The suit relates to a site which has been found to be the joint property of the parties, and which is used as a lane leading to property of the plaintiff. The defendants have roofed over the part of the lane adjoining their own property by means of a chhatra, over which a room has been built. The plaintiff sues for an injunction to compel the removal of this structure. The claim for injunction has been dismissed by the Courts below on the ground that no undue hardship has been caused to the plaintiff. Precedents of cases of this sort are not easy to find; suits relating to the exclusive use of joint property by one of the parties are generally concerned with some structure on the ground. Possibly, it is rare occurrence that one of the joint owners should be in a position to erect a roof of this kind in this way since the opportunity can only occur when he occupies the property on the other side of the lane. A case on very similar facts occurred in Madras *A I R 1928 Mad 810*,¹ but was decided merely on the question of laches.

A case of this province relating to the erection of chhatra over joint property was decided in *A I R 1938 Lah 208*² in which it was held that the structure was made in assertion of an exclusive right to the lane, which was in itself an injury to the plaintiff. In a case of this kind it is not practicable for the plaintiff to sue for partition, since the lane is needed as a means of

1. *Krishnan Pillai v. Kilasathammal*, (1928) 15 *A I R Mad* 810=108 *I C* 69.

2. *Hans Raj v. Jagat Singh*, (1938) 25 *A I R Lah* 208=175 *I C* 254=39 *P L R* 875.

access to the adjoining properties. It is again hardly practicable for him to sue for joint possession of a structure which can only be reached through the house of another owner. The only remedies left are by way of injunction or damages. In the ordinary way, I do not see why one of the owners should not sue for injunction for the removal of a structure of this kind, even though the damage only be very slight or hypothetical, and on this point I do not think that the view taken by the lower Courts was correct. There is however an entirely different reason for refusing to grant an injunction in this case. The plaintiff has made an exactly similar use of the lane opposite his own property, and in these circumstances I do not think that he can ask the defendants to remove their structure, so long as his own structure remains, even though their own encroachment may be greater than his.

At the same time, there seems to be no doubt that a legal right has been infringed, and this was accepted in A I R 1928 Mad 810¹ in which the considerations against the plaintiff were even stronger. An injunction was refused in that case, but the plaintiff was granted a decree for damages, and I think that the same course should be adopted in the present case. Neither party wishes to proceed to the lower Court for the assessment of damages. For these reasons I accept the appeal and grant the plaintiff a decree for Rupees 100 as damages. The parties will bear their own costs throughout.

R.M./R.K.

*Appeal allowed.***A. I. R. 1938 Lahore 780**

DALIP SINGH J.

Waryam Singh—Plaintiff—Appellant.
v.*Pheru and others — Defendants —*
Respondents.

Second Appeal No. 906 of 1937, Decided on 3rd January 1938, from decree of Dist. Judge, Hoshiarpur, D/- 3rd April 1937.

Punjab Relief of Indebtedness Act (7 of 1934), S. 26—Competency of application can only be decided when it comes before Board—Competency or otherwise of application does not affect question of extension of time.

In order to decide whether an application is or is not competent, and whether it comes or does not come within the jurisdiction of the Debt Conciliation Board, as determined by the provisions of the Act, a proceeding before the Conciliation Board is necessary and the mere fact that the decision

of the Conciliation Board is that the application is incompetent or otherwise, cannot affect the question of the extension of limitation under S. 26.

[P 780 C 2]

S. C. Manchanda for Pandit Nanak Chand — *for Appellant.*

Achhru Ram — *for Respondents.*

Judgment. — In this case the plaintiff sued for the recovery of Rs. 1700. The sole question arising in this appeal is whether the suit is barred by limitation or not. Both the Courts below have held that the suit is barred by limitation, though on totally different and, as far as I can understand, opposing grounds. The question however turns on the interpretation of S. 26, Punjab Relief of Indebtedness Act which lays down that

the time spent in proceedings before a Conciliation Board . . . shall be excluded when counting the period of limitation for any suit.

The learned District Judge has held that as the persons against whom the plaintiff applied to the Debt Conciliation Board were not debtors at all but only legal representatives of the original debtor, one Hamir Chand, therefore the application was incompetent and there was no justification for it and therefore the plaintiff was not entitled to the extension provided under S. 26. It appears to me however that in order to decide whether an application is or is not competent, and whether it comes or does not come within the jurisdiction of the debt Conciliation Board, as determined by the provisions of the Act, a proceeding before the Conciliation Board is necessary and the mere fact that the decision of the Conciliation Board is that the application is incompetent or otherwise, cannot affect the question of the extension of limitation under Section 26. I would therefore hold that the plaintiff was entitled to the limitation provided by S. 26 of the Act and I would therefore accept the appeal and hold that the plaintiff's suit is within time. The appeal is therefore remanded under O. 41, R. 23, Civil P. C., to the learned District Judge to give a decision on the other points arising in the appeal. The stamp on this appeal will be refunded and costs of this appeal will be costs in the cause. I have informed the learned counsel for the respondent that if his client chooses, he may apply for a Letters Patent appeal as the point is entirely new.

B.D./R.K.

Order accordingly.

A. I. R. 1938 Lahore 781

ADDISON AND DIN MOHAMMAD JJ.

*Firm Aya Ram-Tola Ram and others—
Defendants—Appellants.*

v.

*Sadhu Lal, Plaintiff and another,
Defendant—Respondents.*

First Appeal No. 273 of 1937, Decided on 21st April 1938, from decree of Sub-Judge, First Class, Dera Ghazi Khan, D/- 27th April 1937.

(a) Contract—Construction—Wagering contract—Speculation does not necessarily involve contract by wager—Common intention to wager must be proved—No proof of bargain, express or implied, that goods were not to be delivered—Contract is not wagering contract.

Speculation does not necessarily involve a contract by way of wager, and to constitute such a contract a common intention to wager is essential. Even if one party to a contract were a speculator who never intended to give delivery, and that fact was known to the other party, yet in the absence of any bargain or understanding, express or implied, that the goods were not to be delivered, that would not convert a contract, otherwise innocent, into a wager; nor would the mere fact that as to the greater part of the goods there was no delivery but an adjustment of claims, vitiate the transaction. [P 783 C 2]

Where therefore although the transactions between the parties were speculative in their nature, there is no evidence showing that the transactions were to be on differences only, or that there was no intention to take delivery, the contract relating to such transactions cannot be held to be a wagering contract: *A I R 1917 P C 101; A I R 1928 P C 30 and A I R 1924 Nag 290, Rel. on.*

[P 783 C 2; P 784 C 2]

(b) Hindu Law—Joint family—Debts—Joint family consisting of father and sons—Debts incurred by father of speculative nature—Joint family estate is liable for payment of debt.

Where speculative debts have been incurred by the father in a joint Hindu family and the other members of the family are his sons, the joint family estate is open to be taken in execution proceedings upon a decree for payment of those debts: *A I R 1935 Lah 761; 106 I C 183; A I R 1926 Lah 41 and A I R 1931 P C 136, Rel. on.*

[P 783 C 2]

(c) Contract—Consideration—Original contract between parties a wagering transaction—Forbearance of plaintiff to sue and declare defendant defaulter constitutes good consideration for fresh agreement—Plaintiff is entitled to recover.

The forbearance of a plaintiff to sue coupled with his forbearance to declare the defendant a defaulter constitutes good consideration for a fresh agreement, although the original contract had been in the nature of a wagering transaction and the plaintiff is entitled to recover on the fresh agreement. The defendant is estopped from setting up the defence that the transaction was wagering: (1908) 2 K B 696, *Foll.*

[P 784 C 2]

J. N. Aggarwal and Asa Ram Aggarwal
— *for Appellants.*

Achhru Ram — *for Respondent
(Plaintiff).*

Addison J. — Between 1913 and 1918, the father of the plaintiff, Sadhu Lal, namely Bodh Raj, under the name of Het Ram-Bodh Raj, dealt with the Karachi commission agency firm, Aya Ram-Tola Ram, and in course of the business struck balances from time to time. A large sum became due to the Karachi firm which sued in Karachi the Firm Het Ram-Bodh Raj, Rs. 1,14,449.8-0 with costs and further interest being claimed. A compromise was entered into on 12th April 1923, a decree being passed against Het Ram-Bodh Raj and the defendant Bodh Raj personally for Rs. 1,04,000 with interest at 6 per cent. per annum from the date of the decree until payment. It was further agreed that if six instalments amounting in all to Rs. 96,000, were paid, the decree would be liquidated. It was stated that the plaintiff firm could recover the decretal amount from the property of Het Ram-Bodh Raj, charged under the compromise, or from the defendant Bodh Raj, personally, but that the brother of Bodh Raj, namely Dharu Lal, was not to be personally liable as he had been joined in the decree only as surety so that his share in the joint family property would become liable. Provision was further made for execution for the full amount if default was made in payment of the instalments. Default was made and the decree-holder firm took out execution in the Court of the District Judge, Dera Ghazi Khan, in the Punjab, the decree having been transferred there.

In execution of the decree at Dera Ghazi Khan, the decree-holder proceeded not to sell the property charged but to attach the property of Bodh Raj, who was made personally liable under the compromise decree. The present plaintiff Sadhu Lal, who was the son of Bodh Raj on 15th October 1926, objected to the attachment on the ground that the property was ancestral and that his half share was therefore not liable as the dealings between his father and the Karachi firm were badni and therefore illegal. These proceedings dragged on for a long time but at length on 27th April 1928 the parties compromised by fixing new instalments and the proceedings in execution were therefore

consigned to the record room after partial satisfaction of the decree. The order of the District Judge was to the effect that the compromise had been finally verified in Court and was an accomplished fact. The objectors, that is, Sadhu Lal and certain others who are not before us, had withdrawn their objections in view of this compromise.

This second compromise was also acted upon to a certain extent, the instalments fixed for 1929 and 1930 thereunder being duly paid while that for 1931 was partially paid. Default having again been committed the decree-holder firm restarted execution in 1932. The decree-holder was then met with the objection on behalf of Bodh Raj and Dharu Lal, his brother, that a new agreement, superseding the old decree, had come into existence by reason of the compromise of 1928 and that the decree could no longer be executed. The District Judge held that the decree was still executable and an appeal to this Court was dismissed. The matter was taken to the Privy Council and that appeal was also dismissed: *see* 42 C W N 509.¹ The appeal was dismissed by the High Court on 24th June 1935 and the appeal to the Privy Council was dismissed in December 1937. In the meantime Sadhu Lal, son of Bodh Raj, had brought the present suit on 7th February 1936 without waiting for the result of the appeal to the Privy Council. His claim is that the transactions had been entered into by his father as wagering contracts and that therefore the son's share of the ancestral family property was not liable to be attached and sold in execution of such a decree. Before the suit was filed the plaintiff put in fresh objections to the attachment of the property, which were summarily dismissed by the executing Court on 21st February 1935. The objections were similar to those which had been put by him in 1926. The trial Court has decreed the plaintiff's claim on the ground that the transactions were badni and illegal. The decree-holder firm has appealed against this decision.

In certain of his transactions with the Karachi firm Bodh Raj had as his partner one Khushal Ram. Bodh Raj however had other transactions with the Karachi firm on his own account. On 17th July 1918 Bodh Raj sued Jhanwar Das, son of Khu-

shal Ram, for rendition of accounts in connexion with the joint transactions that Bodh Raj and Khushal Ram had had with the Karachi decree-holder firm. In that suit Bodh Raj was examined as a witness and stated what the partnership was between him and Khushal Ram. He said that Khushal Ram remained at Karachi to conduct the business but that Bodh Raj himself used also to have separate dealings on his own account with the decree-holder firm. He stated that Khushal Ram had had the books in his possession, having copied them from the books of the decree-holder Karachi firm of Aya Ram-Tola Ram, but that he had destroyed them. Bodh Raj further stated that he himself had struck one balance in Tola Ram's books at Karachi for both sets of transactions, that is the joint transactions of himself and Khushal Ram and also the transactions which he had entered into on his own account. This was because the Karachi firm of Tola Ram only recognized him. In this statement which was recorded on 17th May 1919, he also said that delivery of goods was taken by Khushal Ram in a large number of cases. He particularly remembered that sugar, gram and wheat had been delivered but he could not state from memory the quantities. He had at first instituted a criminal complaint against Khushal Ram and his son Jhanwar Das and then sued the son of Khushal Ram in the Civil Courts, the father having died in the meantime.

Bodh Raj was also examined as a witness in the present case: *see* p. 40 of the paper book. He still admitted that Khushal Ram was his partner in certain forward contracts with the decree-holder and that he had obtained a decree for Rs. 8000 or so against Khushal Ram in connexion with the partnership between the two in dealings with the Karachi firm. He could not however remember whether he pleaded and stated in the suit against Khushal Ram that Aya Ram-Tola Ram were their commission agents. He did not remember even appearing as a witness in that suit, though it was instituted by himself. His statement already referred to was then read out to him but even then he stated that he could not recollect the details after it was read. He might have made the statement that Aya Ram-Tola Ram were commission agents and that Khushal Ram used to take delivery but he was not positive. To every question asked about that previous suit and about what he stated as

1. *Het Ram-Bodhraj v. Aya Ram-Tola Ram*, (1937) 172 I C 999=42 C W N 509 (P C).

a witness, he gave the same reply: "he could not remember". He admitted having been in Karachi himself about 1915 or 1916. This was because Atma Parkash of the Firm Aya Ram-Tola Ram, who was then only 25 or 30 years old, came to his home in Dera Ghazi Khan and asked him to go to Karachi and speculate there. Bodh Raj was himself then about 43 years old and he yielded to the young man because he told him that no delivery would be taken or given and that the business would be in differences only. Obviously Bodh Raj is lying and his statement in this matter must be rejected, contradicted as it is by his former statement in 1919 and by the fact that he allowed a compromise decree to be passed against him in 1923 at a time when there would have been no difficulty for the defendant firm to produce their books. Further his denial that he himself kept no accounts of these transactions is incredible. The trial Judge has made much of the fact that the decree-holder firm has not produced their books but the firm was dissolved in 1927, and a decree had been obtained and it may well have been the case that the books containing these very old transactions were no longer in existence. We consider that no adverse inference should be drawn against the decree-holder firm for their non-production in these circumstances.

The plaintiff examined certain witnesses to prove that it was part of the course of dealings between Bodh Raj and Aya Ram-Tola Ram that no delivery would be given or taken. In the first place it is easy to get witnesses to say this, it being now well established that, if trading takes place on that basis, the transactions are wagering. The first witness is Jhanwar Das against whom Bodh Raj obtained a decree for Rs. 8000 in connexion with similar transactions entered into by Bodh Raj and Khushal Ram jointly. He stated that while he was in Karachi no delivery was in fact given or taken. He had to admit however that Bodh Raj got a decree against his father's estate for contribution for the losses they incurred jointly. He only stayed in Karachi for a few days on two occasions. The second witness Brahmin Lal is a prohibit. He stated that when Atma Parkash came to Bodh Raj's town in Dera Ghazi Khan, he assured Bodh Raj that no delivery in fact would be necessary or made and that the dealings would be in differences. This witness ad-

mitted that he was a friend of Bodh Raj. The third witness Moti Ram is a near relative of the plaintiff and his evidence is obviously false. Bila Ram (P. W. 4) was a Munshi of Bodh Raj some 20 years before. He is also connected by marriage with the plaintiff. He too has stated that Atma Parkash said that no delivery was contemplated. Such evidence is merely contemptible. On the other hand Gowardhan Das was examined as D. W. 1. He was one of the partners of the Firm Aya Ram-Tola Ram. Another partner was examined as D. W. 2. This is all the evidence.

On that evidence we are not prepared to find that the transactions were to be on differences only. It was held in 42 Bom 373² that

speculation does not necessarily involve a contract by way of wager, and to constitute such a contract a common intention to wager is essential. Even if one party to a contract were a speculator who never intended to give delivery, and that fact was known to the other party, yet, in the absence of any bargain or understanding, express or implied, that the goods were not to be delivered, that would not convert a contract, otherwise innocent, into a wager; nor would the mere fact that as to the greater part of the goods there was no delivery but an adjustment of claims, vitiate the transaction.

A similar decision was given in 51 Mad 96;³ see also 78 I C 966.⁴ It was also held in 16 Lah 1077⁵ that if speculative debts have been incurred by the father and the other members of the joint family are his sons, the joint family estate is open to be taken in execution proceedings upon a decree for payment of those debts, unless the debts are proved to have been incurred for immoral or illegal purposes. In 106 I C 183⁶ it was held that the manager of a joint Hindu family has power to incur debts for business in speculative transactions, as such debts cannot be said to be immoral and that the pious obligation of Hindu sons to pay their father's debts extends to commercial debts. In 6 Lah

2. Bhagwandas Parasram v. Burjorji Ruttonji Bomanji, (1917) 4 A I R P C 101=44 I C 284=42 Bom 373=45 I A 29 (P C).

3. Sukhdevdoss Ramprasad v. Govindoss Chaturbhujdoss & Co., (1928) 15 A I R P C 30=107 I C 29=51 Mad 96=55 I A 32 (P C).

4. Kundan Lal v. Qadir Ahmad Ali, (1924) 11 A I R Nag 290=78 I C 966.

5. Pirthi Singh Jowala Prasad v. Mam Chand, (1935) 22 A I R Lah 761=156 I C 539=16 Lah 1077=38 P L R 143.

6. Mauluk Chand Krishnaji v. Daya Kishan, (1927) 106 I C 183.

493⁷ it was said at p. 498 that speculative transactions cannot be said to be immoral and that the sons were liable for such debts incurred by their father: *see also* 58 I A 173.⁸

The conduct of the parties, apart from the evidence being obviously false, is also in favour of the view that these were possibly speculative transactions but not contracts by way of wagering. The dealings continued for a long time and the losses, incurred over the five years or so they lasted, does not indicate very heavy transactions. Bodh Raj as a witness has undoubtedly stated that the transactions amounted to 70 or 75 lacs of rupees but he cannot be believed and there is nothing to corroborate his statement. The next step taken was for Bodh Raj himself to sue Jhanwar Das, the son of Khushal Ram, who had been a partner with him in some of the Karachi transactions with this firm. There it was stated (and the suit was decreed), that delivery was taken in a large number of cases. Bodh Raj himself was then sued by Aya Ram-Tola Ram in Karachi and instead of raising the defence that the transactions were wagering he submitted to a compromise decree in which very favourable instalments were allowed. When default was committed in payment of those instalments and his property was attached in the Dera Ghazi Khan District, his son, the present plaintiff Sadhu Lal, did prefer an objection to the attachment of his share of the property but there was then a compromise entered into in which obviously the son Sadhu Lal participated. Other instalments were then fixed, some of which were paid in due course. When default was again committed and execution taken out a second time, the defence was first raised that Bodh Raj was no longer liable under the decree by reason of the new agreement in 1928 and that his brother Dharu Lal was also no longer liable as a surety as the position had been altered to his detriment by the decree-holder. This question was fought up to the Privy Council and decided against the family. Then the present suit was brought by the son to get his share of the family property released and in this case Bodh Raj came forward to

give evidence at total variance with what he had given in 1919 when he was recovering from the son of his partner Khushal Ram his share of some of the losses incurred. The witnesses are obvious liars. In the present case therefore the conduct of the parties and the surrounding circumstances are not in favour of Bodh Raj and the plaintiff. This being so, it is impossible to hold that the transactions were of a wagering character and on this ground the suit must fail.

It was held in (1908) 2 K B 696⁹ that the forbearance of a plaintiff to sue, coupled with his forbearance to declare the defendant a defaulter, constituted a good consideration for the fresh agreement though the original contract had been in the nature of a wagering transaction and that the plaintiff was therefore entitled to recover. It seems to us that what took place at the time of the compromise on 27th April 1928, when fresh instalments were fixed and the plaintiff withdrew his objections to the attachment on this account, amounted to a fresh agreement which was for the benefit of the plaintiff and his father and that they are now estopped from setting up the defence that the transactions were wagering. For the reasons given we accept this appeal and dismiss the suit with costs throughout.

R.M./R.K.

Appeal allowed.

9. Hyams v. Stuart King, (1908) 2 K B 696=77
L J K B 794=99 L T 424=24 T L R 675=52
S J 551.

A. I. R. 1938 Lahore 784

RAM LALL J.

*Lahauri Ram — Judgment-debtor —
Appellant.*

v.

*Amar Chand — Decree-holder —
Respondent.*

Exn. Second Appeal No. 148 of 1938,
Decided on 20th May 1938, from order of
Dist. Judge, Hoshiarpur, D/- 11th Decem-
ber 1937.

Punjab Alienation of Land Act (13 of 1900),
S. 4 — Groups in Act are territorial — Person
who is notified agriculturist in one District
need not necessarily be agriculturist in another
District.

The groups in the Land Alienation Act are territorial and a person who is a notified agriculturist in one District need not be an agriculturist for the purposes of the Land Alienation Act in another District. Similarly a person belonging to a particular tribe or caste may be an agriculturist

7. Khem Chand v. Narain Das, (1926) 13 A I R Lah 41=89 I O 1022=6 Lah 493=26 P L R 848.

8. Ram Krishna Muraji v. Ratan Chand, (1931) 18 A I R P O 186=132 I C 613=53 All 190=58 I A 173 (P C).

in a particular Tahsil for the purposes of acquiring property in that Tahsil and enjoying the other benefits of the Act in that Tahsil. A person cannot, therefore, be regarded as statutory agriculturist merely because he belongs to a caste which has been notified as statutory agriculturist in a particular Tahsil and because originally his ancestors came from the same Tahsil. [P 785 C 1]

Prakash Chandra Jain — *for Appellant.*

D. N. Aggarwal — *for Respondent.*

Judgment.—The sole point in this case is whether or not Lahauri Ram appellant is a statutory agriculturist. He is a Brahmin who belongs to village Gondpur, Tahsil Garhshankar in the Hoshiarpur District. Mr. Prakash Chandra Jain urges that as Brahmins have been notified as statutory agriculturists in the Una Tahsil, and as originally Lahauri Ram's people came from the Una Tahsil, therefore, he should be deemed to be covered by the notification which declares Brahmins as agriculturists in the Una Tahsil of the Hoshiarpur District. I am totally unable to see any force in this argument. The groups in the Land Alienation Act are territorial and a person who is a notified agriculturist in one district need not be an agriculturist for the purposes of the Land Alienation Act in another district. Similarly a person belonging to a particular tribe or caste may be an agriculturist in a particular Tahsil for the purposes of acquiring property in that Tahsil and enjoying the other benefits of the Act in that Tahsil. If Mr. Prakash Chandra's argument were to be accepted, the notification would not be confined in its operation to the Una Tahsil, to which its language confines it. I hold, therefore, that Lahauri Ram is not a statutory agriculturist within the meaning of the Land Alienation Act and with this finding this appeal is dismissed with costs.

R.M./R.K.

Appeal dismissed.

A. I. R. 1938 Lahore 785

ADDISON AND DIN MOHAMMAD JJ.

Ghulam Mohy-ud-Din Khan and others
— *Plaintiffs* — *Appellants.*

v.

Mt. Niamat Bibi and another, Defendants and another, Plaintiff —

Respondents.

Second Appeal No. 188 of 1937, Decided on 3rd February 1938, from decree of Addl. Dist. Judge, Hoshiarpur, D/. 25th November 1936.

1938 L/99 & 100

(a) Custom (Punjab) — Rajputs of Garhshanker Tahsil — Daughters succeed to non-ancestral property.

Among Rajputs of Tahsil Garhshanker, a daughter succeeds in the presence of heirs and collaterals of any degree to the non-ancestral property: *A I R 1925 Lah 422; A I R 1925 Lah 306; A I R 1933 Lah 107 and A I R 1936 Lah 157, Considered.* [P 786 C 1]

(b) Custom (Punjab)—Riwaj-i-am — Creates rebuttable presumption — Fact of rebuttal is question of fact to be determined finally by District Judge.

The Riwaj-i-am creates at best a rebuttable presumption only and whether a certain presumption of law is rebutted by the production of evidence by the parties or not is a question of fact and can therefore be determined finally by a District Judge: *A I R 1916 P C 129 and A I R 1930 P C 97, Rel. on.* [P 787 C 1]

Ghulam Mohy-ud-Din — *for Appellants.*

Barkat Ali and Hassan Jafri —

for Respondents (Defendants).

Din Mohammad J. — The facts giving rise to this appeal are these: On 23rd August 1933, one Mt. Biman, widow of Sikandar Khan, made a gift of the entire holding of which she was in possession along with a house and one third share of a taur in favour of her two daughters Mt. Niamat Bibi and Mt. Hassan Bibi. Thereupon, on 31st May 1934, the four plaintiffs instituted a suit for a declaration that the gift was void. Mt. Biman died in the meantime and her name was struck off the record. The daughters contended that the land and the taur were the self-acquired property of their father and that the house had been acquired by their mother and that consequently the mother had full authority to gift the property in suit to them by way of acceleration of succession. They further denied that the plaintiffs were the collaterals of their father Sikandar Khan. They also stated that Mt. Biman had previously executed a registered will in their favour on 1st February 1912, and inasmuch as the plaintiffs had not taken any steps to secure the cancellation of that will they were barred by their conduct from contesting the gift. On behalf of the plaintiffs reliance was placed on para. 45 of Humphrey's Customary Law of Hoshiarpur District, which says that among Rajputs of Tahsil Garhshanker (the tribe to which the parties belong) a daughter cannot succeed in the presence of heirs and collaterals of any degree. No instances were however produced. The defendants on the other hand brought on the record certain previous instances where daughters had been

allowed to succeed to the property of their father.

The Subordinate Judge came to the conclusion that inasmuch as the entry in the Customary law was opposed to general custom and no instances had been brought on the record in support of the alleged custom, the plaintiffs, who had been proved to be the collaterals of Sikander Khan in the fifth degree, could not oust the daughters. He accordingly dismissed the suit. On appeal, the District Judge while holding that the plaintiffs were collaterals in the third degree upheld the decision of the Court below mainly on the ground that Question 45 referred to ancestral property only and that inasmuch as the property in suit was self-acquired, the daughters were entitled to succeed in preference to the collaterals. The collaterals have appealed. It would appear that the answer to question 45 taken at its face value favours the collaterals and that even standing by itself it would create a strong presumption in their favour in view of the following observations made by their Lordships of the Privy Council in 45 P R 1917¹:

The Riway-i-am was produced and exhibited as evidence at the very outset of the case; it is a public record prepared by a public officer in discharge of his duties and under Government rules it is clearly admissible in evidence to prove the facts therein entered subject to rebuttal. In their Lordships' opinion the statements contained in the Riway-i-am form a strong piece of evidence in support of the custom which it lay upon the plaintiffs to rebut. . . .

The contention however raised on behalf of the daughters is, as stated above, that the answer to Question 45 relates to ancestral property only and that even if it be taken to refer to non-ancestral property, the presumption created thereby in favour of the collateral stands amply rebutted by the production of the various instances where daughters were preferred to collaterals in the matter of succession to the self-acquired property of their father. In 6 Lah 332² a case which related to Arains of the Hoshiarpur District, a Division Bench of this Court composed of Harrison and Campbell JJ., discussed the probative value that could be attached to the answer to Question 45, and after taking into consideration the instances appended to the

answer, and after referring to 5 Lah 473,³ where Humphreys' Customary Law had been held not to be a reliable piece of evidence, did not choose to follow the Customary law and upheld the decision of the Court below dismissing the suit of the brothers of the last male owner impeaching the gift by the last owner's widow to her two daughters and to a son of a deceased daughter. In A I R 1933 Lah 107,⁴ another Division Bench of this Court of which Harrison J. was a member, after explaining that the opinion expressed in 6 Lah 332² was to some extent obiter, recorded their conclusion in the following words:

We find it established that the custom of inheritance in the Hoshiarpur District is peculiar in that daughters up to a point are excluded both from ancestral and self-acquired property by near collaterals, but as a sort of return they come into their own again by excluding the more distant collaterals and in most cases those beyond the third degree.

In A I R 1936 Lah 157⁵ Bhide and Currie JJ. once more discussed the value to be attached to the answer to Question 45 so far as it affected the self-acquired property and after animadverting upon 5 Lah 473,³ 6 Lah 332² and A I R 1933 Lah 107⁴ remarked:

The questions in reply to which the tribesmen made a distinction between ancestral and self-acquired property though not specifically asked, appear to be very few. There is therefore justification for the appellants' counsel's contention that his clients could never have expected that the answer to Question 45 in the Customary law would be construed to cover non-ancestral property.

This being the state of the judicial decisions on the matter at issue and seeing that cases of custom must be decided mainly on the evidence produced in each case, we are inclined to hold that whatever the presumption created by the answer to Question 45 in favour of the collaterals, it stands rebutted by the instances relied upon by the respondents. Ex. D/A relates to Rajputs of Garhshanker Tahsil and it appears that the widow of one Ghulam Jilani Khan was successful in transferring the land inherited by her from her deceased husband in favour of her two daughters in equal shares. Ex. D/B is a copy of the judgment of the District Judge of Hoshiarpur

1. Beg v. Allah Ditta, (1916) 3 A I R P C 129 = 38 I C 354=44 Cal 749=44 I A 89 = 45 P R 1917 (P O).

2. Pir Bukhsh v. Mt. Abo, (1925) 12 A I R Lah 306=88 I C 71=6 Lah 332=26 P L R 688.

3. Umra v. Mt. Raji, (1925) 12 A I R Lah 222=85 I C 185=5 Lah 473.

4. Mahomed Bukhsh v. Mt. Jeo, (1933) 20 A I R Lah 107=140 I C 778=33 P L R 1061.

5. Mt. Kishni v. Munshi, (1936) 23 A I R Lah 157=162 I C 382.

on appeal which relates to Rajputs of Dasuya and in that case too it was held that collaterals did not exclude daughters in the matter of succession to the non-ancestral property of their father. In Ex. D/C which is a judgment of the Court of the Subordinate Judge, Third Class, Hoshiarpur, relating to Rajputs of Garhshanker, daughters appear to have excluded collaterals of the fourth degree. In Ex. D/E, which is a copy of the order of the District Judge of Hoshiarpur on appeal relating to Rajputs of Hoshiarpur Tahsil, it was not contested that the daughters succeed to the non-ancestral property of their father in preference to his collaterals. In Ex. D/F, which again is a copy of the order of the District Judge, Hoshiarpur, on appeal, the order of the Subordinate Judge referred to above was upheld.

In face of this documentary evidence, the mere entry in the *Riwaj-i-am* of Hoshiarpur relied upon by the appellants would not be of much use to them. The *Riwaj-i-am* as explained in 45 P R 1917¹ creates at best a rebuttable presumption only and whether a certain presumption of law is rebutted by the production of evidence by the parties or not is a question of fact, as remarked by their Lordships of the Privy Council in 11 Lah 199,⁶ and can therefore be determined finally by the District Judge. On these grounds we decline to interfere with the order of the District Judge and dismiss this appeal with costs.

B.D./R.K.

Appeal dismissed.

6. Wali Mahomed v. Mahomed Baksh, (1930) 17 A I R P C 91=122 I C 316=11 Lah 199=57 I A 86 (P C).

A. I. R. 1938 Lahore 787

TEK CHAND AND RAM LALL JJ.

Ahman and others — Convicts

Appellants

v.

Emperor.

Criminal Appeal No. 241 of 1938, Decided on 16th June 1938, from order of the Sessions Judge, Gujranwala, D/- 14th February 1938.

(a) Criminal Trial—Evidence—Admissibility—Entry made in daily diary of thana before recording of first information is inadmissible in evidence for any purpose being part of proceedings of police.

An entry caused to be made by a Sub-Inspector, before the recording of the first information report,

in the daily diary of the thana, mentioning the names of some of the accused alleged to have been given to him by one of the persons alleged to have been assaulted and injured, is a part of the proceedings of the police and is therefore inadmissible in evidence for any purpose in Court.

[P 789 C 1]

(b) Penal Code (1860), Ss. 302, 307, 149—Prosecution evidence discussed—Evidence held to show sufficient amount of doubt in the case—Accused held entitled to benefit of doubt.

Where the deceased *D* along with his companions *S* and *L* were taking their buffaloes from one dera to another, the party of the accused, armed with hatchets and dangs set upon them, inflicting a number of injuries on *D* and killing him and a number of simple injuries on *S*; *L* fled away. The evidence of doctors who examined the body of the deceased and the person of *S* indicated that all the injuries received by the two victims of the assault were contusions, that the injuries in the case of the deceased were serious, causing fracture of the skull but all the 19 injuries in the case of *S* were simple scratches or contusions, none of them having been caused by a sharp weapon. In the first information report made by *D*'s father the names of 8 culprits were mentioned. One of them absconded and the rest were tried for offences under Ss. 302, 307 and 149. *S* in his statement to the police taken subsequently, had implicated three persons, who had not been so far implicated. These were discharged by the committing Magistrate. The first thing noticeable in the case was that every able-bodied member of the family of the accused had been implicated at one stage or other by the witnesses for the prosecution. In the Court, the witnesses omitted to mention the names of three persons who were discharged by the committing Magistrate at the request of the police. It appeared that *S* who was the chief prosecution witness had deliberately given the names of the ten culprits in his early statement, making addition of three to the names given in the first information report. Though the members of the party were alleged to be armed with hatchets and spears, there was no incised or penetrating wound on the bodies of the persons alleged to have been assaulted, though nearly 40 injuries were inflicted on them. The occurrence was alleged to have taken place early in the morning in open field at a time when a number of persons would be doing husbandry work there. It was remarkable that the witnesses who appeared to support the prosecution case were either interested in the complainants and against accused or were shown to have deliberately exaggerated their story :

Held that there was sufficient amount of doubt in the case and the accused were entitled to the benefit of doubt.

[P 789 C 2]

Mukand Lal Puri — *for Appellants.*

R. C. Soni for Advocate-General —

for the Crown.

Ram Lall J. — Ahman son of Khalas, Shahu son of Fazal, Mohammad Din and Raja sons of Khushi have been convicted by the learned Sessions Judge of Gujranwala (at Gujrat) on charges under Ss. 302 and 307, read with S. 149, I. P. C., and sentenced to transportation for life on the murder charge and two years' rigorous

imprisonment each on the attempted murder charge. They have appealed through Mr. Mukand Lal Puri, and Mr. R. C. Soni has appeared in support of the conviction. Mr. Asadullah Khan has put in a petition under S. 439 asking for enhancement of the sentences to death. Originally ten persons were cited as accused before the committing Magistrate, who discharged three of them, that is Ali and Roshan sons of Mauju, and Salehon son of Khalas. Seven persons were committed to the Court of the Sessions and one is said to be absconding still. Of these seven, the learned Judge convicted the four appellants and acquitted three. These three are Mirza son of Khushi, Bahadur son of Fazal and Muradi son of Dina. The absconder is one Ajit Singh who is said to be intimately connected with the deceased inasmuch as they have been involved in criminal cases together before.

The case for the prosecution is that on 5th August 1937, in the morning Shera deceased, Sai and Lala, P. Ws. were taking their buffaloes, from one of their deras to another. On the way, they had to pass the dera of the accused and when they had passed it by a distance of about three kilas, the whole party of the accused armed with hatchets and dangs and Ajit Singh, with a dang to which a chhuri was attached, set upon them. They inflicted a number of injuries on Shera and killed him. Sai, who is a cousin of the deceased and Lala, a little boy of eight or nine, who is a servant of Sai and whose father is a tenant of Roshan, uncle of the deceased, fled, but Sai was overtaken and a number of simple injuries were inflicted on his person. The statements of two doctors who examined the body of the deceased and the person of Sai respectively indicate that all the injuries received by the two victims of this assault were contusions, that the injuries in the case of Shera deceased were serious, causing fracture of the skull and of the ribs, but all the 19 injuries in the case of Sai were simple scratches or contusions, none of them having been caused with a sharp-edged weapon. It is stated that on a hue and cry, several witnesses turned up and on seeing them the assailants fled away. A message was sent to Salabat, the father of Shera deceased, who lodged the first information report at thana Phalia, a distance of 5 miles from the spot. at 11.30 A. M. The Sub-Inspector who is apparently young and inexperienced heard the story of Salabat, gave directions

to the moharrir head constable to record a formal first information report and himself immediately left for the scene of occurrence. In the first information report made by Salabat on information received by him from Sai and other witnesses, the names of eight culprits were mentioned, that is, Ajit Singh absconder and the seven persons who were eventually tried by the learned Sessions Judge. Meanwhile, the Sub-Inspector commenced his investigation at the spot and statements of a number of prosecution witnesses were recorded on that and the following day. It appears that Sai in his statement to the police recorded on 5th August 1937, implicated three persons who had not been so far implicated in the first information report. These are Salehon, Roshan and Ali, who were discharged by the committing Magistrate.

Rehman, P. W. 8, Lala P. W. 11, Khushi, P. W. 12 and Maulu, P. W. 15 have appeared so far as the attack by eight culprits on Shera deceased is concerned and Malku, P. W. 9 and Sahibzada, P. W. 14 so far as the pursuit and attack on Sai is concerned. The first thing that is immediately noticeable in this case is that every able-bodied member of the family of the accused has been implicated at one stage or other by the witnesses for the prosecution. It appears from the statement of Salabat, the father of the deceased, that apparently the only male member of the family that was left out was a minor son of Dina. In Court the witnesses have omitted to mention the names of Ali, Roshan and Salehon, who were discharged by the committing Magistrate at the request of the police. Sai has denied that he gave the names of these three witnesses to the police as having taken part in this occurrence and Mr. Soni, who has appeared on behalf of the Crown, has actually suggested that the Sub-Inspector in order to spoil the case for the Crown deliberately introduced the names of these three persons though they were not mentioned by the witness whose statement he purported to record. Beyond the fact that the Sub-Inspector left for the scene of occurrence even before the first information report was recorded, no good reason has been suggested to us why the Sub-Inspector should falsely introduce these names. The statement of Sai was recorded by him on 5th August and has been proved by the defence as Ex. D/B. If the Sub-Inspector wished to spoil the case for the prosecution he had better ways of doing so

than by implicating three members of the family of the accused on his own initiative. It is significant that these persons were actually discharged by the committing Magistrate and we are not prepared to hold that the Sub-Inspector acted in the manner and for the reason suggested by Mr. Soni.

It is then argued that, when the Sub-Inspector left the thana before the first information report was recorded, he caused an entry to be made in the daily diary of the thana and in this mentioned the names of six of the culprits alleged to have been given to him by Sai. It seems highly doubtful whether this statement is admissible at all. Mr. Puri argued that this should be treated as a first information report in the case but we are unable to agree with this contention. To us it appears to be a part of the proceedings of the police and therefore inadmissible as evidence for any purpose in Court. In any case it appears to us that if the Sub-Inspector was willing to deliberately exclude some of the culprits whose names had been mentioned, he would have equally done so in the statements of the alleged prosecution witnesses which he recorded on the 5th. The action of the Sub-Inspector in leaving the thana immediately appears to us to be rather due to the enthusiasm of a young and inexperienced officer and not to any mala fides on his part. It comes then to this that Sai, who is the chief prosecution witness, has deliberately given the names of ten culprits in his early statement, making an addition of three to the names given in the first information report, and thereby including every adult member of the family of the accused. We are not prepared to accept his explanation that this was done by the Sub-Inspector suo motu, and must hold therefore that the statement of the witness is unreliable to this extent.

The next important consideration, which affects the whole case, is that though the members of the party of the accused were said to be armed with hatchets and spears, there is no incised or penetrating wound either on the person of Shera or Sai, though nearly 40 injuries were inflicted on the two victims of this assault. It is doubtful whether, as suggested by Mr. Soni, the culprits deliberately used the blunt sides of their axes and spears. There are cases in which the head and other vital parts are carefully avoided in order to be able to urge eventually that the offence committed is not one of murder, but in this case the

medical evidence discloses that serious injuries on vital parts, namely the head and the chest, were delivered and it is difficult to see therefore why the business ends of axes and spears should deliberately not have been used.

The next important consideration, which touches the whole case, is that the occurrence took place early in the morning in the open fields at a time when a number of villagers would be doing husbandry work there. The assault must have taken considerable time, having regard to the number of injuries and the pursuit of Sai. It is peculiar that in these circumstances witnesses who appeared in support of the case for the prosecution are either all interested in the complainants and against the accused, or have been shown to have deliberately exaggerated their story. (The judgment then discussed the evidence and proceeded.) It seems obvious that an incident of the nature put forward by the prosecution did take place. But in view of the partisan character of the evidence, in view of the doubt regarding the very presence of some of the prosecution witnesses at the spot, in view of the fact that the witnesses implicated 11 men originally, of whom three were dropped by the committing Magistrate, and in view of the fact that though they say that cutting and penetrating weapons were carried no such injury is found on the complainants, we consider we cannot say with any degree of reasonable certainty that the four appellants before us actually took part in the occurrence which resulted in the death of Shera and injuries on Sai. In our opinion there is not very much to distinguish between the case of the present appellants and that of those whom the learned Sessions Judge acquitted.

In our opinion there is sufficient amount of doubt in the case and giving the benefit of that doubt to the appellants, we accept their appeals, set aside the convictions and order their immediate release.

R.M./R.K.

Appeals allowed.

A. I. R. 1938 Lahore 789

DIN MOHAMMAD J.

Lala — Defendant — Appellant.

v.

Jage Ram — Plaintiff — Respondent.

Second Appeal No. 367 of 1938, Decided on 8th July 1938, from decree of Senior Sub-Judge, Rohtak, D/- 23rd December 1937.

Benami — Suit by benamidar — Principle where applies stated — Benami transaction of mortgage offending against provisions of Land Alienation Act—Suit by benamidar for possession is not maintainable.

The principle that benamidar can maintain a suit against all persons except the beneficiaries and that a Civil Court has no power to decline to enforce a transaction on the ground that it was really intended to benefit a person other than the plaintiff, applies only to those cases where the benami transaction does not contravene the provisions of any law: *A I R 1934 Lah 909, Expl.; A I R 1918 P C 140, Rel. on.* [P 790 C 2]

One *L* orally transferred to *J* mortgage rights in certain land and further mortgaged some more land for a certain sum. This transaction was recorded in a mutation which was regularly attested. But *J* was a fictitious mortgagee on behalf of one *P* who was the real beneficiary under the transaction and had taken a mortgage in lieu of the debt owed by *L* to him. *P* was a non-agriculturist. Possession had not passed to *J* and no payment of land revenue had been made by *J*:

Held the transaction offended against the provisions of the Land Alienation Act in so far as it effected a sale as well as a mortgage for an indefinite period. Hence a suit by *J*, the benamidar, for possession of mortgage lands was not maintainable: *A I R 1936 Lah 727; A I R 1924 Lah 381; A I R 1914 Mad 684; A I R 1917 Mad 492 and A I R 1930 Lah 976, Ref.; A I R 1917 Lah 71 and A I R 1916 Lah 155, Disting.* [P 790 C 2]

Qabul Chand — *for Appellant.*

F. C. Mittal — *for Respondent.*

Judgment. — On 30th December 1933, Lala orally transferred mortgage rights in 1 bigha 18 biswas of land and further mortgaged 1 bigha 3 biswas of land for Rs. 650. This transaction was recorded in a mutation which was regularly attested. On 17th March 1936, the Assistant Collector made an order redeeming the land on a representation made by Lala that Jage Ram was a fictitious mortgagee on behalf of one Pokhar Mahajan who was the real beneficiary under the transaction referred to above and had taken a mortgage in lieu of the debt owed by Lala to him. On 12th May 1936, the suit out of which this appeal has arisen was instituted by Jage Ram for possession of the land referred to above. The suit was resisted by Lala, and the trial Judge, finding that the transaction stated above was without consideration, that no possession had passed, that no payment of land revenue had been made by the plaintiff and that the transaction offended against the provisions of the Land Alienation Act, dismissed the suit. On appeal, the Senior Subordinate Judge, referring to *A I R 1934 Lah 909*,¹ held

that even if Jage Ram was a benamidar he was entitled to sue and, on the authority of *53 P R 1916*,² further observed that it did not matter whether consideration had been paid or not. The appeal was consequently accepted and the suit decreed in terms of the relief prayed for. Hence this appeal.

After hearing counsel on both sides, I have no hesitation in holding that the judgment of the Senior Subordinate Judge cannot be maintained. It is true that in *A I R 1934 Lah 909*¹ Hilton J. held that a benamidar can maintain a suit against all persons except the beneficiaries and a Civil Court has no power to decline to enforce a transaction on the ground that it was really intended to benefit a person other than the plaintiff, but, with all respect, I consider that his conclusion, so far as the facts of the case before him were concerned, was obviously wrong. In support of his conclusion he has referred to *A I R 1918 P C 140*,³ but his attention does not appear to have been drawn to the fact that the principle laid down in the judgment of their Lordships of the Privy Council applied only to those cases where a benami transaction did not contravene the provisions of any law. Here in this case, as in the case before him, the transaction offended clearly against the provisions of the Land Alienation Act in so far as it effected a sale as well as a mortgage for an indefinite period, neither of which is permissible under that Act if once it is found that the real transferee is a non-agriculturist. The suit should have failed on this ground alone; but even on the question of consideration he has not a leg to stand on.

In my view the mortgagee in this case is on the horns of a dilemma. If he contends that he is the real mortgagee and that the transaction has nothing to do with Pokhar Mahajan, he fails on the ground that as no consideration has passed, the transaction is a nullity: see *A I R 1924 Lah 381*,⁴ *23 I C 805*⁵ and *35 I C 455*.⁶ If, on the other

2. *Allah Ditta v. Nazar Din*, (1916) 3 *A I R Lah* 155 = 33 *I C* 474 = 53 *P R* 1916 = 51 *P W R* 1916 (F B).

3. *Gur Narayan v. Sheo Lal Singh*, (1918) 5 *A I R P C* 140 = 49 *I C* 1 = 46 *Cal* 566 = 46 *I A* 1 (P C).

4. *Arjan Singh v. Bakhtawar Singh*, (1924) 11 *A I R Lah* 381 = 69 *I C* 414.

5. *Ramaswami Chettiar v. Sundara Reddiar*, (1914) 1 *A I R Mad* 684 = 23 *I C* 805.

6. *Kumarappan Chettiar v. Narayanan Chettiar*, (1917) 4 *A I R Mad* 492 = 35 *I C* 455.

1. *Abdul Razaq v. Lashkar*, (1934) 21 *A I R Lah* 909 = 154 *I C* 49 = 37 *P L R* 149.

hand, he admits that he is merely a benami-dar for Pokhar Mahajan, he fails because of the Land Alienation Act. Counsel for the respondent has referred to 37 I C 193⁷ and 53 P R 1916,² but neither of these cases is in point. Further, both these judgments have been considered and distinguished in A I R 1930 Lah 976⁸ where Tek Chand J. held that a person, an ostensible mortgage in whose favour is wholly without consideration, cannot sue for possession as against another person having an interest in property as purchaser, even though it is under unregistered sale deeds. It may further be remarked that the Senior Subordinate Judge was clearly in error when he observed that the mortgagor could sue for the mortgage money: see 17 Lah 270.⁹ On the grounds stated above I allow this appeal, set aside the judgment of the lower Appellate Court and restore that of the trial Court. In the circumstances of the case however I leave the parties to bear their own costs before me.

N.S./R.K.

Appeal allowed.

7. Haidar v. Fateh Khan, (1917) 4 A I R Lah 71 = 37 I C 193 = 119 P L R 1916.

8. Pokhchand v. Saidullah Khan, (1930) 17 A I R Lah 976 = 129 I C 127.

9. Pawa Singh v. Milkha Singh, (1936) 23 A I R Lah 727 = 164 I C 582 = 17 Lah 270 = 33 P L R 574.

A. I. R. 1938 Lahore 791

TEK CHAND AND RAM LALL JJ.

Emperor

v.

Ujagar Singh Hakam Singh and another — Accused — Respondents.

Criminal Appeal No. 184 of 1938, Decided on 26th May 1938, from order of the Addl. Sess. Judge, Lyallpur, D/- 23rd November 1937.

Criminal Trial — Murder — Accused held to have acted in right of private defence and not to have exceeded the right.

Where the deceased persons and their companions come armed with barchis and dangs and drunk and feeling that they have a grievance against the accused, they attack them causing an injury with a sharp edged weapon to one of them, the accused can be said to have reasonable apprehension that grievous hurt with deadly weapons would be caused to them so as to give them the right of private defence. So also where it cannot be said that the reasonable apprehension of danger to the persons of the accused's party had ceased before injuries attributed to the accused were inflicted, it cannot be said that the right of private defence has been exceeded. [P 792 C 1]

Mohammad Monir, Assistant to Advocate-General — *for the Crown.*

Jiwan Lal Kapur — *for Complainant.*

Harnam Singh — *for Respondents.*

Tek Chand J. — Five persons, Ujagar Singh, Saudagar Singh, Fauja Singh, Kirpal Singh and Kesar Singh, were tried before the Additional Sessions Judge, Lyallpur, under Ss. 302/149, I. P. C., for having murdered Mangal Singh and Sadhu Singh. The learned Judge, agreeing with the unanimous verdict of the assessors, held the charge unproved and acquitted all the five accused persons. The Crown has appealed under S. 417, Criminal P. C., against the acquittal of two of the accused persons only, namely Ujagar Singh and Saudagar Singh. We have heard the Assistant to the Advocate-General in support of the appeal and Sardar Harnam Singh for the two respondents. The learned Additional Sessions Judge rejected the evidence for the prosecution as "useless" and held that the motive alleged by them was "not believable". He found, on the other hand, that the deceased's party felt themselves aggrieved at the respondents having taken more than their fixed share of water, and that they came drunk and armed with deadly weapons and attacked the respondents and their companions, when they were quietly sitting under the mulberry trees in their land. On these findings, he came to the conclusion that the deceased's party were the aggressors and that the accused persons acting in the exercise of the right of private defence inflicted injuries on Mangal Singh and Sadhu Singh which resulted in their death. He held therefore that their case was covered by S. 100, I. P. C. Accordingly he acquitted them. On appeal before us counsel for the Crown has not attempted to support the case for the prosecution as disclosed by the evidence produced by them at the trial. He contended that on the proved facts and circumstances of the case the accused persons had no right of private defence and that in any case they had exceeded that right. After hearing the learned counsel at length and examining the record, we see no reason to differ from the conclusions of the learned trial Judge.

We find it proved that the deceased persons and their companion, P. W. Pal Singh, came armed with barchis and dangs, that they were drunk, that they felt that they had a grievance against the accused, and they actually attacked them, causing an

injury with a sharp-edged weapon to Sadhu Singh (D. W. 1), who was with the respondents at the time. The respondents thus had a reasonable apprehension that grievous hurt with deadly weapons would be caused to them and they clearly acted in the right of private defence. It is contended however that this right was exceeded. In support of this contention counsel referred us to the injuries which were found on the persons of Mangal Singh and Sadhu Singh, deceased, and Pal Singh (P. W. 16). An examination of these injuries however shows that though their number, as given by the medical witness, is large, in reality they were caused by a small number of blows. The medical witness himself admitted that in the case of Sadhu Singh, five of these injuries were superficial abrasions, which were probably caused while Sadhu Singh was falling down and that injuries Nos. (2) to (9) appeared to have been caused by Sadhu Singh 'grasping the assailant's weapon when it was pushed or drawn out'. This leaves us really with two injuries, caused by effective blows, viz. Nos. (1) and (10), on the person of Sadhu Singh. Similarly two effective blows appear to have been given to Mangal Singh. The whole incident according to the evidence of Jawand Singh (P. W. 15) lasted for about a minute only. In these circumstances it cannot be said that the reasonable apprehension of danger to the persons of the accused's party had ceased before these injuries were inflicted by them on Mangal Singh or Sadhu Singh. We agree with the learned Additional Sessions Judge in holding that the right of self-defence was not exceeded. We maintain the order acquitting the respondents and dismiss the appeal.

R.M./R.K.

*Appeal dismissed.***A. I. R. 1938 Lahore 792**

DIN MOHAMMAD J.

Abdul Ghafoor and others—Defendants
— Appellants.

v.

Fajir Ali and another, Plaintiffs and another, Defendant — Respondents.

Second Appeal No. 349 of 1937, Decided on 7th July 1938, from decree of District Judge, Karnal, D/- 27th October 1936.

(a) Custom (Punjab) — Succession—Rajputs of Karnal District — Daughters succeed to self-acquired property in preference to collaterals.

Among Rajputs of District Karnal, daughters succeed in preference to the collaterals of their respective fathers to the self-acquired property left by them. [P 793 C 1]

(b) Custom (Punjab) — Proof — Instances of judicial decisions.

Apart from the fact that instances of other districts on questions of custom are not of much avail, judicial decisions are also not of much assistance as they proceed on their own facts and are based on the amount of evidence led in each case. [P 793 C 1]

Khwaja Feroze-ud-Din—for Appellants.

Shamair Chand — for Respondents
(Plaintiffs).

Judgment. — The suit out of which this appeal has arisen was instituted by Mt. Allah Di against the collaterals of her father, Lakha, for a declaration that she was entitled to succeed to the self-acquired property of her father in preference to his collaterals who were related to him in the seventh degree. Her suit was dismissed on 9th January 1934, but, on appeal, the Additional District Judge set aside the judgment of the Court below on the ground that the legal representatives of certain defendants who had died during the pendency of the suit had not been properly brought on the record and directed the trial Court to re-hear the case. The suit was again dismissed on 21st June 1935 and from that order an appeal was preferred to the District Judge once more. He came to the conclusion that, in the first instance, the *riwaj-i-am* was not very clear so far as its applicability to the non-ancestral property was concerned and secondly, that the presumption that it gave rise to was amply rebutted by the instances produced on behalf of the plaintiff. He, however, on the application of the defendants granted them a certificate under S. 41 (3), Punjab Courts Act.

Counsel for the appellants has urged that from time immemorial the custom among the Rajputs of the District of Karnal has been uniform and that daughters have always been excluded from inheritance irrespective of the nature of the property. He mainly places his reliance on the mass of oral evidence produced by the appellants and contends that the *riwaj-i-am* as supported by that evidence should prevail in this case. Counsel for the respondents, who are now on the record as the legal representatives of Mt. Allah Di, on the other hand urges that so far as the old *riwaj-i-am* is concerned, it applied to ancestral property alone, and inasmuch as it

did not contemplate non-ancestral property, the questions and answers in that *riwaj-i-am* cannot serve as a valuable guide in the decision of this case. He further stresses the fact that it was only in 1910, when the distinction between acquired and ancestral property was for the first time introduced in the *riwaj-i-am*, that the persons responsible for stating the *riwaj* made the old *riwaj* applicable to the non-ancestral property and that, on this ground, no value should be attached to the statement of custom in the latest *riwaj-i-am*, inasmuch as it is not so ancient as a binding *riwaj* should be. In addition to this, he relies on the three judicial instances produced on behalf of the respondents, which clearly show that the daughters in those cases did succeed in preference to the collaterals of their respective fathers to the self-acquired property left by them. In view of the fact, therefore, that the sheet-anchor of the appellants is a bare statement in the latest *riwaj-i-am*, unsupported by instances, and on the other side there is a clear proof of the fact that on three occasions at least the *riwaj-i-am*, as stated in the Manual of 1910, was not followed, it cannot be reasonably urged that the District Judge has in this case come to such an erroneous conclusion as to justify my interference. Counsel for the appellants admits that there is no authority of this Court dealing with the matter but he seeks support from certain cases relating to the neighbouring Districts of Gurgaon and Hissar. In my view, however, apart from the fact that instances of other districts will not be of much avail, judicial decisions on questions of custom are not of much assistance as they proceed on their own facts and are based on the amount of evidence led in each case. I, accordingly, maintain the decision of the District Judge and dismiss this appeal. In view of the fact, however, that the District Judge had granted a certificate to the appellants under S. 41 (3), Punjab Courts Act, I leave the parties to bear their own costs before me.

N.S./R.K.

*Appeal dismissed.***A. I. R. 1938 Lahore 793**

BHIDE J.

Lachhman Das — Petitioner.

v.

Jai Gopal and others — Respondents.

Criminal Revn. No. 617 and Cr. Misc. No. 130 of 1938, Decided on 17th June 1938.

Criminal P. C. (1898), S. 561-A — Application for expunging remarks by Magistrate—Remarks wholly unsupported by evidence on record even as legitimate inferences and wholly unjustified and likely to affect future of applicant—They should be directed to be expunged.

A Magistrate is, no doubt, entitled to draw legitimate inferences from the evidence on the record but where the remarks of the Magistrate, for expunging which an application under S. 561-A is presented, are wholly unsupported by the evidence on record even as legitimate inference and are wholly unjustified and reflect on the character of the applicant and are likely to affect his future career, it is only fair that they should be directed to be expunged. [P 794 C 2]

Amolak Ram Kapur — for Petitioner.*Jhanda Singh* — for Respondent*(Jagdish Lal).**N. L. Sadana* — for Respondents.

Order. — Criminal Revision No. 617 and Criminal Miscellaneous No. 130 of 1938 are connected and can be disposed of together. The respondents *Jai Gopal* (aged 25), *Jagdish Singh* (aged 20.21), *Satyapal* (aged 20) were prosecuted for offences under Ss. 329, 327 and 347, I. P. C., and *Jagdish* (aged 15) for abetting the offences. *Jai Gopal* was sentenced to rigorous imprisonment for two years, while others were only sentenced to imprisonment till the rising of the Court chiefly in view of their ages. On appeal, the learned Sessions Judge reduced the sentence of *Jai Gopal* also to a fine of Rs. 50. The petitioner *Lachhman Das*, who was the victim of the alleged offences, has filed a petition for enhancement of the sentences (Criminal Revision No. 617 of 1938) of the convicts on the ground that the sentences were grossly inadequate and have resulted in failure of justice and has also prayed under S. 561-A for the expunging of certain remarks in the judgment of the trial Court, which reflect on his character and which according to him are not supported by any evidence on the record.

The case for the prosecution was that *Lachhman Das* who is a teacher in the *Arya High School* at *Hafizabad* had admonished a boy named *Lachhmi Narain* (aged about 14) who was in his class and who is a brother of the respondent *Jagdish*, not to keep the company of vagabonds. The reference was taken to be to the other three respondents who are said to have taken great offence and decided to teach *Lachhman Das* a lesson. Accordingly *Jagdish* decoyed *Lachhman Das* to his house on the pretext that his mother wanted to see him, and when he went there, he was given a sound

thrashing by the other three respondents. The defence version was that on the night of the occurrence, the four respondents returned to the house of Jagdish at about 9.15 P. M. after playing volley ball. They heard a cry from inside and on entering found the petitioner Lachhman Das with Lachhmi Narain, who complained that the former was trying to commit an unnatural offence on him by force. The respondents were enraged and gave Lachhman Das a few slaps and threatened to report the matter to the police. Lachhman Das then tendered an apology and was let off. The respondents however denied that Exhibit P/B was the apology, which according to the prosecution, Lachhman Das had been forced to write. Both the Courts below have held the prosecution story to be proved in substance and rejected the defence version. The learned counsel for the petitioner contended that in view of the serious nature of the offences, the sentences passed on the respondents are wholly inadequate. (The judgment then discussed the evidence and proceeded.) This petition for enhancement was filed more than three months after the judgment of the Sessions Judge was pronounced. No petition for enhancement has been filed on behalf of the Crown and in view of all the circumstances I do not think this is a fit case for enhancement of sentences at this stage. As regards the application under Sec. 561-A the petitioner has prayed for the following passage in the judgment of the trial Court being expunged:

At the same time, I think, Lachhman Das, teacher, has not enjoyed and does not enjoy an enviable reputation, and reading between the lines one can feel his partiality for the boy Lachhmi Narain. It seems this boy had somehow or other begun resenting this affection of the teacher who had then begun to treat him badly in the class. The boy complained of this treatment to his other associates and the present crisis seems to have developed.

It was urged that there is no evidence whatever on the record to support the above remarks which reflect on the character of Lachhman Das and would prejudice his future career. The learned counsel for the Crown drew my attention merely to the fact that the Sessions Judge had made somewhat similar remarks and also urged that the Magistrate was within his rights in drawing inferences from facts, although there was no direct evidence to support the remarks of the learned Magistrate. The only fact to which reference was made in this connexion was that some boys used to

go to Lachhman Das's house at night for tuition and that this was against the rules of the school. The circular containing the rules has not been produced. But even if some boys were going to Lachhman Das at night for tuition, this would not necessarily show that he had immoral relations with them. It is to be noted in this connexion that Lachhman Das is a married man and has children. My attention was not drawn to any evidence to support the remark of the learned Magistrate that "Lachhman Das did not or does not possess any enviable reputation." Nor was any evidence on the record pointed out showing that Lachhman Das had "partiality for Lachhmi Narain" and that the boy had begun to resent it. It is noteworthy in this connexion that the boy Lachhmi Narain was not even produced as a witness in this case. The Sessions Judge's remarks on this point are somewhat confused, but I do not think he meant to give any finding that Lachhman Das was a man of a disreputable character.

Although a Magistrate may be entitled to draw legitimate inferences, the learned counsel for the Crown was unable to invite my attention to any evidence on the record, which would support the above remarks even as legitimate inferences. The case for the prosecution had succeeded, while the defence set up had failed. The above remarks being unsupported by any evidence on the record, were in my opinion wholly unjustified and as they reflect on the character of Lachhman Das and may affect his future it is only fair that they should be expunged. I accordingly direct them to be expunged.

R.M./R.K.

Order accordingly.

A. I. R. 1938 Lahore 794

BHIDE J.

Mal Shah and another —

Creditors — Appellants.

v.

Jabru — Debtor — Respondent.

Second Appeal No. 27 of 1937, Decided on 4th November 1937, from order of Dist. Judge, Gurdaspur, D/- 19th February 1937.

Gift — Date of — Presumption.

Where a person makes an application for mutation, the presumption is that he has made the transfer (gift) when he applies for the transfer being noted in the Revenue records. The question of possession is not material where the donee is a minor living with the donor. [P 795 C 1]

C. L. Aggarwal — *for Appellants.*

Shamair Chand — *for Respondent.*

Judgment.—It appears from the record that the application for mutation was made on 6th February 1934 and the presumption is that the applicant had made the gift when he applied for the transfer being noted in the Revenue records. The question of possession is not material in this case as the donee is a minor aged about six and is living with the donor. As regards S. 5, Lim. Act, it was conceded in the Court below that it does not apply and point has not been raised in the grounds of appeal. I see no good ground to interfere and dismiss the appeal with costs.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1938 Lahore 795

ADDISON AND DIN MOHAMMAD JJ.

*Municipal Committee, Batala —
Defendant — Appellant.*

*Wali Mohammad and others —
Plaintiffs — Respondents.*

Second Appeal No. 828 of 1937, Decided on 1st February 1938, from decree of the Senior Sub.Judge, Gurdaspur, D/- 19th March 1937.

Evidence Act (1872), S. 13—Document purporting to be mortgage deed executed by predecessor-in-interest of plaintiff in favour of third party and documents in which plaintiff has asserted his right to deal with the property are admissible in evidence under S. 13—Such evidence is however of little value.

A document purporting to be a mortgage deed of property in suit executed by the predecessor-in-interest of the plaintiff in favour of a third party and other documents in which the plaintiff has asserted right to deal with the property are admissible in evidence under S. 13. The words "rights and customs" in S. 13 include a right of ownership. Such evidence is however usually of little value and a Court should not place exaggerated importance on this kind of evidence, which is little more than an admission in favour of the person making it and is often manufactured in this country for the purpose of creating evidence for use later in a claim to ownership: *A I R 1937 Lah 688; 12 All 1 (F B); A I R 1921 Mad 383; 16 Mad 194 and 10 Bom 439, Rel. on; Case law discussed.* [P 796 C 1]

Hem Raj Mahajan — *for Appellant.*

Ghulam Mohi-ud-Din—*for Respondents.*

Addison J.—The only question involved in this second appeal is whether the documents Exs. P.1, P.2 and P.3 are admissible in evidence. If they are, the appeal must

be dismissed as concluded by a finding of fact. Ex. P.1 is a document purporting to be a mortgage deed of the property in suit executed by the predecessors-in-interest of the plaintiff in favour of a third party in 1873 while Ex. P.2 and Ex. P.3 are other instances where the plaintiff asserted a right to deal with the property. In the Full Bench decision, 6 Cal 171,¹ it was held that the word "right" as used in S. 13, Evidence Act, referred to something distinct from ownership, that is, a right, which attaches either to some property or to status; in short, an incorporeal right which, though transmissible, is not tangible or an object of the bodily senses. If this decision is correct, the documents in question would be inadmissible in evidence. The same decision was arrived at by another Full Bench in 13 Cal 352.² In 2 C W N 501,³ another Full Bench, however pointed out that the rule laid down in the above mentioned Full Bench decision had been materially qualified by the decision of their Lordships of the Privy Council in 22 I A 60⁴ and 24 I A 10⁵ and in 55 Cal 355⁶ a Division Bench, presided over by the Chief Justice, held that a kabala in favour of the tenant which contained a recital that the holding conveyed by the said deed was the homestead land of the executant of the deed was admissible in evidence as a transaction within the meaning of S. 13, Evidence Act, in a suit in which the nature of the tenancy was agitated.

A Division Bench of the Patna High Court held in 1 Pat 375⁷ in a suit which the plaintiffs claimed the land as their *man* land and the defendant claimed it as his *jote*, that an *ekrarnama*, produced by the plaintiffs, addressed by a third person to an ancestor of the plaintiffs, in which the land in suit was described as *man* land, was admissible under Section 13, Evidence Act. Another Division Bench of the same Court

1. Gujju Lall v. Fatteh Lall, (1881) 6 Cal 171= 6 C L R 439 (F B).
2. Surender Nath Pal v. Brojo Nath Pal, (1886) 13 Cal 352 (F B).
3. Tepukhan v. Rajoni Mohun Das, (1898) 25 Cal 522=2 C W N 501 (F B).
4. Ram Ranjan Chuckerbutty v. Ram Narain Singh, (1895) 22 Cal 533=22 I A 60=6 Sar 530 (P C).
5. Bitto Kunwar v. Kesho Pershad, (1897) 19 All 277=24 IA 10=7 Sar 131=1 CWN 265 (PC).
6. Monmotha Nath Mitra v. Rajeswar Rai, (1928) 15 A I R Cal 315=107 I C 81=55 Cal 355= 32 C W N 184.
7. Sabran Sheikh v. Odoy Mahto, (1922) 9 A I R Pat 488=70 I C 18=1 Pat 375=3 P L T 792.

in A I R 1933 Pat 656⁸ held that it was permissible to use recitals in sale deeds to show the nature of the title that was being asserted and as transactions relevant under S. 13, Evidence Act, by which a right was claimed or asserted on some past occasion. In 12 Pat 285⁹ however another Division Bench held that the word "right" as used in S. 13, Evidence Act, meant an incorporeal right as distinct from ownership of property, 6 Cal 171¹ being followed. The decisions of the Calcutta and Patna High Courts are therefore not very helpful on the question. The Bombay, Madras and Allahabad rulings are in favour of the view that such documents are admissible in evidence. In 10 Bom 439¹⁰ it was said that the words "rights and customs" in S. 13 must be understood as comprehending all rights and customs recognized by law, and therefore included a right of ownership. The same view was taken in 12 Mad 9,¹¹ 15 Mad 12,¹² 16 Mad 194¹³ and A I R 1921 Mad 383.¹⁴ The decision of the Allahabad High Court is 12 All 1.¹⁵ Only one decision of this Court has been referred to, namely A I R 1937 Lah 688,¹⁶ which was decided by a single Judge. It was held that such documents were admissible in evidence. It seems to us that the preponderance of authority is in favour of the view that these documents are admissible in evidence and we so hold. It might however be stated that such evidence is usually of little value and a Court should not place exaggerated importance on this kind of evidence, which is little more than an admission in favour of the person making it and is in this country often manufactured for the purpose of creating evidence for use later on in a claim to ownership. On this finding we dismiss the appeal but make no order as to costs of this Court.

R.M./R.K.

Appeal dismissed.

8. Keshava Prasad Singh v. Brahmdeo Rai, (1933) 20 A I R Pat 656=149 I C 1177=13 Pat 45.
9. Ram Kishun v. Niranjan Pandey, (1933) 20 A I R Pat 285=145 I C 223=12 Pat 285=14 P L T 575.
10. Ranchhoddas Krishnadas v. Bapu Narhar, (1886) 10 Bom 439.
11. Ramasami v. Appavu, (1889) 12 Mad 9.
12. Venkatasami v. Venkatreddi, (1892) 15 Mad 12.
13. Vythilinga v. Venkatachala, (1893) 16 Mad 194.
14. Nallasiva Mudaliar v. Ravan Bibi, (1921) 8 A I R Mad 383=70 I C 389.
15. Collector of Gorakhpur v. Palakdhari Singh, (1890) 12 All 1 (F B).
16. Ihsan Ilahi v. Ata Ullah, (1937) 24 A I R Lah 688=172 C 769=39 P L R 389.

A. I. R. 1938 Lahore 796

MONROE AND DIN MOHAMMAD JJ.

Emperor

v.

Amar Singh — Accused — Respondent.

Criminal Appeal No. 164 of 1938, Decided on 21st June 1938, from order of the Addl. Sess. Judge, Lyallpur, D/- 13th November 1937.

(a) Criminal P. C. (1898), Ss. 337 (1), 10 (2) — Term "District Magistrate" in Sec. 337 (1) includes Additional District Magistrate empowered under S. 10 (2) — Pardon tendered by such Additional District Magistrate without sanction of District Magistrate is not invalid.

The term "District Magistrate" in S. 337 (1) includes an Additional District Magistrate empowered by the Local Government under S. 10 (2) to exercise all the powers of a District Magistrate and a pardon tendered under S. 337 (1) by such Additional District Magistrate without the sanction of the District Magistrate is not invalid. The Additional Magistrate in tendering such pardon, is not in any way affected by the Proviso to S. 337 (1) and is in his own right empowered under the law to tender the pardon. It was not the intention of the Legislature in using the definite article 'the' before the District Magistrate in S. 337 to specify the District Magistrate appointed as such and not the Additional District Magistrate empowered as such: *A I R 1936 Lah 353, Commented upon.* [P 798 C 1, 2]

(b) Criminal P. C. (1898), Ss. 337 (1), 337 (1-A) — Magistrate tendering pardon, stating in his order that pardon has been tendered to person concerned to make him approver to connect accused with offence of murder — It amounts to sufficient compliance with S. 337 (1-A).

Where a Magistrate tendering a pardon under S. 337 (1) states in his order that in order to connect the accused with the offence of murder, it is essential to make an approver in the case and that therefore he tenders pardon under Sec. 337 to the person concerned, it amounts to sufficient compliance with provisions of S. 337 (1-A), as no clearer reason for tendering the pardon can be imagined. [P 798 C 2]

(c) Criminal P. C. (1898), S. 337 (1) — It is not necessary that acceptance of pardon tendered should be expressed in any particular manner — It is to be gathered from circumstances.

Where a pardon has been tendered under S. 337 (1), it is not necessary that the acceptance thereof should be in writing or that it should be expressed in any other manner; it is to be gathered from the circumstances; where the person to whom pardon is tendered appears before various Magistrates in the capacity of a witness and not that of an accused person, it is a clear indication of the fact that he has accepted the pardon tendered to him. [P 798 C 2; P 799 C 1]

(d) Criminal P. C. (1898), S. 337 (2) — Magistrate other than Magistrate taking cognizance of offence is entitled to record statement of person to whom pardon has been tendered.

Although S. 337 (2) contemplates that every person accepting tender shall be examined as a witness, in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any, it is open to a Magistrate, other than the Magistrate taking cognizance of the offence to record statement of the person to whom the pardon has been tendered : *A I R 1933 Lah 321, Rel. on.* [P 799 C 1]

Mohammad Monir, Assist. to Advocate-General — *for Appellant.*

Chaman Lal — *for Respondent.*

Din Mohammad J. — This is an appeal from the order of the Additional Sessions Judge, Lyallpur, acquitting Amar Singh who had been convicted by a Magistrate, First Class, of an offence under S. 193, Penal Code, and sentenced to four years' rigorous imprisonment. The Additional Sessions Judge has based his decision on the following conclusions : (1) that Lala Sant Ram, Additional District Magistrate, was not empowered in law to tender a pardon to Amar Singh and consequently the whole proceedings following thereupon were void; (2) that no reasons having been recorded by the Additional District Magistrate as required by S. 337 (1-A), Criminal P. C., the tender of pardon was bad in the eye of the law; (3) that there was no evidence to show that Amar Singh had ever accepted the pardon; (4) that the statement of Amar Singh made before Mr. Allah Dad Khan, Magistrate, was not recorded in a free atmosphere, and (5) that the statement made before Mr. Allah Dad Khan, Magistrate, had been made under pressure from the police. After hearing the Assistant Advocate-General for the Crown and Mr. Chaman Lal for Amar Singh, we have come to the conclusion that not one of the reasons recorded by the Sessions Judge for the acquittal of Amar Singh is sound in law. We will take the points mentioned above seriatim.

(1) S. 337 (1) lays down that in the case of any offence triable exclusively by the High Court or Court of Session, the District Magistrate, a Presidency Magistrate, a Sub-divisional Magistrate or any Magistrate of the First Class may, at any stage of the investigation or enquiry into, or the trial of the offence, tender a pardon to such person on certain conditions. In the Proviso attached to this sub-section, it is made clear that where the offence is under enquiry or trial, no Magistrate of the First Class other than the District Magistrate shall exercise the power hereby conferred unless he is the Magistrate making the enquiry or holding

the trial and, where the offence is under investigation, no such Magistrate shall exercise the said power unless he is a Magistrate having jurisdiction in a place where the offence might be enquired into or tried and the sanction of the District Magistrate has been obtained to the exercise thereof. The contention raised on behalf of Amar Singh which found favour with the Sessions Judge was that although Lala Sant Ram was an Additional District Magistrate and as such had been empowered by the Local Government under S. 10 (2), Criminal P. C., to exercise all the powers of a District Magistrate under the Code, he could not be treated as a "District Magistrate" under S. 337 inasmuch as the words used in S. 337 are "the District Magistrate" and not "a District Magistrate." It was consequently urged on his behalf that under the second part of the Proviso, Lala Sant Ram stood in need of the sanction of the District Magistrate for a valid tender of pardon and that as no sanction of the District Magistrate had been obtained by him to the pardon tendered to Amar Singh, the pardon could not be legally recognized. This, in our view, is an erroneous way of interpreting these provisions of law. We find however that in this matter the Sessions Judge is supported by an authority of this Court reported in 16 Lah 594.¹ The matter before the Division Bench in that case had nothing to do with the interpretation of S. 337 but in the course of his judgment Bhide J. made the following observations :

It would appear from the Proviso to S. 337, Criminal P. C., that when pardon is to be tendered during the course of an enquiry or trial, it must be tendered by 'the District Magistrate.' There is only one District Magistrate for a district (*vide* S. 10, Criminal P. C.), and although the Additional District Magistrate may have the powers of a District Magistrate he cannot be called 'the District Magistrate'.

Coldstream J. agreed with the judgment of Bhide J. Apart from the fact that this is an obiter dictum, we may say with all respect that we have not been able to realize on what ground the distinction between "the District Magistrate" and "a District Magistrate" is based. It is true that S. 10 (1) lays down that in every District outside the Presidency towns the Local Government shall appoint a Magistrate of the First Class, who shall be called the District Magistrate

1. *Faqir Singh v. Emperor*, (1936) 23 A I R Lah 853=1936 Cr O 294=162 I O 180=37 Cr L J 515=16 Lah 594=37 P L R 715.

and in sub-s. (2) it is provided that the Local Government may appoint any Magistrate of the First Class to be an Additional District Magistrate and such Additional District Magistrate shall have all or any of the powers of a District Magistrate, under this Code as the Local Government may direct. But, that does not mean that the District Magistrate referred to in sub-s. (1) is a different functionary from the District Magistrate referred to in sub-s. (2). In Part 5 of Sch. 3, Criminal P. C., the ordinary powers of a District Magistrate have been specified and these powers include "power to tender pardon to an accomplice at any stage of a case" under S. 337. Consequently, sub-s. (2) of S. 10 refers to the powers of a District Magistrate evidently using the term in a general sense, and the mere fact that in sub-s. (1), the article 'the' has been used before the words "District Magistrate" does not, in our view, alter the situation in any manner.

Similarly, when the Legislature used the words 'the District Magistrate' in S. 337 (1), it did not intend to exclude an Additional District Magistrate upon whom the ordinary powers of a District Magistrate had been conferred under sub-s. (2) of S. 10. We cannot believe that by the use of the definite article before "District Magistrate" in Sec. 337, the Legislature intended to specify the District Magistrate appointed as such and not the Additional District Magistrate empowered as such. If this were so, the whole object of conferring ordinary powers of a District Magistrate including power to tender pardon is clearly defeated. There is no meaning in conferring on a person a power which cannot be exercised by that person. The Sessions Judge has referred to sub-s. (3) of S. 10 in support of his conclusion, but we are unable to see how that sub-section offers any help in that matter. It merely says that for the purposes of S. 192, sub-s. (1), S. 407, sub-s. (2) and S. 528, sub-ss. (2) and (3), such Additional District Magistrate shall be deemed to be subordinate to the District Magistrate, and inasmuch as those provisions of law deal with special matters relating to transfer or withdrawal of cases or appeals, it is not clear how the subordination of the Additional District Magistrate to the District Magistrate mentioned in connexion therewith deprives the Additional District Magistrate of the exercise of powers otherwise conferred upon him under S. 10 (2). To us this matter appears to be so obvious that it

requires no further discussion and if once it is held that the Additional District Magistrate could act as the District Magistrate under S. 337, the argument employed by the Sessions Judge and repeated before us by counsel for Amar Singh falls to the ground. We hold therefore that the Additional District Magistrate was not in any way affected by the Proviso to S. 337 (1) and that he was in his own right empowered under the law to tender a pardon to the accused.

(2) Coming now to the matter of recording reasons, we are surprised to find that the Sessions Judge has devoted a substantial part of his judgment to discussing whether the non-compliance with sub-s. (1-A) of S. 337 is an illegality or a mere irregularity and whether all the proceedings taken subsequent to the pardon thus tendered are vitiated on that account. Sub-s. (1) of S. 337 contemplates that a pardon is to be tendered "with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to the offence" and in Ex. P/G, which is the record of the pardon tendered to Amar Singh it is clearly stated that in order to connect the accused with the offence of the murder of Mt. Jamna, w/o Tara Singh, caste Bhatra of Gobindpura, Police Station Sadar Lyallpur, it is essential to make an approver in this case. I therefore tender pardon under S. 337, Criminal P. C., to Amar Singh, son of Pheru Singh,

What clearer reason could be recorded for tendering a pardon to Amar Singh cannot be imagined and we really fail to understand why the Sessions Judge in the face of this document failed to realize that the only thing required by law to be done had been amply done.

(3) It was contended before the Sessions Judge that there was no proof on the record to show that Amar Singh had accepted the pardon tendered to him. The same argument has been reiterated before us but, in our view, it has no force whatever. The very fact that Amar Singh appeared before the various Magistrates in the capacity of a witness, and not that of an accused person, is a clear indication of the fact that he had accepted the pardon tendered to him. So long as the pardon tendered is not accepted the person concerned is treated as an accused person in the case and it is only after it is accepted that he is removed from that category and treated as a witness. It is nowhere laid down in the Criminal Pro-

cedure Code that the acceptance should be in writing or that it should be expressed in any other manner; it is to be gathered from the circumstances, and there is no doubt whatever from the circumstances brought on the record that the pardon tendered to Amar Singh had been accepted by him. The fact is deposed to by the Additional District Magistrate and his Reader and, apart from the circumstantial evidence referred to above, this direct evidence is enough to establish conclusively that the pardon had been accepted by Amar Singh.

(4) and (5). The remaining two points relied upon by the Sessions Judge namely (a) that the statement of Amar Singh made before Mr. Allah Dad Khan, Magistrate, had not been reported in a free atmosphere and (b) that it was the result of torture by the police are not very material in this case inasmuch as the charge against the accused was that he had altogether denied having made any statement before Mr. Allah Dad Khan and the factum of a statement having been made by a person is quite a different matter from what its legal effect may be on account of the circumstances in which it was made. If it were necessary, however to record a finding on this aspect of the case, we have no hesitation in holding that no pressure was brought to bear upon Amar Singh to make the statement that he made before Mr. Allah Dad Khan and that the circumstances in which that statement was recorded do not support the conclusion that the statement was not voluntary or that it was being made at the time when Amar Singh was under any pressure from the police.

A new point was raised before us by Mr. Chaman Lal, counsel for Amar Singh, that inasmuch as sub-s. (2) of S. 337 contemplates that every person accepting a tender shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any, no other Magistrate is empowered to record the statement of a person to whom pardon has been tendered. This matter is concluded by authority and need not be discussed any further: see 14 Lah 507.² Counsel for the accused finally urged that the case of Amar Singh is not covered by Part I of S. 193, I. P. C., but falls under Part II of that Section. This again

is immaterial as it only affects the question of the sentence, and not of the conviction, of the accused.

It only remains to consider now whether the charge of perjury has been brought home to the accused and on that matter we are not in any doubt whatever. Lala Sant Ram and his Reader have deposed to the effect that Amar Singh was tendered a pardon which he accepted. Mr. Allah Dad Khan has stated that of his own free will and accord Amar Singh made a statement before him after he had accepted the tender of pardon and it is not disputed that his statement recorded by the committing Magistrate on 3rd September 1936, is in direct opposition to what he had made before Allah Dad Khan. Amar Singh's statement to the effect that no pardon had been tendered to him and that he had accepted none and that he had made no statement before Mr. Allah Dad Khan, Magistrate, clearly brings his case within the purview of S. 193 even if his statement before Mr. Allah Dad Khan and the contradictions introduced by him later in the statement before the committing Magistrate are ignored altogether. Holding therefore that the accused has committed an offence under S. 193, I. P. C., we set aside the order of the Sessions Judge, acquitting Amar Singh, and sentence him to eighteen months' rigorous imprisonment from to-day.

R.M./R.K.

Order set aside.

A. I. R. 1938 Lahore 799

BECKETT J.

*Manohar Lal, Defendant and others,
Plaintiffs — Appellants.*

v.

*Roshan Lal and another — Plaintiffs
— Respondents.*

Second Appeal No. 397 of 1938, Decided on 11th July 1938, from decree of the District Judge, Hissar at Gurgaon, D/- 21st February 1938.

Civil P. C. (1908), O. 1, R. 10 — Necessary party — Rule refers to suits as framed — After trial, Court thinking that claim of one claimant should be dismissed — Such person should not be struck out.

When O. 1, R. 10 provides that the Court may strike out the name of a party who has been improperly joined as plaintiff or defendant, these words have reference to the suit as framed and it cannot possibly be suggested that any person who claims to be the owner of an equity of redemption is not a proper party to a suit for redemption of the mortgage. It was certainly never intended

². *Emperor v. Parmanand*, (1933) 20 A I R Lah 821=1933 Cr C 564=142 I O 776=34 Cr L J 469=14 Lah 507=34 P L R 421.

that the claim of a necessary party should be first tried and that his name should then be struck off the record on the ground that his claim ought to be dismissed before any decree has been passed.

[P 800 C 1]

Where therefore a Court after trial thought that claim of one person out of other claimants should be dismissed, it cannot strike out the name of that person under O. 1, R. 10 but it should pass a decree dismissing that person's claim.

[P 800 C 1]

Shamair Chand — *for Appellants.*

Achhru Ram — *for Respondents.*

Judgment. — Four persons sued for redemption of a mortgage. After the trial of these claims, the trial Court came to the conclusion that the claims of two of these persons should be dismissed. Instead of dismissing their claim by means of a decree however it proceeded to strike out their names under O. 1, R. 10, Civil P. C., on the ground that they had not been properly joined as parties to the suit. An appeal was presented to the District Court, which ordered that the name of one of the plaintiffs should be restored, but not the other name. A second appeal has been preferred to this Court by the defendant asking that the name which has been restored should be struck out. I do not propose to enter into the merits of this case. It seems to me that the trial Court has entirely misunderstood the purpose for which O. 1, R. 10 is intended to be used. When the Rule provides that the Court may strike out the name of a party who has been improperly joined as plaintiff or defendant, these words have reference to the suit as framed and it cannot possibly be suggested that any person who claims to be the owner of an equity of redemption is not a proper party to a suit for redemption of the mortgage. It was certainly never intended that the claim of a necessary party should be first tried and that his name should then be struck off the record on the ground that his claim ought to be dismissed before any decree has been passed. Such a procedure can only lead to multiplicity of proceedings. In the present instance, the correct procedure would be to keep the names of all the plaintiffs on the record until a preliminary decree is passed. If the Court is then of opinion that any of the claims have failed, these claims can then be dismissed as part of the preliminary decree; and if an appeal is preferred against this decree, the claims of all the parties concerned can then be heard together. If the names of any of the parties are struck off the record after a

preliminary decree has been passed against them and has become final, this would be quite a different matter, for they then would no longer be necessary parties to the proceedings.

For these reasons I direct that the two names which have been struck off should again be restored to the record until a preliminary decree is passed and becomes final, a course to which counsel on both sides agree. There will be no decision on the merits of their claims at the present stage, and the decision of the District Court on this point should be regarded as cancelled. Costs will be costs in the suit. Stay order is discharged.

B.D./R.K.

Order accordingly.

A. I. R. 1938 Lahore 800

ADDISON AG. C. J. AND DIN

MOHAMMAD J.

Sheo Nath and others,

Defendants — Appellants.

v.

Mughla, Plaintiff and others,

Defendants — Respondents.

Letters Patent Appeal No. 38 of 1938, Decided on 4th July 1938, from decree of Dalip Singh J., in S. A. No. 1027 of 1937, D/- 3rd January 1938.

Easement — Necessity — Convenience is not criterion but absolute necessity.

An easement of necessity is not to be granted merely on the ground of convenience and advantage, but solely on the ground of absolute necessity. Where there are other ways for ingress and exit, an easement of necessity cannot be claimed merely on the ground that such ways are inconvenient: *A I R 1937 Oudh 263, Foll.*

[P 801 C 1, 2]

Shamair Chand — *for Appellants.*

D. N. Aggarwal — *for Respondent*
(*Plaintiff*).

Addison Ag. C. J.—The plaintiff sued the defendants for a permanent injunction restraining the latter from obstructing his passage along the pathway X to T, leading to his fields. It was alleged that the pathway was sufficient for the passage of cattle and cars and that the plaintiff had an easement thereon as he had been passing as of right along it for more than twenty years. The passage was also claimed as an easement of necessity. The trial Judge held that the plaintiff had established the right to use such a pathway and further that he was entitled to it as an easement of necessity. He therefore decreed the suit.

The lower Appellate Court held that the plaintiff had completely failed to establish that he had been using this pathway as of right for the last twenty years and has noted that when it inspected the spot it could not even find a footpath there. As regards easement of necessity the lower Appellate Court held that the plaintiff's fields were surrounded by the fields of other persons as well as by the fields of the defendants and that therefore no question of easement of necessity arose. On these findings it accepted the appeal and dismissed the plaintiff's suit. On second appeal to this Court, the learned Judge accepted the finding of fact that no easement had been established as of right but came to the conclusion that as the plaintiff must have some means of access to his fields and as the land was once shamilat, the law presumed an easement of necessity, giving a right of passage over the defendants' fields to the plaintiff. On this ground he accepted the appeal and held that the plaintiff was entitled to a five feet wide pathway through the defendants' fields, and against this decision this appeal under the Letters Patent has been preferred.

It is correct that this land and other land round about was shamilat in 1869 when it was partitioned. That is a long time ago and the plaintiff has been getting to his fields all that time. In villages as a matter of fact the usual way of getting to fields is through one's neighbours' fields when those fields are vacant and there are only pathways in very few places. In order to give an easement of necessity where a partition has been made of joint property of several persons, the easement must be necessary for enjoying the share of one of the former joint owners. But it is obvious that other land was also shamilat and the persons owning the other land are not parties to this suit, so that it cannot be held that this is the only way along which the plaintiff can go to his fields. Indeed from the plan it is obvious that he can go from other directions, though of course he would then also be going through the fields of other persons. It was held by a Division Bench in A I R 1937 Oudh 263¹ that an easement of necessity is not to be granted merely on the ground of convenience and advantage, but solely on the ground of absolute necessity. Where there are other

ways for ingress and exit, an easement of necessity cannot be claimed merely on the ground that such ways are inconvenient. It is impossible therefore to hold in this case that there is an easement of necessity along the pathway X to T, as claimed by the plaintiffs. Further the partition took place in 1869 and it is now much too late to claim such an easement. For the reasons given we accept this appeal and dismiss the plaintiff's suit with costs throughout.

B.D./R.K.

Appeal allowed.

* A. I. R. 1938 Lahore 801

RAM LALL J.

Chaudhri Fateh Din — Decree-holder
— Appellant.

v.

Diwan Chand and another, Judgment-debtors and another, Decree-holder —
Respondents.

Exn. First Appeal No. 395 of 1937, Decided on 30th May 1938, from order of Senior Sub-Judge, Sialkot, D/- 29th October 1937.

* (a) Civil P. C. (1908), S. 73—Decree by one decree-holder against three persons — Decree by another decree-holder against two of them — Sale in execution of latter's decree — Former decree-holder is entitled to rateable distribution.

For rateable distribution it makes no difference in law that the parties are two in one case and three in the other so long as the same share of the two parties, who are common in both decrees, is sought to be attached. Hence where there is a decree by a decree-holder against three persons and another decree-holder obtains a decree against two of them and a sale is held in execution of his decree, former decree-holder is entitled to rateable distribution in the sale proceeds: *A I R 1926 Bom 150, Rel. on.* [P 802 C 2]

(b) Civil P. C. (1908), S. 73—Sale proceeds held by Sub-Judge, First Class—Senior Sub-Judge can, without intervention of District Judge, transfer case to himself for rateable distribution.

Where sale proceeds are held by the Sub-Judge First Class, the senior Sub-Judge is competent, without intervention of the District Judge, to call for the sale proceeds to his Court to be rateably distributed amongst decree-holders qualified under S. 73: *A I R 1925 Bom 420, Rel. on.* [P 802 C 2; P 803 C 1]

(c) Civil P. C. (1908), S. 73—Order in dispute between rival decree-holders is not appealable.

If an order is made under S. 73 it is an order in execution proceedings and not a decree, being between two rival decree-holders and is therefore not appealable, the judgment-debtor being not concerned with the dispute: *A I R 1915 Cal 658; A I R 1921 Pat 401 and A I R 1931 Bom 252, Rel. on.* [P 803 C 1]

Khawaja Firoz-ud-Din Ahmed —

for Appellant.

Hem Raj Mahajan — *for Respondents.*

1. *Zakia Begam v. Lucknow Improvement Trust*, (1937) 24 A I R Oudh 263=167 I C 414=1937 O W N 252=13 Luck 192.
1938 L/101 & 102

Judgment.—One Ram Rakha Mal obtained a decree on 16th November 1932, against Diwan Chand, his brother Munshi Ram, his son Khairaiti Ram, his father Ramji Das and Munshi Ram's son Walati Ram. So far as Diwan Chand was concerned, his person and property were both liable, but as against the other judgment-debtors they were liable only to the extent of the joint Hindu family property in their hands. An appeal was made to the High Court and the decree was modified on 26th April 1935, reducing the amount of the decree to Rs. 9700 and discharging Walati Ram. During the pendency of the appeal Ramji Das died and his share fell to his heirs. The result therefore was that Diwan Chand was still liable personally and Khairaiti Ram and Munshi Ram only to the extent of the family property in their hands. Ram Rakha Mal took out execution on 18th December 1932, and attached certain houses and shops, but because of the pendency of the appeal in the High Court and because of various objections the execution remained pending and the sale of the attached property was stayed. Ram Rakha Mal after the decision of the High Court applied for the revival of the execution proceedings and for the sale of three quarters of the property, Walati Ram's share having been absolved.

One Fateh Din had also got a decree against Diwan Chand and his son Khairaiti Ram for Rs. 13,000 on 16th November 1935. He sued out execution and half the property of the family was sold on 4th August 1936. At this sale Fateh Din himself purchased the property. On 6th August 1936, the Court of the Sub-Judge, First Class, in whose Court these proceedings were going on, made an order to the effect that the sale had taken place and for objections regarding the illegality of the sale the case was to come up on 3rd October 1936. In the meantime Ram Rakha Mal applied on 21st August 1936 and again on 5th October 1936, that execution proceedings in the Court of the Sub-Judge, First Class, be transferred to the Court of the Senior Subordinate Judge for rateable distribution, as the Court of the Senior Sub-Judge was of higher grade than that of the Sub-Judge, First Class, who was dealing with the execution case of Fateh Din. Fateh Din contested Ram Rakha Mal's prayer for rateable distribution on the ground that the judgment-debtors in the two cases were different as they did not fill the same

legal character and were in fact different legal entities. The records of the case were brought from the Court of the Sub-Judge, First Class, to that of the Senior Subordinate Judge, and on Fateh Din's objection the only issue struck in the case was

whether Ram Rakha Mal decree-holder was entitled to rateable distribution in the sale proceeds realized in the execution of Chaudhri Fateh Din's decree?

The learned Senior Sub-Judge, by his order dated 29th October 1937, held that Ram Rakha Mal could claim rateable distribution in the sale proceeds realized by the junior Court, as the attachment was first made by Ram Rakha Mal, and further that the judgment-debtors in the two decrees were in fact the same. Fateh Din has appealed to this Court through Khawaja Feroze-ud-Din Ahmad and after hearing lengthy arguments in the case the parties took two dates from me on the ground that they wanted to compromise the matter. I acceded to this request on the belief that a compromise would be effected, but the parties have eventually informed me that they have not been able to come to terms, and therefore I proceed to give my decision on the appeal before me.

It appears to me that it makes no difference in law that the parties are two in one case and three in the other so long as the same share of the two parties, who are common in both decrees, is sought to be attached. The judgment-debtors, Diwan Chand and his son Khairaiti Ram, are common in both cases and I am of the opinion therefore that the learned Senior Sub-Judge decided correctly in holding that the proceeds of the sale in the execution of Fateh Din's decree could be made the subject of rateable distribution in this case. In A I R 1926 Bom 150¹ it was decided by a Division Bench of the Bombay High Court that where A obtained a decree against B and C, and in execution attached the property of both, and D, who held a decree against C alone, applied for rateable distribution, D was entitled to claim such rateable distribution in the assets found to belong to the share of C. It was objected on behalf of Fateh Din that the Senior Sub-Judge could not transfer the case to himself without the intervention of the District Judge, but I am of the opinion that it was competent for the Senior Judge

1. Hussain Sahab Haider Sahab v. Babaji Dhonddeo, (1926) 13 A I R Bom 150=93 I C 222=28 Bom L R 78.

to call for the sale proceeds to his Court to be rateably distributed amongst decree-holders qualified under S. 73, Civil P. C., and I am supported in this view by a Division Bench ruling of the Bombay High Court reported in 49 Bom 655.²

The questions decided by the Senior Sub-Judge were in fact one under S. 73, Civil Procedure Code. If the order was made under S. 73, it was an order in execution proceedings and not a decree and was therefore not appealable: see in this connexion 42 Cal 1,³ A I R 1921 Pat 401⁴ and A I R 1931 Bom 252.⁵ It appears to me that the judgment-debtor is not concerned in this dispute between two rival decree-holders and that therefore no appeal lies. Mr. Feroze-ud-Din Ahmad, in the course of his address, urged me to the matter before me as a revision application, if I hold that an appeal was not competent. He based his contention on the grounds, (a) that there was no regular application for execution but merely an application for rateable distribution, (b) that the transfer to the Court of the Senior Sub-Judge should have been through the District Judge, and (c) that his client having set off the sale proceeds against the amount of his decree the proceedings in the Court of the Junior Sub-Judge could not be upset by the Senior Sub-Judge.

So far as (a) is concerned, it is apparent that the application of Ram Rakha Mal for execution was previous in date and that the proceedings, having once been started, continued to remain pending, though because of appeals and objections, the sale proceedings were stayed. In these circumstances in my opinion it was enough to make a prayer for rateable distribution. (b) So far as the transfer of the case without the intervention of the District Judge is concerned, I have already dealt with the matter and held that it was competent to the Senior Sub-Judge to act without the intervention of the District Judge. (c) So far as the question of set off is concerned,

it appears that there was no regular order of set off by the Junior Sub-Judge but merely permission to bid at the auction. It is significant in this connexion to note that on 6th August 1936, the Court did not decide the objections regarding the legality of the sale and in fact made no order to which reference has been made or which I have been able to trace out from the record allowing a set-off as contemplated by O. 21, Rule 72 (2), Civil P. C., wherein the executing Court entered up satisfaction of the decree in question in whole or in part. For the above reasons, I am of the opinion that an appeal in this case was not competent and that there is no good ground shown why I should treat this appeal as a revision application, particularly when Fateh Din has still got his remedy, if any, by way of regular suit. In these circumstances I dismiss the appeal, but, having regard to all the circumstances of the case, I leave the parties to bear their own costs throughout.

D.S./R.K.

Appeal dismissed.

A. I. R. 1938 Lahore 803

DIN MOHAMMAD J.

Firm Daulat Ram-Mohan Dass —

Plaintiff — Appellant.

v.

Firm Vera Mall-Kewal Ram —

Defendant — Respondent.

Second Appeals Nos. 112 and 113 of 1938, Decided on 10th June 1938, from decree of Senior Sub-Judge, Amritsar, D/- 29th October 1937.

Trade-mark—Infringement—Suit for injunction — Principles relating to infringement of trade-marks enunciated — Held that there was no colourable imitation and no deceptive resemblance between goods of plaintiff and those of defendants entitling plaintiff to an order for permanent injunction restraining defendants from using device used by plaintiffs.

The plaintiffs who were manufacturers of black mull had on their goods a device or a trade-mark of their own. The trade-mark consisted of the name of the firm in English at the top followed by a pictorial label containing the picture of a motor-bus with several passengers enjoying a ride therein and a tram-car in the background. Underneath the pictorial label it was given in Devnagri script that the goods were manufactured in India. Below that appeared the numerals "4424" and underneath these numerals were the letters "H R". The last line of the device gave the length of the piece as 24 yards and towards the right there was a seal of the firm. The defendants also started manufacturing black mulls with a device closely resembling that of the plaintiffs; that device also consisted of the name of the firm in English followed by a pictorial label wherein the distinc-

2. Deekappa Malappa Hubli v. Chanbasappa Rachappa, (1925) 12 A I R Bom 420=89 I C 980=49 Bom 655=27 Bom L R 917.

3. Balmer Lawrie & Co. v. Jadunath Banerji, (1915) 2 A I R Cal 658=27 I C 644=42 Cal 1=19 O W N 1202.

4. Mt. Hurmoohi Begum v. Mt. Aysha, (1921) 8 A I R Pat 401=57 I C 421=5 Pat L J 415=1 P L T 296.

5. Navajbhaydu Patil v. Toturam Gobind Patil, (1931) 18 A I R Bom 252=133 I C 737=33 Bom L R 503.

tive feature consisted of motor-car, palm and an iron fencing with green foliage in the background. Their pictorial label also was followed by some words in Devnagri script conveying a similar meaning as those on the plaintiffs' device and the numerals and the letters of the figures showing the measurements of piece were exactly the same. There was also a seal in the corner. The plaintiffs alleged that the device adopted by the defendants was a colourable imitation of their device and prayed for an issue of permanent injunction against the defendants restraining them from using their device, get-up and labels and from passing-off or attempting to pass off their goods as those of the plaintiffs. It was established that the numerals "4424" and the letters "H R" were common to the trade. It was also found that the plaintiffs' goods were not known as 'Motor Chapp'. It was further proved that the plaintiffs' goods were known as "Lal Pagriwala" and that the dealers and customers who were particular in purchasing the goods of one of these firms generally expressed their desire by resorting to those expressions. The characteristic feature of the goods of the two firms was the pictorial label :

Held that there was no colourable imitation and no deceptive resemblance between the goods of the plaintiffs and those of the defendants entitling the plaintiffs to the relief prayed for. The distinctive mark of the plaintiffs had not been copied by the defendants and there was no possibility of illiterate persons confusing the distinctive marks. That having regard to the fact that the plaintiffs came into the market only a few months prior to the institution of the suit, it could not be said that they had acquired a reputation by long user or that their goods were associated in the minds of the customers with the peculiar marks attached to them. That having regard to the fact that the plaintiffs themselves had not been honest in the choice of their device having copied a device used by other traders, no relief could be granted to them. (Principles relating to law of Trade-marks enunciated) : *A I R 1938 Mad 1; 24 Cal 364; A I R 1936 Mad 8; A I R 1934 P C 167; A I R 1937 Lah 186 and 3 Bom L R 220, Applied; Case law discussed.* [P 806 C 2; P 809 C 1]

J. N. Aggarwal — *for Appellant.*

M. C. Mahajan and Yaspal Gandhi —
for Respondent.

Judgment. — This judgment will dispose of Regular Second Appeals Nos. 112 and 113 of 1938. Regular Second Appeal No. 112 has been preferred from Original Suit No. 255 of 1936 while Regular Second Appeal No. 113 has been preferred from Original Suit No. 305 of 1936. In both cases the plaintiffs and the defendants were the same and so were the causes of action. It was alleged at the Bar that there was some difference in the allegations made by the plaintiffs in the two cases but a close reading of the plaints shows that the allegations are practically the same and both cases will therefore be disposed of together. They relate to a matter which in English law is known as "passing-off".

It was alleged by the plaintiffs that they were dealing in piecegoods and had their own dyeing and bleaching mills at Bombay wherefrom black mulls were being manufactured with a device or a trade-mark of their own. This trade-mark consists of the name of the firm in English at the top followed by a pictorial label containing the picture of a motor-bus with several passengers enjoying a ride therein and a tram-car in the background. Underneath the pictorial label it is given in Devnagri script that the goods have been manufactured in India. Below this appear the numerals "4424" and underneath these numerals are the letters "H R". The last line of this device gives the length of the piece as 24 yards and towards the right there is a seal of the firm. The defendants had also started manufacturing black mulls with a device closely resembling that of the plaintiffs. That device also consists of the name of firm in English followed by a pictorial label wherein the distinctive feature consists of a motor-car, a palm and an iron fencing with green foliage in the background. This pictorial label too is followed by some words in Devnagri script conveying a similar meaning as those on the plaintiffs' device, and the numerals, the letters and the figures showing the measurements of the piece are exactly the same. A seal has also been placed in the corner. It was averred that the device adopted by the defendants was a colourable imitation of the device of the plaintiffs and, as it was not permissible under the law to do so, the plaintiffs asked for the issue of a permanent injunction against the defendants restraining them from using their device, get-up and labels and from passing off or attempting to pass off their goods as those of the plaintiffs. It was further prayed that an order be issued directing the defendants to deliver the goods bearing their labels to the plaintiffs. In Suit No. 255 an additional prayer was made in the alternative that the defendants be enjoined to destroy their goods and also called upon to account for the sales made by them.

Both these cases were tried together and the principal issues framed in both cases were the same. The Subordinate Judge came to the conclusion that though the get-up was practically the same in both cases and it was possible for an unwary purchaser to confuse the goods of the defendants with those of the plaintiffs, yet the goods of the plaintiffs were not known as

'Motor Chhap' and that inasmuch as the numerals, letters and figures, etc. were common to the trade and the plaintiffs' label was itself an imitation of the labels of other traders, the plaintiffs were not entitled to any relief. On appeal, the Senior Subordinate Judge practically endorsed the conclusions of the trial Judge and dismissed the appeals. The plaintiffs have appealed. It is obvious that there is no statute of civil law in India which governs this matter. The only provision of law which expressly deals with the subject to some extent is S. 486, I. P. C., which punishes the selling, etc. of any goods with a counterfeit trade-mark or property mark. In the domain of the civil law the only reference to this subject is contained in Illus. (w) attached to Sec. 54, Specific Relief Act, which runs as follows :

A improperly uses the trade-mark of *B*. *B* may obtain an injunction to restrain the user, provided that *B*'s use of the trade-mark is honest.

The rest of the law on the subject is derived from English law and in the discussion of these cases it will therefore be necessary to refer to the principles deducible from the English authorities on the subject. In Kerly on Trade Marks "passing-off" has been defined as meaning 'to represent for trading purposes that the goods of one person are those of the other,' and it is added that it is immaterial whether the representation is effected by direct statements, or by using some of the badges by which the goods of the plaintiff are known to be his, or any badges colourably resembling these, in connexion with goods of the same kind, in such manner as to be calculated to cause the goods to be taken by ordinary purchasers for the goods of the plaintiff (p. 544). At p. 546 it is said that the basis of a passing off action being a false representation by the defendant, it must be proved in each case as a fact that the false representation was made. In cases where the representation is implied in the use or imitation of a mark, or get-up with which the goods of another are associated in the minds of the public, the point to be decided is whether, having regard to all the circumstances of the case, the defendant's use of such mark or get-up is calculated to deceive. No action however lies for passing off the defendant's goods as similar to those of the plaintiff, even though the statement is untrue and injurious to the plaintiffs (p. 552). Where the charge is one of indirect misrepresentation

of the sort indicated above, the onus is cast upon the plaintiff in the first place to show that the things copied or imitated are reputed in the market to denote a connexion between himself and the goods; and in a label or get-up in which there is common matter, the plaintiff must show that the defendant has taken something that is distinctive of the plaintiff's goods (p. 558). Where the existence of repute is not shown the action cannot succeed (p. 559).

In the matter of colourable imitation there can be no infringement in cases where the plaintiff's mark is not actually copied, if there is no reasonable probability of deception (p. 459). The probable purchasers are to be considered in the decision of this question, not merely very careful or intelligent persons but ordinary unwary purchasers (p. 462). It may however be added that those purchasers should not be unusually stupid people, fools or idiots (p. 268). The admissible defences to a passing off action include the assertion that there is no infringement, as well as the contention that the plaintiff is debarred from suing the defendant for all or part of the relief he seeks by, among other things, his own trade being fraudulent or his trade-mark being deceptive (p. 468).

It is presumably in reference to this defence that Illus (w) to Sec. 54, Specific Relief Act, appears to have been incorporated in the Act. The Court in such cases will not interfere to protect the use of a deceptive trade-mark, or to assist the trader who is using his mark for the purposes of a fraudulent trade (p. 486). A mark which so nearly resembles another mark as to be calculated to deceive is not allowed to be used (p. 254). The law on the subject was summed up by Parker J. in a case involving the comparison of the two words as follows :

You must take the two words. You must judge of them, both by their look and by their sound. You must consider the goods to which they are to be applied. You must consider the nature and kind of customer who would be likely to buy those goods. In fact, you must consider all the surrounding circumstances If considering all those circumstances, you come to the conclusion that there will be a confusion then you may refuse the registration, or rather you must refuse the registration in that case.

An imitation of the mark which is calculated to deceive is known as deceptive resemblance. If some parts of the mark are common, it is necessary to consider whether people who know the distinguishing characteristics of the opponent's marks

would be deceived (p. 268). But if the only resemblances between the two marks are in parts which are common, so that the owner of the one has taken nothing which is peculiar to the other, then there is at all events no infringement, at any rate unless the plaintiff had a distinctive arrangement of the common elements. As remarked by Lindley, M. R.,

when what is called the plaintiff's get-up consists of two totally different things combined, namely a get-up common to the trade and distinctive feature affixed, or added to the common feature, then what you have to consider is not whether the defendant's get-up is like the plaintiff's as regards the common features, but whether that which specially distinguishes the plaintiff's has been taken by the defendant. The defendant may take it more or less But if he so nearly takes it that when you look at it as a whole you can say that the defendant's goods are calculated to be taken for the plaintiff's goods when properly looked at, then the plaintiff is entitled to succeed (pp. 273-274).

In comparing the marks therefore, regard must be had not only to their form but also to the appearance they would present in actual use when fairly and honestly used (p. 277). The resemblance between two marks must be considered with reference to the ear as well as to the eye (p. 275). Expert evidence as to the circumstances usually attending the sale of the goods in the particular trade, and as to the ordinary class of customers served, their intelligence and education, what they particularly look for in purchasing the plaintiff's goods, and such like matters is admissible. The Judge can in the end act upon his own view on a comparison of the marks, having regard to the matters of fact referred to above (p. 293).

As to how these principles have been applied to cases coming before the Courts in England, the following illustrations taken from the discussions headed "Contrasted Devices" (pp. 295-300) will suffice. The following resemblances were not considered actionable: (1) A woman's head wearing a helmet with Athena beneath and a man's head with way beneath. (2) A tobacco pipe and dart as contrasted with a tobacco pipe alone. (3) A red deer's head and a moose's head. (4) A sphinx in combination with Egyptian scenery and a sphinx in a different position. (5) A label of which a signature was claimed as the essential feature as contrasted with the label similar in structure, but having the defendant's name prominently upon it. (6) Device of a black cat on a globe and the device of a black cat standing behind a cir-

cular device. (7) Defendants' device of an ox-cart and plaintiffs' device of an ox-cart. (8) "99" and words "double nine" as against "999".

It is well settled that the question of the relative excellence of the plaintiff's and the defendant's goods is not relevant to the right of the plaintiff to maintain an action either for infringement or for passing-off (p. 446). It has always to be determined as a matter of fact as to what are the characteristic features of the plaintiffs' trade mark and on these statements by the plaintiffs in advertisements or the evidence of trade witnesses is material. It is not an infringement to take non-essential particulars from a mark (p. 457). Marks common to the trade cannot be a 'trade-mark' (p. 38).

I have now to examine the cases before me in the light of the principles enunciated above. It is reliably established that the numerals '4424' and the letters 'H R' are common to the trade. It has also been found as a fact, which finding is not open to be disturbed in second appeal, that the plaintiffs' goods are not known as 'Motor Chhap'. It is further proved that the plaintiffs' goods are known as 'Lal Pagriwala' and the defendants' as 'Pili Pagriwala', and that the dealers and customers, who are particular in purchasing the goods of one of these firms generally express their desire by resorting to these descriptions. It is also patent that the characteristic feature of the goods of these two firms is the pictorial label bearing, in the plaintiffs' case, the combined picture of a motor bus with joy riders and a tram and, in the case of the defendants' goods, of a motor car with a different background. Obviously therefore the distinctive mark of the plaintiffs has not been copied by the defendants, and even if we take into consideration the illiteracy of the customers for whom these goods are designed, it cannot be argued that such illiterate persons cannot distinguish a riderless car of a different size and make from a motor-bus with a dozen of riders. There is therefore in my view no colourable imitation and no deceptive resemblance entitling the plaintiffs to the relief prayed for.

It is common ground that the plaintiffs came into the market in September 1935, i. e. hardly a few months before the institution of the present suits. It cannot be said therefore that they have acquired a reputation by long user or that their goods are associated in the minds of the custo-

mers with the peculiar marks attached to them. Counsel for the appellants has referred to 6 Rang 221,¹ 16 Lah 114,² 9 Lah 487,³ (1887) 36 Ch D 1,⁴ (1921) 2 Ch D 583,⁵ A I R 1935 Bom 101⁶ and A I R 1938 Sind 38,⁷ but, in my view, none of these decisions helps them in the least.

In 6 Rang 221¹ the plaintiffs sued the defendants to restrain them from using labels for matches of local manufacture bearing five red stars, alleging that they closely resembled in form, colour and general get-up, the plaintiffs' various star labels on their imported Sweedish matches. The plaintiffs claimed that their labels were known throughout Burma, in English, as the "Star Mark," in Hindustani as "Tara Marka" and, in Burmese as "Kyee tazeik," and that the defendants' matches were likely to be called by the same name. It was found that the plaintiffs had been using their labels in Burma for some six months or more ere the defendants introduced their mark. It was held by a Division Bench of the Rangoon High Court that the plaintiffs had not established a right to restrain everybody from using a design for matches in which any number of stars is a distinctive mark, and that their case as to colourable get-up failed entirely. This case, therefore instead of supporting the plaintiffs, in my view, goes to the root of their case.

16 Lah 114² was a case under S. 486, I. P. C., and being based on the wording of a particular statute would in the main be irrelevant, but even otherwise the observations made therein do not advance the plaintiffs' case any further. It merely lays down the general principles which have been enunciated above. In 9 Lah 487³ the

main question involved was the abandonment of a trade mark and it is not clear as to how it helps the plaintiffs in the present case. In (1887) 36 Ch D 1⁴ at page 5 the question arose as to the similarity of two tablets between which there was a strong general resemblance and Cotton L. J. remarked that, even though there may be no monopoly at all in the individual things, yet if they were so combined by the defendants as to pass off the defendants' goods as the plaintiffs', then the defendants had brought themselves within the old common law doctrine in respect of which equity will give to the aggrieved party an injunction in order to restrain the defendants from passing off their goods as those of the plaintiffs. The principle in the abstract no doubt holds good but the question is as to its application to the case before us. In (1921) 2 Ch Dn 583⁵ at page 588, it was remarked by Lawrence J.:

Now it has often been said that it is wrong, in judging whether a combination mark is distinctive or not, to dissect the mark and to show that each of its component parts is not distinctive in itself and then, as the result of this process, to conclude that the mark as a whole is not distinctive.

This may be so, but as stated above, the only thing that is uncommon to the trade in the plaintiffs' device is the pictorial label and the defendants' label is clearly different from that of the plaintiffs. In A I R 1935 Bom 101⁶ it was laid down that in actions for infringement of trade-mark the plaintiff has to prove that his goods are known to the public by some distinct name, mark, badge, get-up or appearance, and that the defendant's use or imitation of the same is likely to mislead the public into a belief that the defendant's goods are those of the plaintiff, and the mark must have been used or employed long enough to render it probable that a reputation in the market has been acquired. The principle stated as it is goes against the plaintiffs' contention. In A I R 1938 Sind 38⁷ it was remarked that fraud has to be presumed where the similarity is close and remains unexplained, the surrounding circumstances of which will have to be considered in order to determine whether the defendant's mark is or is not a colourable imitation of the plaintiff's mark. It is not only necessary to look at the difference or at the resemblance between two given marks but it is necessary to compare the two marks as a whole and then come to a decision and the question whether the alleged

1. Adamjee Hajee Dawood & Co. v. Swedish Match Co., (1928) 15 A I R Rang 210=110 I C 905=6 Rang 221.

2. Fakir Chand v. Emperor, (1934) 21 A I R Lah 687=1934 Cr C 1005=155 I C 270=16 Lah 114=36 Cr L J 776=35 P L R 749.

3. Noor Illahi Maqbul Illahi v. R. J. Wood & Co., (1928) 15 A I R Lah 924=113 I C 228=9 Lah 487=29 P L R 615.

4. Lever v. Goodwin, (1887) 36 Ch D 1=57 L T 583=36 W R 177.

5. In re Diamond T. Motor Car Co., (1921) 2 Ch D 583=90 L J Ch 508=38 R P C 373=66 S J 36.

6. Anglo Indian Drug & Chemical Co. v. Swastik Oil Mills Co. Ltd., (1935) 22 A I R Bom 101=155 I C 641=59 Bom 373=36 Bom L R 1165.

7. Hiranand Lal Chand v. Sardar Mehar Singh Sadhusingh, (1938) 25 A I R Sind 38=173 I C 930.

colourable imitation has or has not deceived anybody is to be decided with reference to the ultimate purchaser. In passing-off cases the probability of misleading, not experts or persons who know the real facts but ordinary or unwary customers, is the mischief to be guarded against; non-deception of middlemen and vendors is immaterial. The propositions of law enunciated here are based on English decisions and are not open to any objection, but in my view to the facts of the present case they are not applicable. Counsel for the respondents has drawn my attention to A I R 1938 Mad 1,⁸ 24 Cal 364,⁹ A I R 1936 Mad 8,¹⁰ A I R 1934 P C 167¹¹ and A I R 1937 Lah 186.¹²

In A I R 1938 Mad 1⁸ it was held by a Division Bench that in India there are no statutory enactments of the nature of the trade-mark which have been passed in England and relief here can only be granted on the ground that the defendant has done something which is calculated to deceive. It is essential in a passing-off action to show that there has been a false representation. It is not enough for a plaintiff to claim that he has adopted the device as a trade-mark and that the defendant has copied this device or used one so like it that deception is probable. The plaintiff must show that he has used the mark claimed by him in his goods or in connexion with them and that the mark had become associated in the minds of the public with his goods. In the present case the evidence as remarked above is to the contrary. The plaintiffs' own witnesses have stated that their goods are known as "Lal Pagriwala" and that if any customer or dealer intends to purchase the plaintiffs' goods, he is never deceived.

In A I R 1924 Cal 364¹³ it was remarked that the question of the right to the exclusive use of a trade mark must depend upon whether the evidence in the case is

sufficient to show such an association or connexion between a mark and the firm which used it as to indicate to the ordinary purchasers in the market that the goods are the goods of that particular firm. The rights to exclusive user of a name or a number as a trade-mark is not an absolute and unqualified right which would entitle the owner to prevent another person from using it under all circumstances. There must be a reasonable probability of purchasers being deceived; it is not enough to show the mere possibility of deception.

In A I R 1936 Mad 8¹⁰ it was held that before a dealer can restrain another from using a name or mark, it is not sufficient to show that the article with that name or mark has acquired a reputation in the market, but it must also be shown that the public have grown to associate that particular name or mark with himself as the manufacturer of or dealer in that article. Where there is absolutely no evidence to establish any such association in the public mind between the plaintiff's business and the goods bearing the mark in question, the suit must fail. It is not necessary to repeat that in the present case no such association has been established that the concurrent finding of the Courts below is against the plaintiffs on this matter.

It is quite probable, as suggested by both Courts, that the plaintiffs' goods if at all associated in the minds of the public with any particular mark, were so associated with the mark "Tram Chhap" or "Lal Pagriwala" as stated above and consequently the adoption of a pictorial label with a motor car is not intended to deceive the public.

In A I R 1934 P C 167¹¹ their Lordships observed that in an action for infringement of trade mark, in the absence of evidence of actual confusion, a strong case must be made to justify a conclusion that confusion will result from what the defendants are doing. It is true that the Senior Subordinate Judge has remarked in this case that confusion is likely to arise in the minds of the intending customers, but in the first place his conclusion is vitiated by the fact that it is not based on evidence which on the whole leads to a contrary conclusion, and, secondly, I am not prepared to agree with him that, even in the mind of an illiterate customer, a motor car with a peculiar background of its own can ever be confused with a motor bus with a different background. Much stress has been laid on

8. Meera Sahib & Bros. v. Hajee M. Abdul Azeez Sahib, (1938) 25 A I R Mad 1=174 I C 262= I L R (1938) Mad 466.

9. Barlow v. Gobind Ram, (1897) 24 Cal 364=1 C W N 281.

10. Batachayi Rowther v. Ramaswami Pillai, (1936) 23 A I R Mad 8=160 I C 428.

11. Malayah Tobacco Distributors Ltd. v. United Kingdom Tobacco Co. Ltd., (1934) 21 A I R P C 167=150 I C 229 (P O).

12. R. J. Wood & Co. v. Firm Kanshi Ram-Hans Raj, (1937) 24 A I R Lah 186=172 I C 553= 39 P L R 317.

13. Gopal Chandra v. Kadambini Dasi, (1924) 11 A I R Cal 364=78 I C 285.

the fact that the lines above and below the pictorial label written in English and Devnagri script respectively, combined with numerals and letters, tend to create a confusion in the mind of an illiterate purchaser, but I am not inclined to agree with this proposition. To an illiterate person letters and figures convey no meaning and they leave no such impression on his mind as can be said to last. Such minds are attracted by the picture alone and the picture, as remarked above, is entirely different in the two cases. There is no such strong case made out therefore as is envisaged in the Privy Council judgment.

In A I R 1937 Lah 186,¹² it was decided that nobody has any exclusive right or ownership in any mark alone, unless that mark is associated by use with a particular description of goods manufactured by him. It is open to a party claiming a right in a particular mark to establish that it had been so identified and associated with its products that its name would suggest itself to a purchaser on seeing it on any other allied product. The evidence of such association in this case is practically nil.

It will appear therefore that the authorities cited on behalf of the respondents fortify me in the conclusions at which I have arrived above.

The only other question that remains to be considered is whether the plaintiffs themselves have been honest. As remarked above both the Courts below have found against them on this point and there is abundant evidence on the record to show that the bus and tram used by the plaintiffs are used by different traders individually on their own goods and that the combination of the two is in itself fraudulent. In the view of the case that I have taken it is not necessary to dilate further on this matter inasmuch as in my opinion the distinctive features of the two devices are quite different from each other; but, even if it were necessary to come to a finding on this point, I would endorse the concurrent finding of the Courts below, and it is obvious that in the face of that finding no relief can be granted to the plaintiffs. The authority, 3 Bom L R 220,¹⁴ relied upon by the trial Judge, is in point and so is the Illustration (w) to S. 54, Specific Relief Act. I accordingly affirm the decision of the Court below and dismiss

these appeals. In view however of the peculiar circumstances of the case I leave the parties to bear their own costs throughout.

R.M./R.K.

Appeals dismissed.

A. I. R. 1938 Lahore 809

DIN MOHAMMAD J.

Ahsan Elahi—Defendant — Appellant.

v.

*Alla-ud-Din, Plaintiff and others,
Defendants — Respondents.*

Second Appeal No. 410 of 1938, Decided on 28th June 1938, from decree of Senior Sub-Judge, Rohtak, D/- 28th January 1938.

(a) Bengal Land (Redemption and Foreclosure) Regulation (17 of 1806), S. 8—Mortgage without possession — Possession cannot be claimed—Foreclosure—No limitation for foreclosure.

Where the mortgage is without possession, the mortgagee is not entitled in law to sue for possession as such. His only remedy lies in taking foreclosure proceedings under the Regulation and for that purpose no limitation is prescribed: *A I R 1926 Lah 302 and A I R 1918 Lah 198, Ref.*

[P 810 C 1]

(b) Practice — Abandonment of objection — Argument not convincing — It does not mean that point is abandoned.

Where an order of a Court shows that arguments were offered on a particular objection but that they were unconvincing, it is not tantamount to the abandonment of the point. [P 810 C 2]

(c) Bengal Land (Redemption and Foreclosure) Regulation (17 of 1806), S. 8 — Suit for possession by mortgagee as owner—He must show that foreclosure proceedings were in order.

The application of Regulation is very strict and a mortgagee who relies upon it is bound to show that the proceedings were quite in accordance with S. 8. And a mortgagee or his representative is not entitled to bring a suit for possession on the basis of ownership if there has been an irregularity in the foreclosure proceedings: *11 Cal 111 (P C) and A I R 1924 Lah 176, Foll.* [P 810 C 2; P 811 C 1]

Shamair Chand — for Appellant.

F. C. Mittal — for Respondent

(Plaintiff).

Judgment.—The facts of the case out of which this appeal has arisen are these. On 10th March 1891, Musharaf Ali, father of Ishrat Ali, mortgaged half of his house to one Ganga Sahai, father of Ram Sarup, for Rs. 300. The mortgage was however without possession. The limit of time fixed for redemption in the mortgage deed was a year and a half. This period expired on 10th September 1892, but no redemption had taken place until then. Nothing further happened in connexion with this mortgage until 1st October 1934, when Ram Sarup transferred his rights to one

¹⁴ *Abdul v. Mahomed Ali*, (1901) 3 Bom L R 220.

Alla-ud-Din for Rs. 200. On 10th July 1935, Ishrat Ali transferred his rights to Ahsan Ilahi for Rs. 300. On 31st July 1935, Alla-ud-Din applied to the District Court for proceedings under Regn. 17 of 1806. The Judge issued the necessary notices. Ishrat Ali was served on 12th August while Ram Sarup on 15th August. There is no notice on the record which was issued to Ahsan Ilahi but he did appear and put in his written statement challenging, inter alia, the right of Alla-ud-Din to take foreclosure proceedings. No decision was however given on the points raised by Ahsan Ilahi as none is contemplated by the Regulation. The foreclosure proceedings terminated on 30th August. On 13th October 1936, Alla-ud-Din instituted the present suit against Ishrat Ali, Ram Sarup and Ahsan Ilahi, for possession of the property under mortgage on the basis of ownership. Various defences were set up by the principal contesting defendant, Ahsan Ilahi, but they did not find favour with the Additional Subordinate Judge who tried the suit. He accordingly granted Alla-ud-Din a decree in terms of the relief prayed for. His judgment having been upheld on appeal, Ahsan Ilahi has made an appeal to this Court.

It is contended on behalf of the appellant that the suit was time-barred and that at any rate the plaintiff was not entitled to any decree inasmuch as the foreclosure proceedings on which the suit is based were irregular and hence invalid in the eye of the law. So far as the question of limitation is concerned, I consider that the matter is concluded by authority. As stated above, the mortgage was without possession and consequently the mortgagee was not entitled in law to sue for possession as such. His only remedy lay in taking foreclosure proceedings under the Regulation and for that purpose no limitation is prescribed. The suit having been lodged within 12 years of those proceedings is consequently well within time: see 93 I C 688¹ and 79 P R 1918.² The appellant has drawn my attention to 94 P R 1912,³ but there also, as appears from the body of the judgment, the mortgagee was

entitled to immediate possession from the date of the mortgage.

In the question of the invalidity of foreclosure proceedings however, the appellant is on firm ground. Counsel for the respondent has urged that this objection was abandoned before the Senior Subordinate Judge, but from his order it does not appear that it is so. The Senior Subordinate Judge no doubt remarks that "the point of invalidity of proceedings under the Regulation though taken up in the memorandum of appeal was not stressed in arguments"; but at the same time he adds that "nothing was shown as to how these proceedings were irregular," which evidently means that arguments were offered on this point but they were unconvincing and this is not tantamount to the abandonment of the point as remarked by the Senior Subordinate Judge. In the memorandum of appeal to this Court the objection is repeated once more and that clearly indicates that the point was not given up before the Senior Subordinate Judge. The Courts have been very stringent in the matter of the application of Regn. 17 of 1806, and a mortgagee who relies upon it is bound to show that the proceedings were quite in accordance with S. 8 of Regn. 17 of 1806. In 11 Cal 111⁴ the headnote reads as follows:

The Provisions of S. 8 of Regn. 17 of 1806 are not merely directory, but imperative, prescribing conditions precedent to the right of the mortgagee to enforce forfeiture of the estate of the mortgagor, and have for their object the protection of mortgagors from fraud. The prescribed procedure must be strictly followed. "Held, that although the mortgagor at the hearing of the foreclosure suit in the Court of first instance had not insisted on the insufficiency of the notification of the mortgagee's application to foreclose, but had relied on another defence, this could not be construed as a binding admission that notice had been duly given; that service of the copy of petition for foreclosure, and of the parwana signed by the Judge was essential; and that the mortgagor was not precluded from questioning the regularity of the proceedings in his subsequent appeal".

Similarly in A I R 1924 Lah 176⁵ a Division Bench of this Court composed of Martineau and Brasher JJ., observed:

It is settled law that the Court will not presume that all the formalities required by Regn. 17 of 1806 in proceedings for foreclosure have been observed, but the mortgagee must prove affirmatively the due performance of every necessary condition. . . . It is argued for the appellant that as Singhu appeared in Court in 1894 and admitted

1. *Sardarmal v. Gangaram*, (1926) 13 A I R Lah 302=93 I C 688.

2. *Ratandas v. Mt. Guran*, (1918) 5 A I R Lah 198=45 I C 563 = 79 P R 1918 = 25 P L R 1918.

3. *Nand Lal v. Gujar*, (1912) 94 P R 1912 = 15 I C 275=237 P L R 1912=178 P W R 1912.

4. *Madho Persad v. Gajadhar*, (1885) 11 Cal 111 = 11 I A 186 (P O).

5. *Munshi Ram v. Nauranga*, (1924) 11 A I R Lah 176=72 I C 575.

the receipt of the notice and took no objection to its validity it may be presumed that the notice fulfilled the requirements of the Regulation, but we cannot agree with the contention. Singhu may not have read the notice and he may even have been illiterate. At any rate, the mere fact of his raising no objection to the validity of the notice does not warrant the presumption that the notice fulfilled all the necessary conditions. The notice is unfortunately not forthcoming, and this fact makes it impossible for the appellant to prove that all necessary formalities were observed. We recognize the difficulty of his position, but we are unable to hold that the non-existence of the notice relieves him of the burden of proving that the notice satisfied the requirements of Regn. 17 of 1806. It was in fact held in 46 P R 1907⁶ that the non-existence of the notice was fatal to the validity of the foreclosure proceedings. We must therefore decide that as the defendant had not shown that the foreclosure proceedings in 1894 fulfilled the requirements of Regulation, the mortgage subsists.

That case is on all fours with the present case inasmuch as here also the notice that issued to Ahsan Ilahi is non-existent, and reliance is being placed on the statement made by him as a witness admitting its receipt. Sitting as a single Judge, I am bound to follow that decision, supported as it is by the judgment of their Lordships of the Privy Council. I accordingly hold that the mortgagee or his representative was not entitled to bring a suit for possession on the basis of ownership on account of the irregularity of the foreclosure proceedings and that his suit as lodged must fail. It is true that in the case relied on, it was held that the mortgage subsisted, but no such finding can be recorded here, as apart from the fact that the circumstances of this case are different, the question of the subsistence of the mortgage has not been thrashed out between the parties. I accordingly accept the appeal and dismiss the plaintiff's suit with costs throughout.

B.D./R.K. *Appeal dismissed.*

6. Sochet Singh v. Dial Singh, (1907) 46 P R 1907.

* A. I. R. 1938 Lahore 811

SKEMP J.

Hayat Mohammad — Defendant —
Appellant.

v.

Bar Gaushala Ltd., Lyallpur —
Plaintiff — Respondent.

Second Appeal No. 334 of 1938, Decided on 5th July 1938, from decree of Senior Sub-Judge, Lyallpur, D/- 23rd December 1937.

* Civil P. C. (1908), S. 11 — Decision of Small Cause Court on title in suit for rent is not res judicata in subsequent regular suit for rent and ejectment.

The general rule is that where S. 11 can be applied, it must be applied, and the general principles of res judicata can only be invoked where S. 11 is silent : 29 Cal 707 (P C); A I R 1933 Lah 551; A I R 1933 Lah 646 and A I R 1926 Lah 670, Rel. on ; A I R 1921 P C 11 and A I R 1922 P C 80, Ref. ; A I R 1926 Lah 603, Expl.

[P 812 C 1]

There is one apparent exception to the rule that the first Court must be a Court competent to try the subsequent suit, and that is where the first Court is a Court of exclusive jurisdiction, its decision on any matter on which it has exclusive jurisdiction is binding on the other Court. An instance of this is a decision by a Revenue Court on a matter on which it has exclusive jurisdiction : A I R 1929 Lah 586 and A I R 1932 Lah 623, Rel. on.

[P 812 C 2]

Similarly, if a Small Cause Court decides a matter on which it has exclusive jurisdiction, then that decision is binding on subsequent Courts : A I R 1926 Sind 236 ; A I R 1934 Sind 112 and A I R 1937 Lah 346, Rel. on. [P 813 C 1]

In a suit for rent the Small Cause Court has no exclusive jurisdiction to decide the question of title. Hence the decision of Small Cause Court on title in suit for rent cannot be res judicata in the subsequent suit for rent and for ejectment, because the prayer for ejectment takes the suit away from the jurisdiction of the Court of Small Causes : A I R 1937 Lah 346, Disting. ; A I R 1934 Lah 324 and A I R 1924 Bom 454, Rel. on.

[P 813 C 2]

Abdul Karim — for Appellant.

J. L. Kapur — for Respondent.

Judgment.—The plaintiff, the Bar Gaushala Ltd., Lyallpur, sued Hayat Mohammad, defendant, for Rs. 72-14-0, house rent, and also sought his ejectment from the house. The trial Judge found that the plaintiff had not established its title to the house in suit, that this was not immediately relevant and all that was necessary to find was that the defendant was not a tenant of the plaintiff. Accordingly the trial Judge dismissed the suit. On appeal the learned Senior Subordinate Judge said : "I am in general agreement with the view taken by the lower Court so far as the merits of the case are concerned." He gave some reasons for this, but held relying on A I R 1937 Lah 346¹ that the suit was res judicata, because in a previous suit for rent Lala Chhakan Lal, Judge of the Small Cause Court, had found that the defendant was a tenant of the Gaushala and had ordered him to pay Rs. 72 as rent. The second appeal of Hayat Mohammad has been ably argued by Mr. Abdul Karim. I will say at once that the view of the learned Senior Subordinate Judge as to the application of res judicata is wrong. The facts of A I R

1. Ishwar Dutt Churamani v. General Assurance Society Ltd., (1937) 24 A I R Lah 346=174 I C 761.

1937 Lah 346¹ are different from the facts of the present case. On the other hand, it has been twice specifically laid down in 48 Bom 541² and in A I R 1934 Lah 324³ that the decision of a Small Cause Court on a question of title is not *res judicata* or binding in a regular suit. The point at issue in the present appeal is the application of S. 11, Civil P. C., in particular the words "in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised." The learned lower Appellate Judge said in his judgment:

Under S. 11 the finding in the previous suit would have operated as *res judicata*, if the first Court had jurisdiction to try the subsequent suit. That Court had obviously no jurisdiction to try a suit for ejectment of a tenant. S. 11 therefore was not applicable, but since the provisions of the Civil Procedure Code are not exhaustive, the matter must be held to be *res judicata* on general principles independently of S. 11.

Now, the general rule is that where S. 11 can be applied, it must be applied, and that general principles of *res judicata* can only be invoked where S. 11 is silent. In 29 Cal 707⁴ at p. 715, their Lordships of the Privy Council said :

The essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction.

In 48 Cal 499⁵ their Lordships following a previous judgment of their own, 11 I A 37,⁶ applied *res judicata* in an administration suit to which the terms of S. 11 did not apply. Similarly in 45 Mad 320⁷ they applied it to a dispute as to the title to receive compensation which had been referred to the Court, to which S. 11 also did not apply. A Division Bench of this Court took the matter further in 8 Lah 15,⁸ where Fforde J. said :

The plea of *res judicata* is not confined to the provisions of S. 11, Civil P. O., but may be invoked under general principles of law.

2. Rukmini Vithu v. Rayaji Dattatraya, (1924) 11 A I R Bom 454=83 I C 45=48 Bom 541=26 Bom L R 672.

3. Champat v. Joti Ram, (1934) 21 A I R Lah 324=150 I C 17=36 P L R 64.

4. Gokul Mandar v. Pudmanund Singh, (1902) 29 Cal 707=29 I A 196=6 O W N 825 (P O).

5. G. H. Hook v. Administrator-General of Bengal, (1921) 8 A I R P C 11=60 I C 631=48 Cal 499=48 I A 187 (P O).

6. Ram Kirpal v. Rup Kuari, (1886) 6 All 269=11 I A 37=1886 A W N 286 (P C).

7. Ramchandra Rao v. Ramchandra Rao, (1922) 9 A I R P C 80=67 I C 408=45 Mad 320=49 I A 129 (P O).

8. Sahibzudl Begum v. Mahomed Umar, (1926) 18 A I R Lah 608=96 I C 1002=8 Lah 15=27 P L R 504.

This was dissented from by two other Division Benches of this Court in 14 Lah 369⁹ and 14 Lah 437.¹⁰ In 14 Lah 369⁹ Tek Chand J. after quoting 29 Cal 707,⁴ criticized 8 Lah 15⁸ and said :

As regards matters which are specifically provided for in the Code, the Courts are bound to limit the operation of the rule in accordance with the phraseology used by the Legislature, and have no power to ignore the express provisions of the Statute in order to give effect to the general principles of law.

This judgment was approved by another Bench in 14 Lah 437¹⁰ which said :

The general rule of *res judicata* which exists apart from the provisions of S. 11 . . . can be resorted to only in those cases which do not strictly fall within the four corners of S. 11, and held that for the decision in a former case to be *res judicata* in a subsequent suit, the Court which tried the former suit must be competent to try the subsequent suit. A I R 1926 Lah 670¹¹ is also to the effect that general principles of *res judicata* cannot be extended to cases which are within the terms of S. 11. I am in respectful agreement with the three rulings last mentioned, but would observe in passing that although 8 Lah 15⁸ does not lay down the law correctly, I think the decision was correct on its particular facts. Fforde J. said :

Had the question of the superior claim of Mt. Nasir Begum and Mt. Wazir Begum been raised in the previous suit, Mohammad Umer could not have succeeded in establishing his claim to a portion of Mt. Abadi Begum's property. Having acquired an interest in some of the property upon a suppression of the fact that there were other persons with a superior right to it, he cannot now use that fact to defeat a claim for partition of another portion of the same estate.

Apparently then the case could have been decided on broader principles of estoppel without invoking estoppel by *res judicata*. There is one apparent exception to the rule that the first Court must be a Court competent to try the subsequent suit, and that is where the first Court is a Court of exclusive jurisdiction, its decision on any matter on which it has exclusive jurisdiction is binding on the other Courts. An instance of this is a decision by a Revenue Court on a matter on which it has exclusive

9. Fazul Hussain v. Jiwan Shah, (1933) 20 A I R Lah 551=141 I C 454=14 Lah 369=34 P L R 196.

10. Kapurli v. Gangadevi, (1933) 20 A I R Lah 646=146 I C 880=14 Lah 437=34 P L R 817.

11. Nathu Mal Manohar Lal v. Lachhmi Narain Gauri Shankar, (1926) 18 A I R Lah 670=96 I C 910.

jurisdiction: see A I R 1929 Lah 586,¹² a Letters Patent appeal, and A I R 1932 Lah 623.¹³ Similarly if a Small Cause Court decides a matter on which it has exclusive jurisdiction, then that decision is binding on subsequent Courts: see A I R 1926 Sind 236,¹⁴ A I R 1924 Sind 112¹⁵ and A I R 1937 Lah 346.¹ I think this exception is only apparent because S. 11, Civil P. C., does not consider or refer to matters tried by a Court of exclusive jurisdiction. In A I R 1926 Sind 236¹⁴ one party sued in the Small Cause Court at Amritsar and obtained an ex parte decree. Subsequently the other party sued on the same agreement before the Small Cause Court, Karachi and although the Small Cause Court at Amritsar had jurisdiction only up to Rupees 500 whereas the second suit was for Rs. 900, the matter was held res judicata with the remark that if the plea were not to prevail in suits of this nature, the very object of the Legislature in providing for a speedy and summary remedy by conferring exclusive jurisdiction on the Court of Small Causes would be frustrated. Similarly in A I R 1934 Sind 112,¹⁵ a decision of the Small Cause Court at Amritsar was held res judicata in another suit brought by the opposite party on the same agreement in the Small Cause Court at Karachi. A I R 1937 Lah 346¹ is also very similar. The plaintiff, the agent of an Insurance Company, brought a suit for Rs. 108-15-0 in the Small Cause Court, claiming commission from 1st January 1932 to 31st March 1932. His suit was based upon an agreement with the defendant insurance company but was dismissed on the finding that he had violated the terms of the agreement by joining a rival concern. After this he sued in a regular Court claiming commission for similar transactions from 1st January 1932 to 3rd August 1932. The suit was based on the same agreement and actually included the period previously in suit. I have no doubt that it was rightly held to be res judicata; but, with deference the statement of the law leaves something to be desired:

The principle of res judicata is of wider application, as pointed out by their Lordships of the

Privy Council in 48 Cal 499⁵ and 45 Mad 320.⁷ It has been held to govern cases where the matter in issue is the same and has been previously decided by a competent Court. For instance, when a Court has exclusive jurisdiction to try any matter, its decision on that point will operate as res judicata.

This is correct but not complete; it is liable to be misunderstood, and in the present case it has been misunderstood. Rightly looked at, A I R 1937 Lah 346¹ does not govern the case before me. In the case before me the Small Cause Court had decided a question of title. It had to do so for the purposes of the rent suit it was trying, but far from having exclusive jurisdiction, it had no jurisdiction to try the question of title as such. Hilton J., in A I R 1934 Lah 324,³ put the matter with his customary clarity:

The judgment of a Court of exclusive jurisdiction can operate as res judicata only on a matter which that Court could exclusively decide. In the present case the Small Cause Court had no exclusive jurisdiction to decide the question of title, nor to decide the fact or character of the plaintiff's or the defendant's possession. At most there was an exclusive jurisdiction to decide the liability to pay rent, which is not the same thing.

This is the true way of putting the matter. Similarly in 48 Bom 541² a Division Bench of the Bombay High Court said:

No doubt the Small Cause Court had found that the defendant was a tenant of the plaintiff and passed a decree for the plaintiff against the defendant for rent. But that finding of the Small Cause Court could not be res judicata under S. 11, Civil P. C., unless the Small Cause Court had jurisdiction to decide this suit. This suit is for possession and therefore the finding of the Small Cause Court is not res judicata.

This is conclusive and the finding of the Small Cause Court in this case that the defendant is the tenant of the plaintiff is not res judicata. For the benefit of the lower Courts in this Province, I would repeat that the law is that S. 11 must be applied where it can be applied and that the general doctrine of res judicata can only be invoked in cases where S. 11 is silent. A decision by a Court of exclusive jurisdiction is final and operates as res judicata where it has exclusive jurisdiction but not unless it has exclusive jurisdiction. This is only an apparent exception to the rule that Sec. 11 must be applied where it can be. In the present case if instead of suing for ejectment the Gaushala had sued in the Small Cause Court for rent, the previous judgment would have operated as res judicata. It cannot be res judicata in the present case because the prayer for ejectment takes the suit away from the juris-

12. *Mauj v. Sardara*, (1929) 16 A I R Lah 586 = 121 I O 507 = 30 P L R 427.

13. *Daulat Ram v. Munshi Ram*, (1932) 19 A I R Lah 623 = 143 I C 59 = 34 P L R 462.

14. *Velji Dayalji v. Firm of Nandlal*, (1926) 13 A I R Sind 236 = 94 I C 423 = 21 S L R 23.

15. *Hem Raj Harnam Das v. Hargolal*, (1934) 21 A I R Sind 112 = 152 I C 894.

diction of the Court of Small Causes. The respondent's counsel in arguments before me said he was willing to give up the prayer for ejectment; but it was the prayer for ejectment which led to the present suit being lodged in a regular Court. But for that prayer the suit would have been instituted in the Court of Small Causes. I therefore accept this appeal, but as the lower Appellate Court, although agreeing with the lower Court, did not give a definite finding on the other matters, saying for instance he "would have found it difficult to hold that the relationship of landlord and tenant is established between the parties", I remand the case to the lower Appellate Court for re-decision on the merits. The respondent is to pay the appellant's costs in this Court. The parties are to appear before the Senior Subordinate Judge on 5th August 1938, and ask for a date.

D.S./R.K.

*Case remanded.***A. I. R. 1938 Lahore 814**

BECKETT J.

*Firm Phul Chand-Nem Chand —**Plaintiff — Appellant.*

v.

*Aggarwal Battery Manufacturing Co.**— Defendant — Respondent.*

Second Appeal No. 242 of 1938, Decided on 6th June 1938, from decree of Dist. Judge, Delhi, D/- 1st February 1938.

Principal and agent—Agent of match factory entering into contract with third person to promote sale of matches—Latter required to pay for goods before he was allowed to sell them—Profits of sale to go to him — Latter held not agent of former but only favoured buyer.

The main test to determine whether a person selling goods supplied by other is his agent is whether he is supposed to be selling his own goods when the time for sale comes or whether he is supposed to be selling the goods of his principal, for the liability of an agent to render accounts is based on the assumption that he is dealing with money or goods entrusted to him. [P 815 C 1]

An agent of a match factory entered into a contract with a third person to promote sale of matches. The latter was required to pay for the goods before he was allowed to sell them. The profits of the sale apparently went into the pockets of the latter though the agreement was silent on this point :

Held that the latter was not an agent of the former but only a favoured buyer : *A I R 1925 P C 161 ; (1871) 6 Ch A 397 and 21 I C 322, Ref.* [P 815 C 1, 2]

*Vishnu Datta — for Appellant.**Bishen Narain — for Respondent.*

Judgment. — The plaintiff holds an agency under a Company in Calcutta for the sale of a certain brand of matches. In order to further the sale of these matches, the plaintiff entered into an agreement with the defendant on 18th January 1936. Under this agreement, the defendant undertook to sell not less than fifty cases a month, in return for which he was to receive a commission of Rs. 2 per case, together with a bonus or rebate in accordance with the terms fixed by the Company in Calcutta. The matches were to be supplied direct from Calcutta. But the actual form of dealings between the parties was that the defendant received supplies only on payment of the invoice value of the goods, the payment being made either to a Bank or to the plaintiff himself. Purchases of matches were also made direct from the plaintiff, but this is said to have been an arrangement independent of the agreement. The plaintiff has now sued the defendant for rendition of accounts as an agent. Having regard to the actual course of dealings between the parties, however, both the Courts below have come to the conclusion that the true relation between the plaintiff and the defendant was not that of principal and agent but of seller and purchaser. In coming to this conclusion, they have placed reliance on certain remarks made by the Privy Council in *A I R 1925 P C 161*¹ with regard to the trend of modern business in this respect. On this view the plaintiff would not be entitled to demand an account and the suit has accordingly been dismissed.

If regard is had to the written agreement alone, it will fit in equally well with an ordinary contract of agency, since no mention is made of the manner in which the goods are to be sold, and it might be assumed that the intention of the parties was to defer payment for the goods until they had been sold, which would be the ordinary course of an agency business. It seems, however, clear from the evidence that this was never the intention of the parties. The wording of the agreement does not exclude the possibility of a different intention. If the intention was that the defendant should pay for the goods before they were sold, the agreement would not constitute an agency in the ordinary legal sense but would merely be a method of

1. *Hope Prudhomme & Co. v. Hamel & Horley*, (1925) 12 *A I R P C* 161 = 88 *I C* 807 = 49 *Mad* 1 (P O).

favouring a particular buyer. The fact that the word "agent" is often used in a loose sense, which does not attract to itself all the legal implications of the term, appears to have received judicial notice for the first time in (1871) 6 Ch A 397,² a case which was followed in 21 I C 322.³ It is to be observed, however, that both these cases were concerned only with relations of a supposed agent to a third party, whereas in the present instance we have to deal with relations between the supposed agent and a person appointed. It is quite possible that the person may stand in the position of a principal towards a third party and yet stand in the fiduciary position of an agent towards the person under whose instructions the goods are being sold.

The main test, it seems to me, is whether the so-called agent is supposed to be selling his own goods when the time for sale comes or whether he is supposed to be selling the goods of his principal, for the liability of an agent to render accounts is based on the assumption that he is dealing with money or goods entrusted to him. In the Chancery case, the agent was not expected to pay for the goods until he had sold them although he then became the purchaser, and he could reasonably be regarded as an agent up to this point. In the present instance the defendant had to pay for the goods before he was allowed to sell them and it would be difficult to say that he was ever entrusted with anything for which he was liable to account. The profits from sale were apparently to go into his own pocket and the agreement is again silent on this point.

The only argument advanced to support the proposition that the property in the goods was to remain with the plaintiff is a reference in the agreement to godown rent. This is a provision which would more naturally arise in a true contract of agency, but I do not think it is altogether inconsistent with the position of a favoured buyer. It seems clear from the course of dealings that the defendant was entitled to treat the goods as his own from the moment that he paid for them and was not expected to account for the profits made by selling. In this connexion it is pertinent to examine the relief which the plaintiff claims. So far as I have been able to dis-

cover in the course of arguments, it is not suggested that the defendant should make over the profits from the sale of matches less his fixed commission, as he would have to do under a true contract of agency, but the plaintiff simply requires certain information which will enable him to claim concessions from his own principal. I do not think that this is what is meant by an agent's liability to account.

In this connexion it is to be observed that the written agreement reads on the face of it as though the defendant was being appointed a sub-agent on behalf of the Company in Calcutta, in which case the plaintiff would not be able to sue in his own name. In order to meet this objection the plaintiff has been forced to take up the position that the agreement was one between himself and the defendant as principal and agent. His difficulties appear to have arisen from this cause, since the carrying out of many of the terms in the agreement is dependent on his relations with the Company in Calcutta. His own relations with the Company may have been those of an agent; but it seems to me that his agreement with the defendant was intended to confer upon the latter only the position of a favoured buyer. For these reasons I dismiss the appeal with costs.

D.S./R.K.

Appeal dismissed.

A. I. R. 1938 Lahore 815

YOUNG C. J. AND MONROE J.

*In re Vidya Sagar Kapur, Editor,
'Daily Guru', Lahore, and others.*

Criminal Original Case No. 15 of 1937,
Decided on 18th February 1938.

Contempt—Contempt of Court — Complaint charging certain persons of abduction — Pending proceedings, complainant taking copy of complaint to editor of newspaper—Editor publishing complaint with scare headlines and comments of his own—Publication held contempt of Court.

A complaint was filed against certain persons charging them of abduction. While the proceedings were pending in the Courts, the complainant took a copy of the complaint to an editor of newspaper. The editor, without making any enquiry as to what happened, proceeded to publish the complaint with scare headlines. The headlines consisted of the following: "A case of abduction against . . . and his father . . ." "A sensation of extreme type has been created in the educated circle on account of the case":

Held that the publication was bound to tend to prejudice the hearing of the case and hence amounted to contempt. [P 816 O 1, 2]

2. *Ex parte White*, *In re Nevill*, (1871) 6 Ch A 397=40 L J Bk 73=24 LT 45=19 WR 488.

3. *Suryaprakasara Mudalliar v. Matheson's Coffee Works*, (1918) 21 I C 322.

M. Aslam Khan and Mohd. Monir, Asst.
Govt. Advocate-General —
for Petitioner.

G. R. Kapur, Prem Nath and M. A. Jan
—for Respondents.

Sohan Lal (Respondent No. 2) in person.

Young C. J. — Notice is issued to the four respondents to show cause why they should not be committed or otherwise punished for contempt of Court. The facts are that on 13th August 1937, a complaint was filed by Sayad Iqbal Hussain in the Court of the Tahsildar complaining that his wife had been enticed away by several persons whose names it is not necessary to mention. On 17th August the Magistrate in the preliminary enquiry took a statement by the complainant and proceeded thereon to issue warrants against the respondents to the complaint. The respondents took proceedings then before the Judge in revision asking that the complaint should be quashed. The learned Judge referred the matter to the High Court recommending that the complaint as against some of the respondents should be quashed. The learned High Court Judge on a further application by the respondents ordered the whole case to come up to be considered by him on the question whether the complaint be quashed against all these respondents. On 16th December 1937 the complainant Sayad Iqbal Hussain took a copy of his complaint to the editor of the newspaper 'Daily Guru' four months after the complaint had been filed and while the matter was pending both in the High Court and in the lower Court as against some of the respondents to the complaint. Without making the least enquiry as to what had happened, the editor proceeded to publish the complaint with scare headlines. The headlines consisted of the following :

"A CASE OF ABDUCTION AGAINST AND HIS FATHER"

This case has created a sensation in all the educational Muslim circle of Lahore. A sensation of extreme type has been created in the educated circle of Lahore particularly in the Muslim educated circle on account of a case. The facts of the case are alleged as follows :

Thereafter appeared the complaint in which gross allegations were made against the respondents to the complaint. It is to be noted moreover that the whole of the complaint was not published. That this publication amounts to contempt there can be no doubt. This is not a case of a newspaper re-

porting bona fide the proceedings in a Court. As noted above the complaint was taken to the editor of the paper by the complainant himself four months after the complaint had been filed and while the proceedings were actually pending in the High Court for quashing the complaint. To add to the mischief the paper proceeds to publish above the complaint its own comments. It is quite clear that nothing could be more in the nature of contempt than action of this character. It was bound to tend to prejudice the hearing of the case. It is quite clear that the publication by Sayad Iqbal Hussain was malicious. We suspect also that the same influence affected the newspaper. As regards the editor, he has appeared in Court. Counsel on his behalf has offered an abject apology and further in the issue of the paper dated 21st December 1937 the paper itself published an apology to one of the respondents in the case. This was however after the High Court had the matter of the contempt before it to the knowledge of the newspaper. The editor is a youth who apparently ought not to hold such a responsible position. His father is the printer and publisher of the newspaper and no doubt the chief person interested. He however apologizes. In fact all the respondents admit the error and the contempt and offer an apology.

We take this into consideration. As regards the keeper of the Press he is in this case under no liability and the proceedings against him are dismissed. With regard to the editor and the printer they will be jointly and severally liable for the payment of Rs. 100 costs. This leaves the question of Sayad Iqbal Hussain who is really responsible for the publication of the contempt and he also clearly had this contemptuous article published in order to bring pressure to bear upon the respondents. We order that he pay a fine of Rs. 200 and Rs. 50 costs. In all these cases, if the respondents to this petition fail to pay the amount of fine and costs within two months they will undergo a sentence of one month's imprisonment. Costs will be paid half to Government and half to the petitioners.

D.S./R.K.

Order accordingly.

A. I. R. 1938 Lahore 817

ADDISON J.

Abdul Hakim and another — Accused
Petitioners

v.

Emperor.

Criminal Revn. No. 246 of 1938, Decided on 4th April 1938, reported by Sess. Judge, Multan, D/- 4th February 1938.

Motor Vehicles Act (8 of 1914), S. 2 — Houses situated on two sides of motor stand of petitioner—City wall running along third side — Fourth side open looking towards public street — Land privately owned and leased out to petitioners—Deep city drain passing through portion leased — Bridge constructed to cross city drain — Lorries of petitioner parked over the bridge—Held that the place was not public place within meaning of S. 2.

The mere fact that a place would be styled as a public place for the purposes of the Gambling Act and the Penal Code, does not necessarily mean that it is a public place as defined in S. 2, Motor Vehicles Act. To make it a public place under the Motor Vehicles Act, it must be a road, street, way or a place over which the public have a right to pass or to which the public are granted access.

[P 818 C 2]

On the two sides of the motor stand of the petitioners, there were houses while the city wall ran along the third side. The fourth side, however, was open and looked towards a public street. The land was privately owned and had been leased by the petitioners. Through the portion leased by them ran a deep city drain which could only be crossed by means of a bridge and it was over the bridge that the lorries of the petitioners were parked. Thus to all intents and purposes the petitioners were keeping their lorries in an enclosed place except that apparently there was no gate at the bridge :

Held that the place was not a public place within the meaning of S. 2, Motor Vehicles Act : Criminal Revn. No. 922 of 1934, Rel. on; (1930) 1 K B 443, Disting. [P 818 C 2]

Shabir Ahmad — for Petitioners.

Mohammad Monir, Asst. to Advocate-General—for the Crown.

Facts. — On 18th March 1937, a plot of land situate in front of the Multan Municipality's lorry stand was leased by the owner Rai Bahadur Lala Madan Gopal to Faiz Mohammad, accused, who executed a deed of lease in favour of the owner Ex. P-A. This plot is being used as a private lorry stand for collecting passengers. Faiz Mohammad, lessee of this plot, and Abdul Hakim, lorry driver, were tried and convicted for breach of Rule 53 (a) of the Punjab Motor Vehicles Rules in that on 25th March 1937 Faiz Mohammad, accused, allowed Abdul Hakim, accused, to park his lorry at a public place for the purpose of collecting passengers which had not been

approved for the purpose by the registering authority. Each of them was sentenced to a fine of Rs. 25.

The petition is forwarded to the Hon'ble High Court for revision of the Magistrate's order on the following grounds : The sole question for determination is whether the premises in question come within the definition of a public place. R. 53 (a) with the infringement of which the accused are charged originally read as follows :

A person in charge of a light motor-bus shall not allow such light motor-bus to stand elsewhere than at a place appointed for the purpose or loiter for the purpose of being hired in any public place.

The present rule which was amended by Punjab Government Notification No. 14761 dated 25th May 1933 reads as follows :

The person in charge of a light motor-bus shall not allow such light motor-bus to loiter in any public place for the purpose of collecting passengers or goods or to stand for the aforesaid purpose in any public place other than the one approved by the registering authority for the purpose.

It is undeniable that the lorry of Abdul Hakim in this case stood for the purpose of collecting passengers in premises which had not been approved by the registering authority. A comparison of the wording of the rules would go to show that the rigidity of the old rule has to some extent been relaxed. The definition of a public place is given in S. 2, Motor Vehicles Act. It means :

A road, street, way or other place whether a thoroughfare or not to which the public are granted access or over which they have a right to pass.

The plot of land in the present case is admittedly owned by a private individual and the mere fact that it is used by a motor-bus cannot convert its private into a public character. As the definition clearly shows in order to describe a piece of land as a public place there must be a grant of access to the public or the public must have a right to pass over it. It is quite clear that in the present case the public cannot claim a right to pass over this plot. The word 'grant' in the definition seems to have been used in the same sense as dedication. The private place may become a public place if it is dedicated by the owner for the public use. There must be an *animus dedicandi* of which the user by the public is evidence. There is nothing of the sort in the present case. The character and the user of the site in the present case depends upon the sweet will of the owner and his lessee. It is open to them to shut out the public at any time they liked. It will be ridiculous to describe a place as a public

place when access to it depends not upon any grant or dedication but upon individual wish and expediency. I therefore recommend that the conviction in this case should be quashed and the fine refunded.

Order. — Faiz Mohammad allowed Abdul Hakim to park his lorry in land leased by the former from Rai Bahadur Lala Madan Gopal and both Faiz Mohammad and Abdul Hakim have been convicted for a breach of Rule 53 (a) of the Punjab Motor Vehicles Rules and sentenced to a fine of Rs. 25 each. The learned Sessions Judge of Multan has forwarded the case to this Court with the recommendation that the convictions be quashed. By S. 2, Motor Vehicles Act "public place" means a road, street, way or other place, whether a thoroughfare or not, to which the public are granted access or over which they have a right to pass, while Rule 53 (a) runs as follows :

The person in charge of a light motor bus shall not allow such light motor bus to loiter in any public place for the purpose of collecting passengers or goods or to stand for the aforesaid purpose in any public place other than one approved by the registering authority for the purpose.

According to the evidence of Amir Bakhsh there are two authorized lorry stands in Multan, one owned by the Municipal Committee of which Amir Bakhsh is the contractor and the other owned by a Mr. Sham Sundar. In cross-examination however, he admitted that there were 8 or 9 other unauthorized lorry stands in the city which had been in existence for many years. This witness being the contractor, who has paid a large sum to the Municipal Committee for the lease of their lorry stand, has admitted that an attempt is being made to stop any other place from being used as a lorry stand except that from which he is trying to make as much profit as he can. From the evidence of Abdul Rehman, P. W. 3, it is established that on two sides of the motor stand of the petitioners there are houses while the city wall runs along the third side. The fourth side however is open and looks towards a public street. The land is privately owned and has been leased by the petitioners. Through the portion leased by them runs a deep city drain which can only be crossed by means of one bridge and it is over this bridge that the lorries are parked. To all intents and purposes therefore the petitioners were keeping their lorries in an enclosed place except that apparently there was no gate at the bridge.

It is true that for the purposes of the Gambling Act and for the purposes of the Indian Penal Code, this place would properly be styled a public place. But that does not necessarily mean that it is a public place as defined in S. 2, Motor Vehicles Act. From the description given, it causes no inconvenience to the public or to traffic, but it may cause the Municipal Committee to get a smaller sum for the lease of the motor stand which they auction to the highest bidder and which the Committee seems to want as a monopoly. As the rights of private citizens are concerned, the expression has to be construed strictly. The Crown principally relied on (1930) 1 K B 443.¹ The question involved there was whether a stage carriage was plying for hire in a "public place." "Stage carriage" is defined in S. 4, Metropolitan Public Carriage Act, 1869, but "public place" does not appear to be defined in that Act just as it is not defined in the Indian Penal Code or in the Indian Gambling Act. It is for that reason that under these two Indian Acts a public place has always been held to be a place where the public go, no matter whether they have a right to go or not. But to make it a public place under the Indian Motor Vehicles Act it must be a road, street, way or a place over which the public have a right to pass or to which the public are granted access. It is claimed that this is a place to which the public are granted access, although the site is privately owned and is a private place which the owner can keep as private as he likes. Because the lessee allows a limited number of persons to cross the bridge over the ditch to ride on his lorries, it is not sufficient in my opinion to make it a public place within the definition given in S. 2 of the Act. If any one other than a passenger tries to go there the lessee has the right to make him leave at once. He could put up a gate at the bridge and exclude everybody except passengers who have paid their fare. Could it then be said to be a public place, that is, a place to which the public are granted access. What is being done now without the gate, is very much the same and I do not see that there would be any difference in principle whether there were a gate or not. I have already come to the same conclusion in Cri. Revn. No. 922 of 1934, decided

1. White v. Cubitt, (1930) 1 K B 443 = 99 L J K B 129 = 142 L T 427 = 94 J P 60 = 28 L G R 44 = 73 S J 868 = 46 T L R 99.

on 16th August 1934 and after consideration I see no reason to change my opinion. If the argument of the Crown is correct, a motor shop would be a public place and under R. 44 no motor display or exhibition in which more than five motors took part, could be permitted in any such shop without the previous sanction of the Inspector-General of Police whose decision is final. That would mean that a motor firm could not advertise that their new vehicles for the season had arrived and would be displayed or exhibited at their shop, unless sanction had been previously obtained from the Inspector-General of Police. The English case relied upon by the Crown is distinguishable from the present for the reason already given, namely that there is no definition in the English Act as to what a public place is and also because there was in that case no sort of barrier, physical or other, to prevent the ingress or egress of the public. For the reasons given, I accept the recommendation of the learned Sessions Judge and set aside the convictions of the two petitioners. The fines, if paid, will be refunded.

R.M./R.K. *Convictions set aside.*

A. I. R. 1938 Lahore 819

TEK CHAND J.

Lal Chand Chaudhri — Debtor —
Petitioner.

v.

Bogha Ram and others — Respondents.

Civil Revn. No. 796 and 797 of 1937,
Decided on 7th February 1938.

Provincial Insolvency Act (1920), S. 6 (e)—
Execution sale when complete stated—Act of
insolvency occurs when property is sold and
not when sale is confirmed.

Execution sale is complete when the property is
knocked down to the highest bidder and it is not
open to the Court thereafter to offer the property to
any person who may be prepared to purchase it for
higher amount: *A I R 1936 Lah 555, Foll.*

[P 820 C 2]

Therefore an act of insolvency in S. 6 (e) occurs
when the property is sold, and not when the sale
is confirmed. Hence a petition by a creditor must
be made within three months from the date of sale
and not that of confirmation: *A I R 1933 Cal 564,*
Rel. on. [P 820 C 1]

M. A. Majid — *for Petitioner.*

Achhru Ram — *for Respondent No. 1.*

Order.—This judgment will dispose of
Civil Revisions Nos. 796 and 797 of 1937.
The petitioner, Lal Chand Chaudhri, has
been adjudicated an insolvent by the Insol-
vency Judge, Lyallpur, on two petitions
presented by Bogha Ram. The order has

been confirmed on appeal by the District
Judge. On revision, it is urged that the
orders of the Courts below are contrary to
law. On 15th January 1935, the respon-
dent Bogha Ram who is admittedly one of
the creditors of the petitioner, presented an
application for his adjudication as an insol-
vent. The act of insolvency alleged to have
been committed by the petitioner was that
he had transferred certain property of his
to another creditor, named Gurditta Mal
who is related to the petitioner, and that
in doing so he gave him fraudulent prefer-
ence. While this petition was pending,
another petition was presented by the same
creditor on 27th April 1935, in which
several other acts of insolvency were alleged
to have been committed by the insolvent.
Of these the Insolvency Judge held the
following two to be proved:

(1) that in execution of a decree which had been
obtained by the wife of the insolvent against him,
one-half share in a house belonging to the insol-
vent had been sold, and

(2) that on 12th February 1935, the insolvent
had leased six squares of land to a creditor,
Wasandha Ram-Kishan Chand, who had obtained
a decree on an award against him and had thus
given him fraudulent preference over the other
creditors.

The trial Judge held the three "acts of
insolvency" above mentioned to be proved
and declared the petitioner insolvent. On
appeal the learned District Judge agreed
with the findings of the Insolvency Judge
with regard to the first two acts, but did
not give any finding as to the third. Before
me, it is urged that the debt in favour of
Gurditta Mal was genuine debt, that there
had been litigation between him and the
insolvent, and that in the circumstances of
the case it should be held that the transfer
in favour of Gurditta Mal was effected as a
result of "pressure" by Gurditta Mal on
him. It was also pointed out that the
transfer had really been effected in July
1934, and not on 24th October 1934, as
found by the Court and therefore it was
more than three months before the date of
the presentation of the petition for insol-
vency. I have heard the petitioner's counsel
at length and have examined the record,
but cannot find any adequate ground for
dissenting from the conclusions of the
Court below. The finding that the sale had
been effected on 24th October 1934, is one
of fact, based on evidence, and on examin-
ing the terms of the compromise between
Gurditta Mal and Lal Chand and the other
materials on the record, I am of opinion
that no other conclusion was possible. The

Courts have also concurrently found that no pressure had been exercised by Gurditta Mal on the insolvent in the matter of the transfer in question. On this point again, the materials on the record fully justify the conclusions of the Courts below. There is no proof whatever of the alleged pressure and it appears that the transaction had been effected by the transferor of his free will and accord, and with a view to give preference to a favoured creditor. I hold therefore that the Courts below had come to a correct conclusion in holding the first act of insolvency proved.

With regard to the sale of a half-share in the house of the insolvent, effected in execution of the decree obtained by the wife of the insolvent against him, the contention raised is that the sale, though effected in execution of the decree of the wife on 27th March 1935, had not been 'confirmed,' when the petition for insolvency had been presented. It was pointed out that both the decree-holder and the judgment-debtor had filed objections under O. 21, R. 90, alleging irregularities in publishing and conducting the sale, and that until the disposal of those objections and confirmation of sale by the Court, it could not be said that there was a 'sale' within the meaning of Cl. (e) of S. 6, Provincial Insolvency Act. The learned counsel has not been able to cite any authority in support of his contention, and he concedes that the only ruling in which this matter has been considered is against him. In A I R 1933 Cal 564¹ it was held that the act of insolvency in S. 6 (e) occurs when the property is sold, and not when the sale is confirmed. Hence a petition by a creditor must be made within three months from the date of sale and not that of confirmation.

With this conclusion I respectfully agree. The learned counsel referred me to a number of cases in which the question raised was whether a bidder could retract his bid after the sale had been completed by the Officer of the Court but before it had been confirmed by the Court. The rulings have no direct bearing on the point. It may be stated however that the view taken therein has been dissented from by a Division Bench of this Court in A I R 1936 Lah 555.² In that case it was held that :

When the officer of the Court or such other person as the Court may appoint to conduct a

sale as provided in O. 21, R. 65 knocks down the property to the highest bidder, such person must be deemed to have been declared to be purchaser of such property. The sale is complete when the property is knocked down to highest bidder and it is not open to the Court thereafter to offer the property to any person who may be prepared to purchase it for higher amount.

I agree in holding that the second act of insolvency is also proved. In view of my findings given above, it is not necessary to go into the question as to whether the lease of six squares of land for one year in favour of Wasandha Ram Kishan Chand did or did not amount to an "act of insolvency." The petition for revision fails and is dismissed with costs.

N.S./R.K.

Petition dismissed.

A. I. R. 1938 Lahore 820

ADDISON AG. C. J. AND DIN MOHAMMAD J.

Jalal Din and another — Defendants — Appellants.

v.

Hukam Chand — Plaintiff —

Respondent.

First Appeal No. 31 of 1938, Decided on 21st June 1938, from decree of Sub-Judge, First Class, Gujrat, D/- 10th November 1937.

Punjab Alienation of Land Act (13 of 1900), S. 14 — Permanent alienation of agricultural land in favour of non-agriculturist — Sanction refused by Deputy Commissioner — Alienee cannot resile from transaction — Transaction not being void, S. 65, Contract Act, does not apply — Alienee cannot claim refund of money paid under alienation.

When a permanent alienation of an agricultural land by an agriculturist in favour of a member of a non-agriculturist tribe is effected, it is not void. If sanction of the Deputy Commissioner has not been given in advance it takes effect immediately as a usufructuary mortgage permitted under Section 6 (a) of the Act. If later the Deputy Commissioner does not sanction the sale it continues as a usufructuary mortgage in the terms permitted by S. 6 (a). If an alienee enters into such transaction, he comes under the terms of the Act and is bound by it. His sale compulsorily becomes a usufructuary mortgage as permitted by S. 6 (a) and he cannot resile from transaction when permission of the Deputy Commissioner is refused. As the transaction does not become void, S. 65, Contract Act, does not apply and the alienee is not therefore entitled to sue for refund of the money paid by him as consideration for the alienation : A I R 1934 Lah 979 and A I R 1930 Lah 331, Disapproved ; A I R 1935 Lah 401, Disting ; A I R 1937 Lah 408, Rel. on. [P 822 C 1, 2]

M. M. Aslam Khan and Bashir Ahmad
— for Appellants.

Bishan Narain, A. N Khanna and M. L. Puri — for Respondent.

Addison Ag. C. J.—The plaintiff, Hukam Chand, purchased from Jallu, defendant 1,

1. Kanai Lal Nandy v. Tinkari De, (1938) 20 A I R Cal 564=145 I C 429=57 C L J 148 = 37 C W N 535.

2. Hosbnak Ram v. Punjab National Bank Ltd., (1936) 23 A I R Lah 555=166 I C 603.

some land by a deed, dated 3rd July 1922, and more land by a deed, dated 10th July 1924, for Rs. 2000 and Rs. 1500 respectively, these deeds being registered on the dates of their execution, although this was against the provisions of S. 17, Punjab Alienation of Land Act. It has been correctly found by the trial Court that both the vendor and the vendee knew that the vendee was a non-agriculturist and could not therefore purchase land from the vendor who was an agriculturist. Later, defendant 2 acquired an interest in the land and he was added as a defendant. Some time later, namely on 17th May 1933, the vendor moved the Deputy Commissioner of Gujrat to revoke the mutations sanctioning the transfers. This he refused to do and defendant 1 carried the matter to the Financial Commissioners. The revision before them was accepted on 3rd August 1934 and the Deputy Commissioner was ordered under the provisions of S. 3 (3), Punjab Alienation of Land Act, to inquire into the circumstances of the alienation and either to sanction the sales or refuse sanction. In the latter case it was the duty of the Deputy Commissioner, under the provisions of S. 14, to convert the sales into usufructuary mortgages in form (a) permitted by S. 6 for such term not exceeding 20 years and on such conditions as the Deputy Commissioner considered to be reasonable. Accordingly the Deputy Commissioner refused to sanction the sales and converted them into usufructuary mortgages for the full term of 20 years permitted. Thereafter, the plaintiff instituted the present suit for a declaration that he was the absolute owner of the land in question owing to his adverse possession for more than 12 years and in the alternative he sued for the refund of Rs. 8000 as the sale consideration, together with the cost of improvements effected by him. Various pleas were raised in defence. The trial Judge held that there was no question of adverse possession but he considered that the plaintiff was entitled to a decree for refund of the purchase money, Rupees 3500, together with the cost of improvements effected to the value of Rs. 2170, total Rs. 5670, and he granted the plaintiff a decree for that amount with costs against the defendants, at the same time giving the plaintiff a lien on the land for that amount. Against this decision the defendants have appealed and the Deputy Commissioner has put in a revision peti-

tion under S. 21-A, Punjab Alienation of Land Act, on the ground that the effect of the decree was to contravene the provisions of the Punjab Alienation of Land Act, inasmuch as a lien on the land to the extent of the decretal amount had been ordered for an unspecified period, which was against the provisions of the Act.

Under S. 3 of the Act a person is at liberty to make a permanent alienation of his land if he is a member of an agricultural tribe, as the vendor here is, only to a person who is a member of the same tribe or of a tribe in the same group. In the present case, the plaintiff vendee is not a member of an agricultural tribe at all. Where such a sale as the present is effected, it is enacted by Sec. 3 (2) that such a permanent alienation of land shall not take effect as such unless and until sanction is given thereto by a Deputy Commissioner, and it is further provided that such sanction may be given after the act of alienation. By S. 3 (3) the Deputy Commissioner has full discretion to grant or refuse sanction. Then comes S. 14 which provides that in the case of such permanent alienation as the present, which under Sec. 3 is not to take effect as such until the sanction of a Deputy Commissioner is given thereto, it shall, until such sanction is given or if such sanction has been refused, take effect as a usufructuary mortgage in form (a) permitted by Sec. 6 for such term not exceeding 20 years and on such conditions as the Deputy Commissioner considers to be reasonable. The words are mandatory and the alienation shall take effect immediately as a usufructuary mortgage in form (a) permitted by Sec. 6 and also takes effect in the same form if such sanction has been refused. In the present case therefore ab initio the alienation took effect as a usufructuary mortgage under the law and when later sanction was refused it continued as a usufructuary mortgage under the law in form (a) permitted by Sec. 6, the Deputy Commissioner in the present case allowing the full term of 20 years. The form of usufructuary mortgage provided for by S. 6 (a) is that by which the whole mortgage is automatically redeemed without payment of any sum of money at the expiry of the term fixed by the Deputy Commissioner or which is agreed upon in the first instance. There are other forms of mortgage provided for in S. 6, but these we are not concerned with. S. 9 further enacts that if a member of an

agricultural tribe makes a mortgage of his land in any manner or form not permitted under the Act, the Deputy Commissioner has authority to revise and alter the terms of the mortgage so as to bring it in accordance with such form of mortgage permitted by the Act as the mortgagee appears to him to be equitably entitled to claim. This Section is only mentioned to show that the Deputy Commissioner has again full power to alter a mortgage and must do so. Lastly, S. 21 of the Act runs as follows :

21 (1). A Civil Court shall not have jurisdiction in any matter which the Provincial Government or a Revenue Officer is empowered by this Act to dispose of.

21 (2). No Civil Court shall take cognizance of the manner in which the Provincial Government or any Revenue Officer exercises any power vested in it or in him by or under this Act.

It is clear from this Section that no Civil Court shall take cognizance of the manner in which the Provincial Government or any Revenue Officer exercises any power vested in it or in him by or under this Act. It follows from the provisions of the Act that when such a permanent alienation, as is involved in the present case, is effected, it is not void. If sanction of the Deputy Commissioner has not been given in advance, it takes effect under the law as a usufructuary mortgage permitted under S. 6 (a) of the Act. If later the Deputy Commissioner sanctions the sale, it becomes an out-and-out sale. If he does not, it continues as a usufructuary mortgage in the terms permitted by S. 6 (a) of the Act, the longest period of possession for the automatic redemption of the mortgage being 20 years. If an alienee enters into such a transaction, he comes under the terms of the Act and is bound by it. His sale compulsorily becomes a usufructuary mortgage as permitted by S. 6 (a) of the Act. That is the law and he cannot avoid the law by stating that he resiles from the transaction when permission of the Deputy Commissioner is refused.

There is no question of the application of S. 65, Contract Act. That Section is to the effect that when an agreement is discovered to be void or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it or to make compensation for it to the person from whom he received it. The present transaction has not become void. Under the law it automatically becomes a usufructuary

mortgage for such term, not exceeding 20 years, as the Deputy Commissioner fixes. It is obvious therefore that S. 65, Contract Act, does not apply and that the plaintiff is not entitled to sue for refund of the money. In this respect we do not agree with the single Judge decision, A I R 1934 Lah 979.¹ Nor we are in agreement with another single Judge decision, A I R 1930 Lah 331,² which held that such a lien as the trial Judge allowed in the present case was not in contravention of the Punjab Alienation of Land Act. A I R 1935 Lah 401³ is not in point, the provisions of the Punjab Colonization of Government Lands Act being entirely different from those of the Punjab Alienation of Land Act. That case therefore does not help towards the decision of the present case. The correct position appears to have been laid down in A I R 1937 Lah 408.⁴

It was not contended before us that the possession of the vendee was adverse and obviously from the provisions of the Act already quoted, there could be no question of adverse possession, the transaction taking effect as a usufructuary mortgage. All that was contended before us was that the transaction could be avoided by the alienee when the Deputy Commissioner refused sanction to the permanent alienation taking effect. It has already been made clear that he has no such option but that the transaction automatically becomes a usufructuary mortgage in the terms permitted by S. 6 (a) of the Act, the maximum period for automatic redemption being one of 20 years. For the reasons given, we accept the appeal and dismiss the plaintiff's suit with costs throughout. On this decision the revision petition put in by the Deputy Commissioner becomes infructuous and may therefore for the present be struck off the register of pending cases. Had it been necessary to decide it, our decision would have been that the decree did offend against the provisions of the Punjab Alienation of Land Act in giving an indefinite mortgage of the land for the amount of the purchase money together with the value of the improvements.

N.S./R.K.

Appeal accepted.

1. Bahadur v. Mohammad Din, (1934) 21 A I R Lah 979=151 I C 172.
2. Ghulam Muhammad v. Ali Bakhsh, (1930) 17 A I R Lah 331=121 I C 75.
3. Ghulam v. Nur Ali, (1935) 22 AIR Lah 401.
4. Deputy Commr., Gujrat v. Allahdad, (1937) 24 A I R Lah 408=173 I C 520=I L R (1938) Lah 188=38 P L R 391.

*** A. I. R. 1938 Lahore 823**

DIN MOHAMMAD J.

Firm Chandu Lal Ghanshyam Dass and another—Defendants—Petitioners.

v.

Saraswati Sugar Syndicate Ltd., Lahore—Plaintiff—Respondent.

Civil Revn. No. 317 of 1938, Decided on 16th May 1938, from order of Dist. Judge, Ambala, D/. 24th November 1937.

* Civil P. C. (1908), O. 30, R. 1 and O. 9, R. 13, Proviso—Suit by or against firm—Addition of partners' names is not obligatory—Suit against firm through G—G also added as defendant—On G's failure to appear suit decreed ex parte—Application for setting aside ex parte decree—Decree ought to be set aside both against firm and G and not only against firm.

In cases of suits by or against firms properly represented, the addition of the names of individual partners is not obligatory and the suit can proceed even in the absence of the partners' names: *A I R 1924 Bom 155, Rel. on.* [P 824 C 1]

A suit was instituted against a firm through one G in which G was also made a defendant. On G's failure to appear on the date of hearing, an ex parte decree was passed both against the firm and G. G applied for setting aside the ex parte decree on the ground that he had not been properly served. The District Judge allowed G's application and set aside the decree but added that the decree had been set aside only against the firm :

Held that the order of the District Judge was illegal and the decree ought to be set aside both against the firm and G. [P 824 C 1, 2]

Mela Ram and R. P. Khosla —
for Petitioners.

S. M. Sikri — *for Respondent.*

Order.—This order will dispose of Civil Revision Nos. 317 and 318 of 1938. The facts are these. On 15th April, 1936, the Saraswati Sugar Syndicate Limited, Lahore, instituted a suit against the firm Chandu Mal Ghanshyam Das through Ghanshyam Das and impleaded Ghanshyam Das also as a defendant in the case. On 9th June, no one appeared on behalf of the defendants and an ex parte decree was made against them. On 18th July 1936, Ghanshyam Das made an application for setting aside the ex parte decree on the ground that he had not been properly served and that inasmuch as he was absent from his place of residence for about four months prior to the institution of the suit, a false service was manufactured against him. On 29th January 1937, the trial Court dismissed his application, but on appeal the District Judge allowed the application and set aside the ex parte decree. He however added that the decree had been set aside against the firm only. At the trial the question arose

as to whether the decree against Ghanshyam Das could stand in the circumstances and the decision went against Ghanshyam Das. He again made an appeal to the same District Judge who interpreted his previous order to mean that the decree as against Ghanshyam Das had not been set aside. Civil Revision No. 317 of 1938 has been preferred against the original order of the District Judge allowing the appeal but setting aside the decree against the firm only and Civil Revision No. 318 of 1938 has been preferred from the subsequent order of the District Judge refusing to set aside the order of the trial Court dated 2nd February 1938.

Order 30, Civil P. C., deals with suits by or against firms and persons carrying on business in names other than their own. R. 1 lays down that any two or more persons claiming or being liable as partners and carrying on business in British India may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action and further says that any party to a suit may in such case apply to the Court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished in such manner as the Court may direct. Sub-r. (2) of R. 1 enacts that where persons sue or are sued as partners in the name of their firm, it shall, in the case of any pleading or other document required by the Code of Civil Procedure to be signed, verified or certified by the plaintiff or the defendant, suffice if such pleading or other document is signed, verified or certified by any one of such persons.

Rule 3 provides that where persons are sued as partners in the name of their firm, the summons shall be served either upon any one or more of the partners or at the principal place at which the partnership business is carried on, upon any person having, at the time of service, the control or management of the partnership business there, as the Court may direct. R. 4 lays down that where two or more persons may sue or be sued in the name of a firm and any of such persons dies whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit. R. 6, says that where persons are sued as partners in the name of their firm, they shall appear

individually in their own names, but all subsequent proceedings shall, nevertheless, continue in the name of the firm. R. 7, absolves the person having the control or management of the partnership business from appearing unless he is a partner of the firm sued.

It would thus appear that the principal defendant in the case is the firm and so long as the firm is represented, proceedings can continue. It follows, therefore, that the addition of the names of the individual partners is not obligatory and that the suit can proceed even in the absence of the partners' names. In 77 I C 1055,¹ plaintiff had brought a suit against the firm M and described the defendant C as the manager and owner of the shop M. It was subsequently discovered that C had died before the institution of the suit. A Division Bench of the Bombay High Court held in these circumstances that the suit was in substance, though not in form, against the firm M and the addition of the words "C as the manager and owner of the shop" in the description of the defendant was mere surplusage and that consequently it was not necessary to bring on the record the legal representatives of C and the suit could continue against the firm M as having been properly filed on the date of its original institution. This being so, the addition of the name of Ghanshyam Das was mere surplusage and the suit against the firm could proceed even in his absence. His name however having been mentioned in the plaint as a defendant in addition to the firm, the question is whether the decree which was made against both the defendants was not set aside in toto on the application made by Ghanshyam Das under Order 9, Rule 13.

There is a clear Proviso to R. 13 which says that where the decree is of such a nature that it cannot be set aside as against that defendant only who applies, it may be set aside as against all or any of the other defendants also. It is clear that the only reason for setting aside the ex parte decree in this case was the absence of Ghanshyam Das from the place of his residence and it was on this account that it had been found that no proper service had been effected on the defendants. It would be anomalous in these circumstances to say that the decree as against Ghanshyam Das stood

and that it was set aside only in relation to the firm. This was the decree to which the Proviso pre-eminently applied and the District Judge had, in my view, in the exercise of his jurisdiction committed an illegality in not setting aside the decree in toto and in confining his order to the firm alone. The maintaining of the District Judge's order could result in grave injustice and even if there was any technicality in favour of the respondent, I will be disposed to amend the order of the District Judge on this ground alone. I therefore allow the petition for revision submitted against the order of the District Judge, dated 24th November 1937, and amend the order to the extent of setting aside the ex parte decree both against the firm and Ghanshyam Das. In this view of the case it is not necessary to dispose of Civil Revision No. 318 of 1938. The case will now be remanded to the trial Court for disposal in accordance with law against both the defendants. There will be no order as to costs.

N.S./R.K.

*Case remanded.***A. I. R. 1938 Lahore 824**

BHIDE J.

Mt. Bholi — Defendant — Appellant.

v.

Jai Lal and others, Plaintiffs and others, Defendants — Respondents.

Second Appeal No. 194 of 1938, Decided on 10th May 1938, from decree of Senior Sub-Judge, Rohtak, D/- 25th January 1938.

Punjab Courts Act (6 of 1918), S. 41 (3)—Appellant raising point that lower Appellate Court omitted to determine point that reversioner has no right to succeed to property of deceased in presence of his daughter and her son according to Hindu law—Appeal does not fall within S. 41 (3).

Where the appellant raises a point that the Senior Subordinate Judge had omitted to determine one of the points raised by the appellant, namely that the reversioner had no right to succeed to the property of the deceased in the presence of daughter and her son according to Hindu law, the appellant is not raising any question of the existence or validity of a custom and in the circumstances the appeal does not fall within the purview of S. 41 (3): *A I R 1938 Lah 33, Disting.* [P 825 C 1]

Shamair Chand — *for Appellant.*F. C. Mittal — *for Respondents.*

Judgment.—One Harnam, an Aggarwal Mahajan, died on 27th September 1925 and his property was taken possession of by his daughter Mt. Sarti and her son Mutsaddi. Mt. Sarti and Mutsaddi sold a house out of

1. *Moti Lal Jasraj v. Chand Mal Hindu Mal*, (1924) 11 A I R Bom 155 = 77 I C 1055 = 25 Bom L R 1081.

this property in favour of Mt. Bholi for Rs. 400 on 18th April 1933. Thereupon the plaintiffs claiming to be the reversioners of Harnam instituted a suit to challenge the alienation. Mutsaddi resisted the suit contending that he was the adopted son of Harnam. In the alternative, it was also pleaded that the plaintiffs had no right to succeed to the property in the presence of the daughter and the daughter's son of Harnam, according to the Hindu Dharma Shastras by which the parties were governed. The trial Court dismissed the suit. On appeal the learned Senior Subordinate Judge held that the defendants had failed to prove that any adoption had taken place or that the custom of adoption obtained. On these findings he accepted the appeal and decreed the plaintiffs' suit with costs. From this decision Mt. Bholi, defendant, has preferred the present appeal. The only point raised by the learned counsel for the appellant is that the Senior Subordinate Judge had omitted to determine one of the points raised by the appellant, namely that the plaintiffs had no right to succeed to the property in the presence of Mt. Sarti and her son Mutsaddi according to Hindu law. The learned counsel for the respondents conceded that this point had not been determined by the learned Senior Subordinate Judge but he contended that the defendants were not entitled to agitate the point in the present appeal, as they had obtained no certificate from the learned Senior Subordinate Judge under S. 41 (3), Punjab Courts Act, on the question of custom involved. In support of this contention he relied on 18 Lah 642.¹ The facts of that case were however quite different. In the present case the appellant is not raising any question of the existence or validity of a custom and in the circumstances the present appeal does not appear to me to fall within the purview of S. 41 (3), Punjab Courts Act. I accordingly accept this appeal and remand the case to the learned Senior Subordinate Judge for decision of the aforesaid point on which he has given no finding. The stamp on appeal will be refunded. Costs will follow final decision. Parties are directed to appear before the learned Senior Subordinate Judge on 1st June 1938.

D.S./R.K.

Case remanded.

1. *Munshi Ram v. Mehr Das*, (1938) 25 A I R Lah 33=175 I C 689=I L R (1937) 18 Lah 642=40 P L R 295.

A. I. R. 1938 Lahore 825

TEK CHAND J.

Lakshmi Narain and others —
Plaintiffs — Appellants.
v.

(*Lala*) *Bala Parshad, Proprietor of*
Messrs. Kanahya Lal Balak Ram
and Messrs. Shiv Narain Bala Par-
shad — Defendant — Respondent.

Civil Revn. No. 807 of 1937, Decided on 18th January 1938, from decree of Small Cause Court Judge, Delhi, D/- 14th June 1937.

(a) Contract — Mandi contract with pacca ahrti of Bombay A at Delhi placing with B a pacca ahrti of Bombay order for forward transaction of certain bales of cotton and undertaking to pay mandi — Contract held complete between parties and A held liable for mandi and loss suffered by B.

One A at Delhi placed with B a pacca ahrti of Bombay through his agent at Delhi an order for a forward transaction of 100 bales of Broach cotton asking B "to debit the amount of the 'mandi' in his khata," and undertaking "to pay the amount thereof as soon as a telegram was received." He also agreed to pay brokerage. The transaction was of the nature of what are called 'mandi' contracts in the Bombay market. The agent at once communicated by wire the contents of the order to B at Bombay, who entered into a forward contract of April-May delivery at the current market rate, and the next day he wired back to the agent, that the order had been placed at Rs 208-12-0 per candy at a (mandi) premium of Rs 7-8-0. Three days later, the agent communicated this to A who failed to pay the amount of the 'mandi' as agreed upon, in spite of demand by B. The rate varied to the disadvantage of A and he repudiated the contract, whereupon B sold the transaction to another party at a loss :

Held that there was no question of an "offer" by A and its "acceptance" by B. There was a completed contract between the parties and A was liable to pay the amount of the 'mandi' and he was also liable to pay B the loss which the latter had suffered in the transaction, together with brokerage at the stipulated rate : *A I R 1922 Bom 408, Ref.* [P 826 C 2]

(b) Contract Act (1872), S. 30 — Teji mandi contracts are not wagers without proof that common intention of parties was to deal only in difference.

Teji mandi contracts cannot be held to be wagers merely on their apparent nature and characteristic, without proof of the fact that the common intention of the contracting parties at the time of entering into the particular contract in question was to deal only in differences and in no circumstances to call for, or give, delivery : *A I R 1922 Bom 408 and A I R 1933 Bom 348, Rel. on.* [P 826 C 2]

Bhagwat Dayal — *for Petitioners.*Qabul Chand — *for Respondent.*

Order.—The plaintiff brought a suit for recovery of Rs. 253.13.0 as damages for breach of contract, other expenses and

interest. The suit has been dismissed by the Judge, Small Cause Court, on the finding that there was no completed contract between the parties, and that the transaction was of a wagering character. The plaintiff has come in revision under S. 25 of Act 9 of 1887. After examining the record and hearing counsel, I have no doubt that the decision of the learned Judge is erroneous and must be set aside. The plaintiff is a pakka ahrti of Bombay, who has an agent named Daulat Ram, at Delhi. The defendant works in Delhi under the name and style of Messrs. Kanhya Lal-Balak Ram. On 3rd February 1934, the defendant at Delhi placed with the plaintiff, through his agent Daulat Ram, an order (Ex. P-1) for a forward transaction of 100 bales of Broach cotton, April-May delivery, asking the plaintiff "to debit the amount of the 'mandi' in their khata," and undertaking "to pay the amount thereof as soon as a telegram was received." He also agreed to pay brokerage at the rate of seven annas per cent. The transaction was of the nature of what are called 'mandi' contracts in the Bombay market. Daulat Ram at once communicated by wire the contents of the order to the plaintiff at Bombay, who entered into a forward contract of April-May delivery at the current market rate, and the next day they wired back to Daulat Ram, that the order had been placed at Rs. 208-12-0 per candy at a (mandi) premium of Rs. 7-8-0. Three days later, Daulat Ram communicated this to the defendant. The defendant failed to pay the amount of the 'mandi' as agreed upon, in spite of demand by the plaintiff. The rate varied to the disadvantage of the defendant and he repudiated the contract, whereupon the plaintiff "sold the transaction" to another party at a loss.

The learned Judge has considered that the order contained in Ex. P-1 was merely an "offer" by the defendant to enter into a transaction, which would have become a completed contract only after "acceptance" of the "offer" by the plaintiff had been communicated to the defendant within a reasonable time. He also held that as in this case the acceptance was not communicated by Daulat Ram to the defendant until four days after the making of the "offer" by the latter, there was no binding contract. He has accordingly dismissed the suit.

The learned Judge has clearly misunderstood the nature of the transaction in dis-

pute. It is quite clear from Ex. P-1 and the other evidence on the record that the transaction was of the nature of what are called "mandi" contracts with *pacca ahrtis* in the Bombay market. An account of these contracts will be found in 47 Bom 263¹ where its well-known incidents are summarized. The plaintiff is a *pacca ahrti* of Bombay, with whom several merchants of Delhi had been dealing, through his agent Daulat Ram, for 19 years, and there is no doubt that the defendant knew full well the nature of the contract. Obviously there was no question of an "offer" by the defendant and its "acceptance" by the plaintiff in this case. The terms of the document, Ex. P-1, clearly show that an order for entering into a transaction of 100 bales of cotton at the current market rate had been placed by the defendant with the plaintiff. The learned Judge appears to have been misled by some of the answers given by Daulat Ram to certain questions put to him, when examined as a witness, in which the words "offer" and "acceptance" were loosely used. Reading Daulat Ram's statement as a whole, there is no doubt as to what he really meant. On the evidence, it is quite clear that there was a completed contract between the parties, that the defendant failed to pay the amount of the 'mandi' when communicated to him, and that he is also liable to pay to the plaintiff the loss which the latter had suffered in the transactions together with brokerage at the stipulated rate.

The learned Judge is also in error in holding without any evidence on the record that the transaction was of a wagering nature. It is now well settled that transactions of this type cannot be held to be wagers merely on their apparent nature and characteristics, without proof of the fact that the common intention of the contracting parties at the time of entering into the particular contract in question was to deal only in differences and in no circumstances to call for, or give, delivery: 47 Bom 263¹ and A I R 1933 Bom 348.² Admittedly no evidence of such intention is forthcoming on the present record.

The plaintiff however is not entitled to charge any interest. No agreement to pay interest is proved, nor has any mercantile

1. *Manilal Dharamsi v. Allibhai Chagla*, (1922) 9 A I R Bom 408=68 I O 481 = 47 Bom 263=24 Bom L R 812.

2. *Naran Das v. Ghanshyamdas*, (1933) 20 A I R Bom 348=147 I O 412=35 Bom L R 640.

usage been established under which it could be claimed. I accept the petition for revision, set aside the judgment of the Court below and, in lieu thereof, pass a decree for Rs. 227-9-0 in favour of the plaintiff against the defendant. As some confusion was created in the lower Court by the loose phraseology used by the plaintiff's agent in his evidence, I leave the parties to bear their own costs in both Courts.

D.S./R.K.

*Petition accepted.***A. I. R. 1938 Lahore 827**

BHIDE J.

Firm Chandu Lal-Parma Nand —
Plaintiff—Petitioner.

v.

Messrs. Grahams Trading Co. (India)
Ltd. and another — Defendants —
Respondents.

Civil Revn. No. 59 of 1938, Decided on 12th July 1938, from order of Sub-Judge, 1st Class, Amritsar, D/- 30th October 1937.

(a) Revision — Court having jurisdiction — Decision whether right or wrong is no ground for interference.

Where a Court has jurisdiction to decide points arising in a suit, whether his decision is right or wrong in law, that would not be a ground for interference in revision: *A I R 1928 Lah 140, Rel. on.* [P 827 C 2]

(b) Companies Act (1913), S. 152—Agreement for settlement by arbitration — Limited Company in Punjab being one of the parties — No specific reference to Arbitration Act—Arbitration Act held did not apply.

A company under the Companies Act stands in the Punjab on no different footing than a private individual governed by Punjab Act 1 of 1911. Therefore if an agreement between the parties of which one is a company makes no specific reference to the Arbitration Act, the Arbitration Act will not apply to the arbitration agreement between the parties: *A I R 1936 Lah 721 (F B), Applied.* [P 828 C 1]

D. R. Sawhney—for Petitioner.

M. C. Mahajan—for Respondents.

Order.—This is a petition for revision of the order of the Subordinate Judge, First Class, Amritsar, staying proceedings in a suit under S. 19, Arbitration Act. The parties entered into a contract for supply of certain goods, but the plaintiff firm refused to accept the goods on certain grounds, with the result that the defendant Company re-sold the goods and is alleged to have suffered a loss of Rs. 10,521-7-10. The defendant wanted to refer the dispute to arbitration in pursuance of the agreement between the parties but the plaintiff did not agree to do so and instituted a suit

for a declaration that the defendant had no right to refer the matter in dispute to arbitration. The plaintiff prayed for an injunction restraining the defendants from making any reference to arbitration, but the defendants had in the meantime actually made a reference and obtained an award. So they opposed the application for an injunction about which notice had been served on them and at the same time made an application for stay of the suit. The latter application was opposed by the plaintiff on a large number of grounds but the learned Subordinate Judge rejected them and ordered the suit to be stayed under S. 19, Arbitration Act. The plaintiff has filed a petition for revision of this order.

The main points argued before me were:

- (1) The agreement was governed by Punjab Act 1 of 1911 and as it was not specifically stated in the agreement that the arbitration would be governed by the Arbitration Act, that Act did not apply and consequently the application for stay under Sec. 19, Arbitration Act, was not maintainable.
- (2) That the defendant Company having exercised its right of re-sale, the original contract of sale was rescinded and consequently the clause as regards reference to arbitration also ceased to have force.
- (3) The award given by the arbitrators to whom a reference was made by the defendants was void as it was admittedly given during the pendency of this suit and consequently the power to make a reference exhausted itself and there could be no fresh reference to arbitration. The suit must therefore proceed.

The learned Subordinate Judge has given his decision against the plaintiff on points Nos. (2) and (3). He had certainly jurisdiction to decide these points and whether his decision is right or wrong in law, that would not be a ground for interference in revision: 9 Lah 308.¹ The learned Subordinate Judge has however given no decision on point No. 1 and he seems to have acted with material irregularity in the exercise of his jurisdiction in staying the suit without deciding this point. The learned counsel for the respondent contended that the point should be considered to have been given up as it is not touched in the judgment and relied upon 4 Lah 364² in

1. Sant Singh v. Mubarak Singh, (1928) 15 A I R Lah 140=106 I C 901=9 Lah 308=29 P L R 42.

2. Harjimal v. Devi Dittamal, (1924) 11 A I R Lah 107=77 I C 398=4 Lah 364.

support of his argument. On behalf of the plaintiff, it was stated at the bar by his counsel, that as a matter of fact the point was never given up. The point was certainly included in the issue. It was the first and foremost point raised by the plaintiff and if it was dropped, one would have expected the learned Subordinate Judge to say so at any rate. In the circumstances of the case, I do not think it justifiable to assume that the point was dropped.

The learned counsel for the respondent next urged that the point involves questions of fact and cannot therefore be gone into at this stage. However the point having been included in the issue, it was for the defendant to produce such evidence as they liked in support of the facts they wished to rely with reference to this point. They however led no evidence at all. Taking then the agreement between the parties to be executed at Amritsar, as it purports to be, the question which requires decision is whether, in the absence of any specific provision in the agreement that the arbitration will be governed by the Arbitration Act, that Act will apply. The only reply which the learned counsel for the respondent could make on this point was that the defendant being a limited company, the arbitration was governed by S. 152, Companies Act, and hence the arbitration must be held to be governed by the Arbitration Act. This contention does not appear to be tenable in view of the Full Bench decision of this Court reported in A I R 1936 Lah 721.³ It was held in that case that S. 152, Companies Act, is only an enabling Section and confers powers on a company to resort to arbitration under the Arbitration Act by an agreement in writing if it chooses to do so. This would mean that a company stands in the Punjab on no different footing in this respect than a private individual governed by Punjab Act 1 of 1911. In the present instance, the agreement between the parties makes no specific reference to the Arbitration Act. I must therefore hold that the Arbitration Act will not apply to the arbitration agreement between the parties. Consequently the application for stay of the suit under S. 19 of that Act was not maintainable.

The award given by the arbitrators during the pendency of the suit was admittedly null and void. The question whether the

defendants can still enforce the arbitration clause under the ordinary arbitration law and whether they can apply for stay of the suit under Para. 18, Sch. 2, Civil P. C., is one which it is unnecessary to consider for the purpose of the present petition. If the defendants care to go to arbitration under the ordinary law, and if they wish to apply for a stay of the suit under Para. 18, Sch. 2, Civil P. C., they may do so if so advised. I accept this petition for revision and set aside the order of stay passed under S. 19, Arbitration Act, and direct the suit to proceed. In view of all the circumstances I leave the parties to bear their costs. Parties are directed to appear before the trial Court on 25th July 1938.

B.D./R.K.

*Petition allowed.***A. I. R. 1938 Lahore 828**

BLACKER J.

Sardar Gian Singh — Convict
Petitioner

v.

Emperor.

Criminal Revn. No. 345 of 1938, Decided on 23rd May 1938, from order of Addl. Sess. Judge, Lahore, D/- 1st March 1938.

(a) Penal Code (1860), Ss. 415, 419—*P's* wife applying to Sub-Registrar that one *R* had sold his house to her and was refusing to have sale deed registered and praying for compulsory registration—*P* having knowledge of fact that *R* was dead previous to application—Sub-Registrar issuing notice to *R*—*P* pointing out third person to process server as *R* and trying to get him falsely served—*P* charged and convicted under S. 419—Charge not making clear as to by virtue of which consequences referred to in S. 415, *P* was liable of offence of cheating—Held that the offence under S. 419 was made out—That charge was defective—That defect in charge was material irregularity which could not be cured by S. 225, Criminal Procedure Code.

P had become friendly with one *R* who was a spend-thrift and drunkard. *R* died a premature death on 30th June 1936. On 2nd July, wife of *P* made an application to the Sub-Registrar that *R* had in March 1936 sold a house to her but was refusing to have the sale-deed registered and she prayed for compulsory registration. The Sub-Registrar issued a notice to *R* to appear before him. *P* having found out which process server was going to issue the process to *R* got hold of a third person and pointed him out to *B*, the process-server, as *R*. The person admitted to be *R* but refused to accept service and when *B* was taking him to Administrative Subordinate Judge, he slipped away. Enquiry followed and *P* was prosecuted and convicted under S. 419, I. P. O. The charge against *P* did not make clear by virtue of which of the several consequences referred to in S. 415, he must be held liable of the offence of cheating:

Held that the offence under S. 419 had been made out. The action which *B* would have been

³ *Balmukand v. Punjab National Bank Ltd., Ambala*, (1936) 23 A I R Lah 721=164 I O 893=17 Lah 722=39 P L R 35 (F B).

deceived into taking was such as would have caused or was likely to cause damage to him in mind, body, property or reputation. The almost certain result of the act brought about by P's deception upon B would have been a departmental enquiry against him. That the charge found against the accused was however defective by reason of the failure by the Magistrate to set out in the charge the particular consequences by virtue of which deception became an offence. That the defect in the charge was material irregularity and could not be cured by S. 225 : 36 P R 1888 Cr, Rel. on ; A I R 1919 Lah 473; A I R 1934 Lah 833 and A I R 1924 Cal 495, Disting. [P 830 C 2; P 831 C 1 ; P 832 C 1]

(b) Criminal P. C. (1898), S. 223—Accused tried for cheating—Term 'manner' in S. 223 includes every ingredient by which act ceases to be one of mere deception and becomes one of cheating.

The term 'manner' in S. 223, Criminal P. C. includes, with reference to an offence of cheating, every ingredient by virtue of which the act ceases to become one of mere non-criminal deception and becomes one of cheating within the meaning of S. 415, I. P. C., and the effect of the deception upon the victim's body, mind, reputation or property would thus be a part of manner of cheating. [P 831 C 2]

B. R. Puri and L. Chaman —
for Petitioner.

M. Sleem, Advocate-General —
for the Crown.

Order.—Sardar Gian Singh, an ex-member of the Judicial Branch of the Punjab Civil Service and an advocate of the High Court, is a petitioner for revision of the order of the learned Additional District Magistrate of Lahore upheld on appeal by the learned Additional Sessions Judge of Lahore, convicting him under Sec. 419, I. P. C., and sentencing him to three months' rigorous imprisonment and a fine of Rupees 100. The facts of this case are that Sardar Gian Singh had become friendly with one Roshan Lal, son of Rai Sahib Dr. Maya Das, retired Civil Surgeon. Roshan Lal was a drunkard and a spendthrift and died a premature death on 3rd June 1936. On 2nd July, the wife of the petitioner put in an application before the Sub-Registrar, Lahore, to the effect that this Roshan Lal had on 31st March 1936 sold a house to her for Rs. 6000 but was refusing to have the sale deed registered. Her prayer in this application was that there should be a compulsory registration and the Sub-Registrar accordingly issued process to Roshan Lal to appear before him. The finding of the Courts below is that Sardar Gian Singh wanted to get this compulsory registration effected ex parte knowing that Roshan Lal was dead and that his successor-in-interest would probably contest the alienation. He accordingly found out which

process server was to issue the process upon Roshan Lal and having got hold of a third person, whose identity has not been discovered, pointed him out to Babu Ram, the process server, as Roshan Lal. This person admitted that he was Roshan Lal but refused to accept service. Babu Ram accordingly made a report to this effect on the back of the process, namely that service had been effected upon Roshan Lal who refused to accept it. In view of his refusal he took Roshan Lal to the Naib Nazir who directed him to take him to the Administrative Subordinate Judge. On the way Roshan Lal slipped away and was never seen again. Enquiry followed which resulted in the present prosecution and conviction of Sardar Gian Singh. There are three main points under consideration in this revision and I will deal with them in what appears to be their logical order, though this is not the exact order in which they were presented before me.

The first contention is that even on the findings of the Courts below no offence has been made out against the petitioner because one of the necessary ingredients of S. 415 does not exist. To complete the offence of cheating under S. 415 it is necessary not only that there should be a deception and that this deception should cause the person deceived to take some action but also that this action should be such as causes or is likely to cause damage to that person in mind, body, property or reputation. The Courts below have found that if Babu Ram had not been fortunate enough immediately to expose the deception which had been practised on him, he would certainly have had to face a departmental inquiry and that even if this departmental inquiry had resulted in his exoneration it would certainly have caused him considerable mental anxiety and some loss of property inasmuch as he would have had to spend some sum of money, however small, for the purposes of his defence. It was contended on behalf of the petitioner that the likelihood of Babu Ram suffering such harm was too remote to justify the Court in relying upon it for holding that the ingredients of the offence were all present. Counsel for the petitioner has relied upon three reported judgments. The first of these is 34 P R 1918 Cr.¹ In that case a lambardar had been cheated by being presented with

1. Emperor v. Muhammad Shah, (1919) 6 A I R Lah 473=48 I C 877=34 P R 1918 Cr=20 Or L J 77.

some persons as recruits for the army who had as a matter of fact been already rejected as such. The lambardar being deceived by the representation that they had never been rejected anywhere presented them before the Recruiting Officer when it was discovered that they had already been rejected at another place. The learned Judges who heard that appeal referred to 17 Cal 606² in which it was held that the damage or harm caused or likely to be caused must be the necessary consequence of the act done or must be necessarily likely to follow therefrom.

With all due respect to the learned Judges who tried the case, 17 Cal 606,² I must frankly confess that I do not quite understand what is meant by the phrase "necessarily likely" which appears to me to be in the nature of an oxymoron. A consequence can either be necessary or it can be likely but I do not quite see how it can be necessarily likely. Presumably, as was later held by the Calcutta High Court in A I R 1924 Cal 495,³ what was meant was that the likelihood of harm must not be too remote. In the case cited by counsel it seems to me that the circumstances were entirely different. As the learned Judges pointed out it was not really likely that the lambardar would have to face any enquiry and in fact his explanation was immediately accepted and he did suffer no harm. The second case on which counsel has relied is a single Bench judgment of this Court : 36 Cr L J 274.⁴ This was a case of cheating by personation in mutation proceedings before a Naib Tahsildar. Again, the case is not on all fours with the present one and with the greatest respect I fully agree with the learned Judge who heard that revision petition that the Naib Tahsildar was not likely to suffer any harm to his reputation merely because he had passed orders forwarding the application to the Girdawar for entering the mutation and putting it up for orders at the time of his next visit to the village. Even less apposite is the third case on which the counsel has relied, the Calcutta case to which I have just made reference, namely A I R 1924 Cal 495.³ In that case the person cheated was not an

individual but a juristic person, namely The East Indian Railway Company and therefore their Lordships, if I may say so, quite rightly found that it could not be expected that this corporation would suffer any harm in mind or reputation in consequence of the deception practised upon it.

On the other hand, the learned Government Advocate has drawn my attention to a judgment of this Court which appears to me to be very much closer to the present case, that is 36 P R 1888 Cr.⁵ That was a case in which the appellant who was an income-tax clerk having lost some files cheated the record-keeper by inducing him to accept some other files as those which were missing and to make an entry in his register that he had received the missing ones. Tremlett and Rattigan JJ. who heard that appeal were unhesitatingly of opinion that the necessary consequence had been made out. In fact Tremlett J. remarked :

It would be notorious to any person acquainted with the business of district offices, that a person who had acknowledged receiving files he could not produce, would be likely to suffer harm in reputation and also in all probability in property.

It was also remarked by Rattigan J. in a separate judgment :

Had the accused's deception not been subsequently discovered, the act was one which would in all probability have caused the record-keeper to be either fined or dismissed, or at least subjected to some other departmental punishment or censure. It was therefore an act which was likely to cause damage or harm to the record-keeper in property or reputation.

These remarks appear to me to be wholly applicable to the present case. To borrow the phraseology of Tremlett J. it would be notorious to any person acquainted with the business of District Courts, that a process-server who had entered a false report upon a process would be the subject of a departmental enquiry which would be certain to end either in his dismissal or some other serious punishment. It can of course be contended that in the present case the process-server could have established his innocence by the same evidence upon which the present petitioner has been convicted. This may be so but it is clear that if the deception had not been immediately discovered, as it was in the present case, the fact that the endorsement was false must have come to light as Roshan Lal was dead and there must have been some inquiry. Even if eventually Babu Ram could establish his innocence no reasonable person can contest the proposition that even an inno-

2. *Mojey v. Queen-Empress*, (1890) 17 Cal 606.

3. *Superintendent and Remembrancer of Legal Affairs, Bengal v. Manmatha Bhusan Chatterjee*, (1924) 11 A I R Cal 495=84 I C 554=26 Cr L J 330=51 Cal 250=28 C W N 160.

4. *Rattan Singh v. Emperor*, (1934) 21 A I R Lah 883=1934 Cr C 1180=153 I C 30=36 Cr L J 274=35 P L R 666.

5. *Nand Lal v. Empress*, (1888) 36 P R 1888 Cr.

cent person facing a departmental inquiry must be subjected to a considerable mental anxiety and strain and also, as I have said above, must spend some money on defending himself. It seems to me therefore that the first contention of the learned counsel for the petitioner is answered and that on the findings there is no reason to hold that an offence under S. 419 has not been made out. I might however add in passing that all this discussion would possibly have been quite unnecessary if the learned Additional District Magistrate had carefully studied the provisions of Ss. 108, 109, 192 and 193, Penal Code, and framed the charge accordingly after having done so.

The second point which is to be considered is whether it can be held to have been fairly established on the record that the result of this false endorsement would in all probability have been an inquiry against Babu Ram. Admittedly there is no direct evidence on this point; Babu Ram himself could not depose to this as he could only have offered an opinion which would not have been evidence. Possibly the Administrative Subordinate Judge might have been asked by the prosecution whether in the event of this false endorsement coming to his notice without the intervening circumstance of the deception by Gian Singh having been immediately discovered, he would have held a departmental inquiry against the process-server. One must confess that probably the learned Administrative Subordinate Judge's reply to that question would have been that this is a hypothetical question which he was not fully justified in answering and the case would have stood where it is now. It seems to me that the question whether the consequence is likely to follow from the act is not one which can be proved so much from the mouth of a witness as inferred by the Court from the circumstances of the case and from the natural course of human conduct and human business. Therefore I am of opinion that the learned Additional District Magistrate was fully justified in inferring as he did that the almost certain result of the act brought about by the petitioner's deception upon the process-server would have been a departmental inquiry against the process-server.

I now come to the third and what is possibly the most difficult point to decide in the case, that is, the contention that the charge as framed was defective within the

meaning of S. 223, Criminal P. C., which lays down that when the nature of the case is such that the particulars mentioned in Ss. 221 and 222 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose. *Illus. (b)* to the Section runs:

A is accused of cheating *B* at a given time and place. The charge must set out the manner in which *A* cheated *B*.

In the present case the charge runs as follows:

I (Magistrate) charge you Gian Singh that you, on or about 7th July 1936 at Lahore Civil Courts cheated by personation by knowingly substituting a certain person for Roshan Lal (deceased) who had before that date died representing to Babu Lal that that person was Roshan Lal, a respondent to the notice Ex. P K.

It is pointed out that this charge did not make it clear to the petitioner by virtue of which of the various consequences referred to in S. 415 he must be held liable of the offence of cheating. Those consequences are not only the doing of an act which was likely to damage the actor's reputation, etc. but also include the delivery of property and the like. It is contended that not having had notice of the particular consequence of his act by virtue of which he was held to have cheated Babu Ram, the petitioner was handicapped in his defence or that he did not know what he had to rebut. It appeared to be part of argument of the learned Government Advocate that the manner of cheating is set forth in the charge as the charge does say that he cheated by knowingly substituting a certain person for Roshan Lal. But it seems to me that the word "manner" could fairly be interpreted as including every ingredient by virtue of which the act ceases to become one of mere non-criminal deception and becomes one of "cheating" within the meaning of S. 415 and the effect of the deception upon the victim's body, mind, reputation or property would thus be a part of the "manner" of cheating. But even if this is held to be too wide an interpretation of the word "manner", the illustration is only an illustration and I think that by analogy if S. 223 demands that the manner shall be set out it must also demand that in the case of cheating the particular consequence by virtue of which the deception becomes an offence should also be set out. Nor is it possible to accept the view that S. 225

cures this irregularity. The Court cannot profess to be a mind reader and it is impossible to say what evidence the petitioner might or might not have led if he had had notice of what the Court intended to infer against him to be the consequence by virtue of which his offence was complete. It seems to me, therefore, that the charge is defective in this case and that there is a material irregularity and that the present conviction must be set aside.

The question now arises whether there should be a re trial. Counsel for the petitioner has urged with some emphasis that in the circumstances of the case a re-trial would cause a considerable harassment to the petitioner whose sentence was only one of three months. But it seems to me, although the learned Additional District Magistrate has not expressly said that the only justification that he could have had for passing such a very lenient sentence in such a very serious case must have been the consideration that the petitioner was almost certain to be struck off the roll of advocates of this Court and might even lose his pension as a result of this conviction. It is impossible for me and would be most improper for me to make any attempt to pre-judge the result of any re-trial. But if the petitioner is guilty I think that it would be a gross miscarriage of justice that he should obtain a complete acquittal merely on account of this irregularity in the framing of the charge. If he is again convicted no doubt the imprisonment which he has already undergone will be taken into consideration by the learned Magistrate. I therefore accept this petition to this extent: that I set aside the charge and the proceedings in the lower Court subsequent to the charge and direct that a re trial be held from that stage. Before framing a new charge the Magistrate should also put to the accused under S. 342, Criminal P. C., any inference which he intends to draw from the prosecution evidence already recorded in order to give him an opportunity of explaining it away if he can. At the same time there would be nothing to prevent the Magistrate, if he is so advised, framing a charge under S. 193, I P C., either in place of the charge under S. 419 or as an alternative charge. Pending the fresh trial the petitioner will remain on his present bail.

R.M./R.K.

*Re-trial ordered.***A. I. R. 1938 Lahore 832**

ABDUL RASHID J.

Gurdas Singh v. Emperor.

Criminal Revn. No. 201 of 1938, Decided on 12th April 1938.

Criminal Trial — Revision — Retrial when ordered by High Court stated.

In the exercise of its revisional powers a retrial is ordered by the High Court only in cases where non-compliance with the provisions of the Criminal Procedure Code has prejudiced the accused. The High Court is not bound to set aside a trial on a technical point on the revision side if no injustice has resulted. [P 832 O 2]

Khurshid Zaman for Advocate-General
— for the Crown.

Order. — The petitioner Gurdas Singh was convicted under Ss. 354/451, I. P. C. and sentenced to two months' rigorous imprisonment by Mr. Chaman Lal, Magistrate, Second Class, by his order, dated 14th December 1937. His appeal was summarily dismissed by the Additional District Magistrate. He preferred a revision in the Court of the Sessions Judge, Hoshiarpur Division. The learned Sessions Judge has recommended that the conviction of the petitioner may be set aside and a re-trial ordered on the ground that the provisions of S. 342, Criminal P. C., were not complied with and the accused was not examined after the prosecution evidence had concluded. In the exercise of its revisional powers a re-trial is ordered by the High Court only in cases where non-compliance with the provisions of the Criminal Procedure Code has prejudiced the accused. The High Court is not bound to set aside a trial on a technical point on the revision side if no injustice has resulted. I have accordingly gone through the record of the case. After going through the statements of Mt. Gurdevi, Karta Ram, Chanan, Mohan and Lachhman Das, I am of the opinion that they have not given true evidence. It was impossible for the petitioner single handed to be able to confine Karta Ram, Mt. Gurdevi and their son in a kothri when they were proceeding to the police station in the company of Chanan and Mohan. Mt. Gurdevi and Karta Ram considerably improved their statements when they were recorded for the second time by the trial Court. No reliance can therefore be placed on their testimony. For the reasons given above, I accept this petition for revision and acquit the petitioner. He will be released from the bail bond forthwith.

N.S./R.K.

Petition accepted.

A. I. R. 1938 Lahore 833

DALIP SINGH J.

Firm Mukat Behari Lal-Tej Pal —
Judgment-debtor — Appellant.
 v.

Dina Nath — Decree-holder —
Respondent.

Exn. First Appeal No. 225 of 1937, Decided on 8th November 1937, from order of Sub-Judge, First Class, Ludhiana, D/- 10th June 1937.

Civil P. C. (1908), S. 144 — S. 144 includes decrees as well as orders.

Section 144 can be extended to include orders as well as decrees. [P 833 C 2]

Parkash Chandar and Shamair Chand —
for Appellant.

Hem Raj and Bishen Narain —
for Respondent.

Judgment. — The firm Mukat Behari Lal-Tej Pal brought a suit against the firm Narain Das-Labhu Ram and took proceedings under O. 39, R. 1, Civil P. C. One Khushi Ram, son of Khushali Mal, and another Khushi Ram, son of Mula Mal, stood sureties in the proceedings on behalf of the Firm Narain Das-Labhu Ram. The trial Court passed a decree for Rs. 6704 with costs against the Firm Narain Das-Labhu Ram in favour of the firm Mukat Behari Lal-Tej Pal. On appeal the decree was enhanced by this Court by a sum of Rs. 2301.7.0. After the decision of the appeal, the decree-holders applied to realize the sum of Rs. 2301.7.0 from the sureties. The sureties objected and the trial Court upheld their objections against the realization of the enhanced sum from them. On appeal, however, the High Court held that the sureties were liable and on this order the sum was realized from the sureties. The sureties went in a Letters Patent appeal and there the decision of the single Judge was reversed and it was held that the sureties were not liable to pay this enhanced sum of Rs. 2301.7.0. The sureties have now applied for restitution under Ss. 144 and 151, Civil P. C., of this sum. The actual person making the application is an assignee of the sureties. The trial Court on objections taken by the Firm Mukat Behari Lal-Tej Pal rejected the objections and directed execution for restitution to proceed. The Firm Mukat Behari Lal-Tej Pal have come in appeal from this order.

not apply to sureties but only to parties, and 42 All 158¹ at p. 166 is cited in support of this proposition together with other rulings. It is contended that the order of the single Bench of this Court is only an order and not a decree and as Sec. 144 speaks of the variation or reversal of a decree and not of an order, it does not apply to the present case. It is also contended that the word 'party' in Sec. 144 means party to the suit. On behalf of the respondent it is contended that Sec. 144 is not exhaustive and there is inherent jurisdiction in the Court to correct any errors made by the Court itself whereby the party has been prejudiced. 2 Pat 10² is cited as authority for this proposition along with other rulings. It is also contended that in an earlier application which was made by the original sureties the decree-holder firm, the present appellants, appeared and entered objections but finally withdrew them and asked for time to pay. It is therefore contended that the objections not having been raised are barred by the rule of constructive res judicata and 15 Lah 869,³ and other rulings are cited in support. In reply to this last contention it is contended on behalf of the appellant that the matter is one of jurisdiction and therefore there can be no waiver nor can the rule of constructive res judicata be applied. It is unnecessary for me to decide anything beyond the simple fact that undoubtedly, and as indeed admitted by the learned counsel for the appellant, the sureties were parties to the order passed by the single Judge of this Court. The only question therefore that remains is whether S. 144 can be extended to include orders as well as decrees. The Privy Council themselves have extended Sec. 144 on the ground of inherent jurisdiction apart from the Section to the case of an order, for in the case before them an auction-purchaser who had purchased certain property in an auction sale was held entitled under S. 144 under the inherent jurisdiction of the Court to ask for restitution of the sale money when the sale itself was set aside on appeal. That being the case it is unnecessary for

1. Raj Raghubar Singh v. Jai Indra Bahadur Singh, (1919) 6 A I R P C 55=55 I C 550=42 All 158=22 O C 212=46 I A 228 (P C).

2. Jai Berham v. Kedar Nath, (1922) 9 A I R P C 269 = 69 I C 278=2 Pat 10=49 I A 351 (P C).

3. Prabhu Dayal v. Dewat Ram, (1935) 22 A I R Lah 200 = 155 I C 286 = 15 Lah 869 = 35 P L R 429.

me to decide whether the order of the single Judge amounted to a decree as appears to be the opinion of Mr. Mulla in his Commentary in the Civil Procedure Code at page 8 (ii), nor is it necessary to decide whether the rule of constructive *res judicata* applies or not to the facts of this case. It is sufficient to hold that the surety was a party to the order of the single Judge of this Court and therefore under the inherent jurisdiction of the Court can apply to the Court for restitution. I therefore dismiss the appeal with costs.

B.D./R.K.

Appeal dismissed.

A. I. R. 1938 Lahore 834

TEK CHAND AND RAM LALL JJ.

Waryam Sher Mohammad and another
Convicts — Appellants
 v.

Emperor.

Criminal Appeal No. 76 of 1938, Decided on 10th June 1938, from order of Sess. Judge, Ferozepore, D/- 5th January 1938.

(a) Penal Code (1860), S. 300 (3) — Murder — Number of serious injuries — Cumulative effect being death — Intention to cause sufficient injuries as will result in death, held established — Case held came under S. 300 (3).

The deceased had received no less than 28 injuries. Of these 12 were punctured wounds on the legs and arms, both the legs and arms had been fractured at several places; the right ulna bone had been dislocated; and one of the incisor teeth in the upper jaw was missing. There were also two contused wounds skin-deep on the head, and contusions on other parts of the body. It may be that none of these injuries individually was sufficient to cause death, but death was due to the cumulative effect of the multiple injuries. On these facts :

Held that the accused assaulted the victim with the intention of causing such bodily injuries as were sufficient, in the ordinary course of nature, to cause death. Their case, therefore, clearly fell within clause *thirdly* of S. 300.

[P 835 C 1]

(b) Penal Code (1860), S. 300 (2) — Constitutional or peculiar defect leading to death as a result of injuries not ordinarily sufficient to cause death — Neither presence of such defect nor its knowledge to accused established — Case held not covered by S. 300 (2).

Where it has not been shown that any constitutional or other peculiarity existed in the case of the deceased which would have made it likely that injuries which ordinarily would not cause death, would be fatal in his case, and where it has not been shown that his assailants were aware of any such defect :

Held that the case did not fall under S. 300 (*Secondly*) : 1 Bom 342; A I R 1929 Lah 157 and A I R 1932 Oudh 186, *Rel. on.* [P 835 C 2]

(c) Penal Code (1860), S. 300 — Sentence — Injuries not on any vital part — Merciless beating resulting in death — Sentence of death is proper.

In cases in which none of the vital parts has been touched, and yet the victim has been beaten in a most merciless manner and been practically pounded to death, sentence of death is proper in the absence of any extenuating circumstance.

[P 836 C 1]

B. R. Puri — *for Appellants.*

Jhanda Singh for Advocate-General —
for the Crown.

Tek Chand J. — Waryam, Wattu, and Pala Singh, Jat, of Mauza Dabwali Roherianwali, Tehsil Fazilka, Ferozepore District, have been convicted of the murder of Gurdial Singh of the same village and have been sentenced to transportation for life. Against their conviction and sentences they have appealed. There is also before us an application for enhancement of the sentences from transportation for life to death, presented by Bhan Singh, brother of the deceased. The case for the prosecution is that there was old and bitter enmity between the deceased on one side and the appellants and Sardara and Abu (absconders) on the other. On the morning of 20th September 1937, at about 7.30 A. M., Gurdial Singh was returning from a neighbouring village to mauza Dabwali, and as he was passing through the lane near the houses of Pala Singh appellant and Abu absconder, Abu caught hold of him and shouted to Pala saying that he had caught their enemy. On this Pala Singh armed with a dang, Waryam with a khunda, and Sardara with a sela, came to the spot and began to beat Gurdial Singh. Gurdial Singh fell down. Abu went to his house and brought a sela and joined the other three in beating the victim. Gurdial Singh raised a cry, hearing which his sister, Mt. Maryan alias Nandi, (P. W. 10), who had gone to get water from the kassi and happened to be close by, ran towards the spot and tried to intervene. Pala and Waryam, however, beat her and caused her several injuries. Six other persons, Sajwara (P. W. 9), Nazar Singh (P. W. 11), Zabta (P. W. 12), Bahadur (P. W. 13), Jabru (P. W. 14), and Suleman (P. W. 15) also reached the spot and saw Gurdial Singh being beaten. But before they could do anything, the culprits had made good their escape. The first information report was lodged by Bhan Singh, brother of the deceased, at the police station, a distance of 10 miles, at 10 A. M. In the meantime, Gurdial Singh

had died as a result of the injuries. The learned counsel for the appellants has criticized the evidence of the eye-witnesses. But after hearing him at length, I can see no reason to disbelieve them. The presence of Mt. Maryan at the spot cannot be denied as she herself had received injuries. Jabru (P. W. 14) is a wholly independent witness and nothing has been brought out to show as to why he should give false evidence against the appellants. The other witnesses, some of whom are no doubt relations of the deceased, corroborate their testimony. I hold, in agreement with the learned Sessions Judge, that Gurdial Singh died as a result of the injuries caused to him by the appellants along with two other persons. Counsel has pointed out that in the first information report the names of only four of the eye-witnesses were mentioned, and that besides the appellants and the absconders two other persons also were mentioned as the assailants. But, as has been stated already, the report was made by Bhan Singh, who had not himself seen the assault. His information was admittedly based on hearsay, and therefore this matter does not affect the case.

Counsel next argued that the offence does not amount to "murder" as defined in the Penal Code, but falls within S. 304-II, I. P. C. With this contention I am unable to agree. The medical evidence shows that the deceased had received no less than 28 injuries. Of these, 12 were punctured wounds on the legs and arms; both the legs and the arms had been fractured at several places; the right ulna bone had been dislocated, and one of the incisor teeth in the upper jaw was missing. There were also two contused wounds skin-deep on the head, and contusions on other parts of the body. It may be that none of these injuries individually was sufficient to cause death, but as pointed out by the medical witness, death was due to the cumulative effect of the multiple injuries caused by blunt and sharp-edged weapons, which had been used by the assailants. There can thus be no doubt that they had assaulted the victim with the intention of causing such bodily injuries as were sufficient, in the ordinary course of nature, to cause death. Their case, therefore, clearly falls within clause *thirdly* of S. 300, and they have been rightly convicted under S. 302. Before concluding this part of the case, it seems necessary to point out that the learned Sessions Judge has found that the case was

covered by S. 300 "secondly as well as thirdly". The learned Judge is, however, clearly in error in holding that the second clause of the Section is also applicable to the facts as found by him. That clause lays down that "culpable homicide" is "murder", if the act by which the death is caused is done "with the intention of causing such bodily injury as the offender *knows to be likely* 'to cause the death of the person to whom the harm is caused. As was pointed out as far back as 1876 by Melvill J. in the celebrated case in 1 Bom 342¹ at p. 345 the essence of this clause appears to be found in the words which have been underlined (*here italicized*). The learned Judge observed :

The offence is murder, if the offender *knows* that the *particular person injured* is likely, either from peculiarity of constitution, or immature age, or other special circumstance, to be killed by any injury *which would not ordinarily cause death*. The illustration given in the Section is the following :

'A knowing that Z is labouring under such a disease that a blow is likely to cause his death, strikes him with the intention of causing bodily injury. Z dies in consequence of the blow. A is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health'.

See also to the same effect the judgment of Dalip Singh J. in 10 Lah 477² at p. 481 and 7 Luck 634.³ In the case before us it has not been shown that any constitutional or other peculiarity existed in the case of Gurdial Singh, which would have made it likely that injuries which ordinarily would not cause death, would be fatal in his case. Nor has it been shown that his assailants were aware of it. For these reasons, Cl. 2 is clearly inapplicable. The matter is however of no practical importance, as the act of the appellants is covered by clause *thirdly* of S. 300, as has been held above, and therefore they are guilty of murder.

Coming now to the question of enhancement of the sentence, I may say at once that I am unable to accept as adequate the reason given by the learned Sessions Judge for imposing the lesser penalty permissible under the law. He has observed that though there was no extenuating circumstance but considering "that there were no

1. Reg v. Govinda, (1875-77) 1 Bom 342.

2. Inder Singh v. Emperor, (1929) 16 A I R Lah 157 = 113 I C 333 = 30 Cr L J 141 = 10 Lah 477 = 30 P L R 674.

3. Emperor v. Ratan, (1932) 19 A I R Oudh 186 = 1932 Cr C 443 = 138 I C 123 = 33 Cr L J 561 = 7 Luck 634 = 9 O W N 285.

serious injuries on the head, chest or other vital parts of the body the alternative sentence of transportation for life would meet the ends of justice." But this circumstance, by itself, is no ground for not imposing the death sentence. Cases frequently occur in which none of the vital parts has been touched, and yet the victim has been beaten in a most merciless and brutal manner and been practically pounded to death. In such cases, in the absence of any extenuating circumstance, the capital sentence would be the only appropriate punishment. In the present case, however, there are other reasons for which I do not think it fit to interfere with the sentence. According to the evidence of the eye-witnesses, there is a clear distinction between the cases of the present appellants, and Abu absconder. He appears to have been the prime mover in the affair, and Pala Singh and Waryam Singh took a less prominent part. It was Abu who waylaid the deceased, and both the appellants came to the spot and joined in the attack at his instance. I do not therefore think that this Court should interfere with the sentence, in the exercise of its revisional powers. It may also be stated that counsel for the Crown does not support the application for enhancement, which had been made by a relation of the deceased. For the foregoing reasons I would dismiss the appeal and confirm the sentence of transportation for life passed against the appellants by the learned Sessions Judge. I would also reject the application for enhancement of sentence.

Ram Lall J. — I agree.

B.D./R.K. *Appeal dismissed.*

A. I. R. 1938 Lahore 836

TEK CHAND AND SKEMP JJ.

Hakim Rai Lala Rallia Ram —
Plaintiff — Petitioner.
v.

L. Ganga Ram Lala Rallia Ram —
Defendant — Respondent.

Civil Misc. Nos. 243 and 390 of 1937,
Decided on 16th June 1937.

(a) Limitation Act (1908), Sec. 5—Sufficient cause— Agreement between parties to end litigation and accept High Court's decree as final — One party resiling and filing application for leave to appeal— Application for leave filed by other party some days out of time — Held there was sufficient cause for extending time.

Defendant did not apply for leave to appeal within time because plaintiff approached him, through certain relations not to continue this litigation any further and suggested that both parties might accept as final the decision of the High Court. But defendant afterwards received a notice which showed that plaintiff had gone back on the agreement and had filed an application for leave to appeal. Thereupon defendant also presented application for leave to appeal to the Privy Council. But it was some days out of time :

Held that in the circumstances there was sufficient cause for extending the time under Sec. 5.

[P 837 C 1, 2]

(b) Civil P. C. (1908), Sec. 110—High Court varying decree of lower Court — Party held entitled to appeal to Privy Council as of right — Appeal need not involve substantial question of law.

Where in plaintiff's appeal, the High Court varied the trial Court's decree by a sum which was far in excess of Rs. 10,000 and though the variation was all in favour of the plaintiff and he could not have any appealable grievance against such variation, the decree of the High Court could not be said to be one of affirmance. Hence the plaintiff was entitled to appeal to His Majesty in Council as of right and it was not necessary for him to show that his appeal raised any substantial question of law : *A I R 1925 P C 60, Foll.*

[P 837 C 2 ; P 838 C 1]

Qabul Chand — for Petitioner.

J. N. Aggarwal and J. L. Kapur —
for Respondent.

Tek Chand J.—This judgment will dispose of two civil miscellaneous petitions Nos. 243 and 390 of 1937, for leave to appeal to His Majesty in Council against the decrees of this Court passed in two cross appeals (Nos. 906 and 988 of 1934) which arose from the same suit. The suit was instituted by Hakim Rai against his brother Ganga Ram for dissolution of partnership and rendition of accounts. The value for purposes of jurisdiction was tentatively fixed in the plaint at Rs. 2000. A preliminary decree was passed in the suit, after which proceedings continued for determining the exact amount due. In the course of these proceedings the plaintiff claimed that a sum of over Rs. 70,000 was due to him by the defendant. The defendant denied that anything was due by him to the plaintiff. On the other hand, he averred that the plaintiff owed a large sum to him. The Subordinate Judge granted the plaintiff a decree for Rs. 3286. From this decree the plaintiff and the defendant filed cross appeals in this Court; the plaintiff prayed for an enhancement of the decretal amount by Rs. 29,647; and the defendant asked for a total dismissal of the suit. The two appeals were heard together, and were decided

by this Bench on 7th January 1937. We dismissed the defendant's appeal, and accepted that of the plaintiff partially, raising the amount decreed to him from Rupees 3286 to Rs. 11,726 with interest thereon at six per cent. per annum from the date of the suit (13th January 1916) till realization. On 5th April 1937, Hakim Rai presented a petition in this Court for leave to appeal to His Majesty in Council. In the grounds for the proposed appeals, he mainly contests the findings of fact on various items with regard to which this Court, in agreement with the Court of first instance, had disallowed his claim. This petition was presented within 90 days of the date of the decree of this Court, as required by Article 179, Limitation Act.

On 17th May 1937, Ganga Ram, defendant, also presented a petition for leave to appeal to His Majesty in Council. This petition was one month and ten days out of time. Along with the petition, an application was made under S. 5, Limitation Act, for extension of time. This application was supported by an affidavit, in which it was stated that he intended to appeal to His Majesty in Council from the decree of the High Court and had obtained copies for the purpose, but early in March 1937 Hakim Rai approached him, through certain relations, not to continue this litigation any further, as it had already gone on for more than 20 years, and the parties had incurred enormous expense; he suggested that both parties might accept as final the decision of the High Court, and the defendant should arrange to pay him the amount decreed as soon as possible, that Ganga Ram agreed and on this understanding he did not apply for leave to appeal within time; that on 11th March he was surprised to receive a notice from this Court which showed that Hakim Rai had gone back on the agreement and had filed an application for leave to appeal; that thereupon Ganga Ram also took steps to present this petition, which was done on 17th May. He accordingly urged that there was sufficient cause for non-presentation of the petition within time and that the delay be condoned. Hakim Rai filed counter-affidavit denying that there had been any such agreement between them. The parties asked for, and were allowed, opportunity to lead evidence in support of their respective allegations. After hearing the evidence, we are of opinion that Ganga Ram's story is substantially true and that, in the circumstances

there was sufficient cause for his not presenting the petition for leave to appeal within the time prescribed by law. We accordingly extend the time under Sec. 5, Limitation Act, and hold that his petition, presented on 17th May 1937, is within time. In this case the requirements of S. 110 have clearly been fulfilled, the subject-matter of the dispute is admittedly over Rs. 10,000, and this Court has varied the decree of the trial Court to the prejudice of Ganga Ram. We accordingly grant his petition.

With regard to the petition presented by Hakim Rai, the subject-matter of the suit as well as of the proposed appeal is over Rs. 10,000. It is however objected by the opposite party that leave should not be granted, as the proposed appeal does not raise any substantial question of law, this Court having affirmed the findings of the trial Court with regard to the particular points which Hakim Rai wishes to agitate before His Majesty in Council. The plaintiff's counsel urges in reply that under S. 110 what has to be seen is not whether the findings of the trial Court on any particular point have or have not been affirmed, but whether the decree of this Court has affirmed or varied that of the Court below. It is conceded that in Hakim Rai's appeal, this Court varied the trial Court's decree by a sum which is far in excess of Rupees 10,000. This variation no doubt was all in favour of Hakim Rai, and he cannot have any appealable grievance against such variation, but none the less, the decree of this Court was not one of affirmance and having regard to the clear wording of S. 110 and the ruling of their Lordships of the Privy Council in 51 Cal 969¹ it must be held that the requirements of Section have been fulfilled and Hakim Rai is entitled to appeal to His Majesty in Council as of right. Counsel for the opposite party cited a large number of rulings, but it is not necessary to discuss them as in every one of them the suit comprised several distinct and separate "subject-matters," and leave to appeal to His Majesty was sought with regard to those "subject-matters" only, in which both Courts in India had concurrently decreed against the applicants. In the present case, there was only one single and indivisible subject-matter in dispute and therefore it clearly falls within the rule laid down by

1. *Annapurnabai v. Rup Rao*, (1925) 12 A I R P O 60=86 I C 504=51 Cal 969=51 I A 319 (P O).

their Lordships in the case already cited. It is therefore not necessary for Hakim Rai to show that his appeal raises any substantial question of law. His petition was made within time and must be granted. We accordingly allow both the petitions, and grant Hakim Rai as well as Ganga Ram leave to appeal to His Majesty in Council. The parties shall bear their own costs of these proceedings.

N.S./R.K.

*Petitions allowed.***A. I. R. 1938 Lahore 838**

JAI LAL J.

Shiv Nath Rai — Petitioner.

v.

Messrs. Lallo Mal-Madan Lal and another — Respondents.

Civil Revn. No. 883 of 1937, Decided on 31st January 1938, from order of Addl. Dist. Judge, Amritsar, D/- 14th August 1937.

Arbitration—Additional District Judge can entertain proceedings if powers of District Judge are assigned to him — On considering circumstances powers held so assigned—Party not raising objection to jurisdiction of Additional District Judge at the time of disposing of case cannot subsequently raise it.

The contention that under the Arbitration Act jurisdiction to entertain proceedings is given to the District Judge alone and the Additional District Judge is not competent to entertain such proceedings is not maintainable as it is opposed to S. 21, Punjab Courts Act, which provides that the Additional District Judge can exercise all the powers of the District Judge, but the District Judge has to assign such powers to him.

[P 838 C 2]

Previously a case was on the record of the District Judge, who actually heard it and subsequently it went to the Additional District Judge who disposed of it. No objection was taken by the party to the jurisdiction of the Additional District Judge on that date :

Held that under the circumstances it must be assumed that the District Judge did assign this case to the Additional District Judge. In any case, the party having taken no objection to the jurisdiction of the Additional District Judge was not entitled to raise it subsequently : *A I R 1919 Lah 27, Rel. on.*

[P 838 C 2]

Dwarka Nath Aggarwal —

*for Petitioner.*Daulat Ram — *for Respondent 1.*

Order.—This is a petition for revision of an order passed by the Additional District Judge of Amritsar directing that an award made by the arbitrators appointed under the Indian Arbitration Act be filed in Court. The main ground taken on this

petition is that the Additional District Judge had no jurisdiction to entertain the proceedings. What appears to have happened is that the application was originally filed before the District Judge of Amritsar who continued to hear the case till 5th February 1937. On that date the case was postponed to 17th April 1937 and it was mentioned that the Additional District Judge was busy in hearing some Sessions case. But on 17th April 1937 the case was heard by the Additional District Judge and decided by him. No objection was taken by the petitioner to the jurisdiction of the Additional District Judge on that date. It is contended before me that under the Indian Arbitration Act jurisdiction to entertain proceedings is given to the District Judge alone and the Additional District Judge is not competent to entertain such proceedings. This contention seems to be opposed to S. 21, Punjab Courts Act, which provides that the Additional District Judge can exercise all the powers of the District Judge, but the District Judge has to assign such powers to him. The real question, therefore, in this case is whether the District Judge assigned the function of deciding the present case to the Additional District Judge. There is no express order on the record sending the case to the Additional District Judge, but previously the case was on the record of the District Judge, who actually heard it and on 17th April it went to the Additional District Judge who disposed of it. I consider that under the circumstances it must be assumed that the District Judge did assign this case to the Additional District Judge. In any case, the petitioner having taken no objection to the jurisdiction of the Additional District Judge is not now entitled to raise it on this petition for revision. This view is in conformity with the view taken in 52 I C 352¹ decided by this Court.

As to the merits of the petition I consider that there is no force in any of the grounds taken by the petitioner. One ground taken is that no proper notice of the arbitration proceedings was given by the arbitrators. But there is a notice on the record from which it appears that a notice was given to the petitioner. It is true that the time of the arbitration proceedings was not specified in this notice, but it appears that the petitioner had no mis-

1. *Kishen Lal v. Jai Lal*, (1919) 6 A I R Lah 27 = 52 I C 352 = 1 Lah 158 = 95 P L R 1919.

understanding about the matter because his case is that he went to the arbitrators at 4 o'clock but he did not find them there. One of the arbitrators, on the other hand, says that they waited for the petitioner from 4 to 5 P. M. but the petitioner did not appear and therefore proceeded with the case ex parte. The statement of the petitioner that he went to the place appointed by the arbitrators at 4 o'clock has been disbelieved by the Additional District Judge. But this is a clear indication of the fact that the petitioner knew at what time the arbitration proceedings were to take place. Another objection taken is that the arbitrators have decided the matters which were not referred to them. In order to establish this fact no good evidence was led by the petitioner. What he attempted to do was to attack the merits of the award and from that he wanted the Court to infer that the arbitrators could not have taken into consideration all the matters referred to them or that they took into consideration matters which were not referred to them. In my opinion, this was nothing but a clever attempt to attack the award of the arbitrators on the merits which the petitioner was not entitled to do. This petition in my opinion has no force and I dismiss it with costs.

D.S./R.K.

Petition dismissed.

* A. I. R. 1938 Lahore 839

SKEMP J.

Roda and others—Accused—Petitioners.
v.*Autar Singh — Complainant —*
Respondent.

Criminal Revn. No. 669 of 1938, Decided on 26th September 1938, from order of Magistrate, Second Class, Gujar Khan, D/- 14th March 1938.

* (a) Criminal P. C. (1898), S. 522—Accused breaking lock of house in absence of person in possession and taking possession of house — Order under S. 522 is competent.

Where accused breaks the lock of a house in absence of the person in possession and takes possession of the house, he uses criminal force to the lock which he breaks, criminal because it involves the crime of mischief and therefore an order under S. 522 is competent : *A I R 1934 Lah 454, Dissented.* [P 840 C 2]

(b) Criminal P. C. (1898), S. 522 — Judge not finding that there was criminal force but finding complainant's evidence regarding it as true — Order under S. 522 is competent.

Though a Judge has not actually found that there was criminal force, an order under S. 522 is competent if he has found as true the complainant's evidence that the accused used criminal force by breaking the lock of the house : *A I R 1935 Lah 477, Ref.* [P 840 C 2]

* (c) Criminal P. C. (1898), S. 522 (3) — S. 522 (3) imposes no period of limitation on Court of Appeal or revision — Order restoring possession by Appellate Court more than one month after conviction — High Court in revision would not interfere.

Section 522 (3) imposes no period of limitation on a Court of Appeal or revision. Hence a Court of Appeal can pass an order restoring possession more than one month after the date of conviction and in a revision by convicts against the Appellate Court's order restoring possession, the High Court would not interfere : *A I R 1933 Pat 617 ; A I R 1934 Pat 154 ; A I R 1925 Pat 689 and A I R 1924 All 212, Rel. on ; A I R 1932 Lah 210 ; A I R 1932 Cal 750 and A I R 1937 Pesh 7, Expl.*

[P 841 C 1, 2]

L. M. Dutta — *for Petitioners.*Harnam Singh — *for Respondent.*

Order. — The facts which have led to the present revision are as follows: Autar Singh purchased a house belonging to Ilam Din at a court auction held in execution of a decree in favour of a third party against Ilam Din. The sale was held on 9th February 1934, Autar Singh was granted a sale certificate on 15th June 1934, and on 3rd August 1934, he was put into actual possession. He remained in possession until 17th May 1936, when he was dispossessed. The circumstances of dispossession are to be found in the complaint lodged by Autar Singh on 19h May 1936, and in his evidence in Court, the four petitioners, who are related to Ilam Din, broke the lock of the house. Autar Singh who was informed by Devi Das hurried to the spot and found that the accused were still there armed with kulharis and dangs. He went and reported the matter to the zaildar. The complainant was supported by Inayat Khan, zaildar, Bahadur Ali, lambar-dar of the village, Ilam Din, chowkidar and some others. The Naib Tehsildar found that the complaint was true, convicted the four accused under S. 448, I. P. C., and sentenced them each to pay Rs. 40 fine or in default suffer one month's rigorous imprisonment. The accused appealed to the Additional District Magistrate; their appeals were dismissed and they served the terms of imprisonment in default.

The Naib Tehsildar passed sentences on 16th September 1936, and the appeal was dismissed by the Additional District Magistrate on 16th October 1936. On 18th Nov.

ember 1936, the Naib Tehsildar issued warrants purporting to be under S. 522, Criminal P. C., ordering Autar Singh to be restored to the possession of the house. For some reason not quite clear on the record—possibly because of the delay of more than one month that had elapsed from the date of the convictions—these warrants were not executed. Subsequently the complainant Autar Singh applied to the Additional District Magistrate to be put in possession and on 23rd July 1937, the Additional District Magistrate passed an order under Sec. 522 (3), Criminal P. C., directing that a warrant for the restoration of possession of the immovable property be issued against the four respondents in favour of Autar Singh, complainant. Some difficulty arose about the boundaries of the house and on 6th January 1938, the case was made over to the Tahsildar for further proceedings. The Tahsildar ascertained the boundaries and sent the warrant to the police for compliance. The warrant was carried out, the four respondents were dispossessed and Autar Singh was put in possession.

The four persons convicted under S. 448, respondents in the petition under S. 522, have come here in revision through Mr. L. M. Dutta. The revision purports to be against the order of the Tahsildar, dated 14th March 1938. Mr. Dutta took two points: (1) that no order could be passed under S. 522 unless the offence was attended with criminal force; and (2) that the order was out of time. S. 522, Criminal P. C., runs:

(1) Whenever a person is convicted of an offence attended by criminal force 'or show of force or by criminal intimidation' and it appears to the Court that by such force 'or show of force or criminal intimidation' any person has been dispossessed of any immovable property, the Court may, if it thinks fit, 'when convicting such person or at any time within one month from the date of the conviction' order 'the person dispossessed' to be restored to the possession of the same.

(2) * * * * *

(3) An order under this Section may be made by any Court of Appeal, confirmation, reference or revision.

On the first point Mr. Dutta quoted A I R 1934 Lah 454,¹ the headnote of which runs:

'Force' contemplates the presence of the person using the force and of the person to whom the force is used. Where therefore a person breaks open the lock of a house in absence of the person

in possession and enters into possession thereof the possession is taken without any 'force or show of force' and an order under S. 522 cannot be passed.

With deference I think this view of law is wrong. "Criminal force" is defined in S. 350, I. P. C., and "force" is defined in S. 349. Section 349 runs:

A person is said to use force to another if he causes motion, change of motion or cessation of motion to that other, or if he causes to any substance such motion, or change of motion, or cessation of motion as brings that substance into contact with any part of that other's body, or with anything which that other is wearing or carrying, or with anything so situated that such contact affects that other's sense of feeling. . . .

Section 350 runs:

Whoever intentionally uses force to any person without that person's consent, in order to the committing of any offence, or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other.

It will be noticed that these Sections define "criminal force" as applied to a person but they say nothing about "criminal force" as applied to a thing. Is it not possible to use criminal force to a thing? If a person or persons forcibly demolish a wall belonging to another, do they not use criminal force to the wall? I would say that in the present case the petitioners used criminal force to the lock which they broke, criminal because it involved the crime of mischief and that an order under S. 522 is therefore competent. Mr. Dutta also referred to A I R 1935 Lah 477² in which Currie J. said:

An order under S. 522, Criminal P. C., can only be passed in cases where criminal force as defined in S. 350, Penal Code, has been used and where a finding to that effect has been recorded.

From the reported facts of the case it does not appear whether there was any criminal force or not. In the present case Mr. Dutta argued that the Naib Tehsildar did not find that there was criminal force but, as pointed out by Sardar Harnam Singh, he found that the complainant's evidence was true. That evidence has already been summarized. The accused were seen by Devi Das breaking the lock and when the complainant reached the spot the four present petitioners were standing there armed with kulharis and sticks. In my judgment an order under Section 522 was competent.

1. *Bihari Lal v. Emperor*, (1934) 21 A I R Lah 454=1934 Cr O 702=152 I O 162=86 Cr L J 59=15 Lah 786=86 P L R 91.

2. *Suba v. All Gauhar*, (1935) 22 A I R Lah 477=1935 Cr O 871=157 I O 471=36 Cr L J 1161=87 P L R 176.

Secondly Mr. Dutta argued that the present order was barred by time because it was made more than a month after the date of the conviction. On this point I was referred to several authorities. It has been held several times by the Patna High Court that sub-s. (3) of S. 522, which was added by the Amending Act of 1923, imposes no period of limitation on a Court of Appeal or revision. In 12 Pat 787,³ a Division Bench ruling, it was held that it was competent to a Court of Appeal or revision to pass an order restoring the property to the complainant even after the expiry of one month from the original conviction or from the disposal of appellate or revisional proceedings. In A I R 1934 Pat 154,⁴ another Division Bench ruling, this principle was again affirmed and the High Court made an order in the exercise of its revisional jurisdiction. In A I R 1925 Pat 689⁵ it was laid down that :

An order under the Section may be passed by the Courts of Appeal, confirmation, reference or revision at any time howsoever long after the conviction by the Magistrate. Thus, where a Magistrate passes an order under Sec. 522 beyond the prescribed one month, though the order by the Magistrate is illegal, yet it is competent to the High Court as Court of revision to order the restoration of possession to the person dispossessed.

46 All 92⁶ was a case in which a learned Judge of the Allahabad High Court on 4th October 1923, passed an order restoring the complainant to possession on the revision side. It is not clear how long after the conviction the order for restoration was passed, but it could not have been within one month. On the other hand Mr. Dutta in reply referred to 33 P L R 481⁷ in which a learned Judge of this Court held that the order passed by the trial Magistrate after a month was without jurisdiction and set it aside. He differed from an earlier Patna ruling and said :

I cannot see that the words "Courts of Appeal" etc., can refer to anything except the Courts dealing with the original conviction or trial and do

3. Fida Husain v. Sarfaraz Husain, (1933) 20 A I R Pat 617=1933 Cr C 1366=145 I O 327=84 Cr L J 940=12 Pat 787=14 P L T 696.

4. Gudri Mahton v. Jangi Mahton, (1934) 21 A I R Pat 154=1934 Cr O 339=150 I O 787=85 Cr L J 1158=15 P L T 163.

5. Rameshwar Singh v. Emperor, (1925) 12 A I R Pat 689=91 I O 809=27 Cr L J 137=4 Pat 438=7 P L T 285.

6. Laohman v. Emperor, (1924) 11 A I R All 212=88 I O 910=26 Cr L J 206=46 All 92=21 A L J 871.

7. Ghazan v. Mt. Bhagbhari, (1932) 19 A I R Lah 210=1932 Cr O 254=135 I O 679=83 Cr L J 191=33 P L R 481.

not refer to the High Court in reference from the order restoring possession.

Mr. Dutta also referred to A I R 1932 Cal 750⁸ where a Division Bench of the Calcutta High Court set aside an order under S. 522 made by the trial Magistrate after the expiry of a month. The Bench did not consider whether they could take any action on the revision side. Mr. Dutta also referred to A I R 1937 Pesh 7⁹ where it was laid down :

Under S. 522, a month after the date of conviction, the trial Magistrate becomes functus officio in the matter of delivering possession. When once the lower Court has ceased to have the power of giving possession, the revisional Court cannot, when moved to consider the order of that Court refusing to give possession on the ground of limitation, enlarge that period and grant the relief. Sub-cl. (3) to that Section comes into play only when an appeal or revision has been preferred against the conviction. It is then that the appellate or revisional Court is seized of that jurisdiction to restore possession although the original Court may not have done so and such higher Courts are not bound by the limitation of one month in doing so. But this clause does not help if the Court of revision is considering the order of the trial Court under Section 522, Criminal P. C., refusing to grant possession because the time for making the order had passed.

This ruling does not help the present petitioners. The order restoring possession to Autar Singh was really made by the Additional District Magistrate on 23rd July 1937; owing to difficulties about boundaries the Tehsildar was named as a ministerial officer to carry out the order. The Additional District Magistrate's order was on an application made in his Court and thus according to the Patna and the Peshawar Courts the period of limitation did not apply. There is no authority directly to the contrary. In the authorities which have been quoted, those of Dalip Singh J. and the Calcutta High Court, the Court did not interfere on the revision side when the order of the trial Court was beyond the expiry of one month. This particular point is not before me. It is the Additional District Magistrate, the Appellate Court, that gave the order and it is the persons convicted who seek that I should interfere on revision with that order. I decline to do so. There is no doubt that convenience and justice are in favour of the Patna view. In the present case Autar Singh was the pur-

8. Aswini Kumar Das v. Sasanka Mohan, (1932) 19 A I R Cal 750=1932 Cr O 745=140 I O 66=33 Cr L J 868=59 Cal 1153=36 O W N 624.

9. Said Umar v. Abdul Qadir, (1937) 24 A I R Pesh 7=166 I O 872=38 Cr L J 333.

chaser of the house at a court auction; he had been in possession for nearly two years when he was forcibly dispossessed, the petitioners were convicted under Sec. 448 and finally he has been restored to possession in pursuance of the order of the Appellate Court, dated 23rd July 1937. To eject him from possession now would be to force him to go to a Civil Court to recover possession of a house to which there is no doubt that he is legally entitled. I reject this revision.

D.S./R.K.

*Revision rejected.***A. I. R. 1938 Lahore 842**

ADDISON AG. C. J. AND
DIN MOHAMMAD J.

Sikandar — Defendant — Appellant.
v.

Mt. Karam Nishan and others, Plaintiffs and others, Defendants —
Respondents.

First Appeal No. 192 of 1937, Decided on 2nd May 1938, from decree of Senior Sub.Judge, Montgomery, D/. 10th March 1937.

(a) Punjab Colonization of Government Lands Act (5 of 1912), S. 21 (a)—Occupancy rights conferred on widow in land originally held by her husband as tahud khawahi tenant—Widow should be treated as person to whom tenancy was first allotted and succession is governed by S. 21 (a)—Fact that her husband was original lessee cannot be treated as tantamount to his having rendered service within meaning of S. 21 (a)—Nomination should therefore be made only from issue of widow.

The words 'first allotted' in S. 21 (a) describe the creation of tenancy. Hence where occupancy rights have been conferred on a widow in land originally held by her husband as tahud khawahi tenant, the widow should be treated as a person to whom tenancy was first allotted and the succession to the occupancy rights held by her would be governed by S. 21 (a). But the nomination cannot be made from the male agnates of her husband as the tenancy cannot be said to be allotted to her in recognition of the services of her husband. The word 'services' as used in S. 21 (a) refers to some sort of signal service rendered either in the Military or the Civil Departments or in any other way which may deserve the recognition of the Government, but it definitely does not allude to the mere fact of being a lessee from the Government. Consequently the nomination must be made from the issue of the female tenant. The Collector in making the nominations can make the choice of all the issues and is not enjoined to confine his choice to one only from among this group: *A I R 1932 Lah 412, Approved; Reasoning in A I R 1930 Lah 474 and A I R 1931 Lah 271, Differed from; A I R 1933 Lah 293, Disting.; A I R 1937 Lah 329, Explained.* [P 844 C 2; P 845 C 1]

(b) Custom (Punjab)—Succession—Khokhars—Daughters exclude collaterals.

Among Khokhars daughters exclude male collaterals in succession to the self-acquired property of their father. [P 843 C 1; P 845 C 2; P 846 C 1]

(c) Res judicata—Finding in favour of pro forma defendant is not res judicata in subsequent suit.

A finding in favour of a party joined as pro forma defendant and not a necessary party in previous suit does not operate as res judicata in subsequent suit: *23 P R 1907; A I R 1923 Lah 16; A I R 1928 Lah 493; 41 P R 1899 and A I R 1916 Lah 13, Rel. on; A I R 1933 Lah 66, Disting.* [P 846 C 1]

Achhru Ram and Indar Dev Dua —
for Appellant.

R. C. Soni and Manzur Qadir —
for Respondents (Plaintiffs).

Din Mohammad J.—The suit out of which this appeal has arisen was instituted by Mt. Karam Nishan, Mt. Ghulam Fatima and Mt. Amir Begum, daughters of one Ghulam Farid Khan, for a declaration that they were entitled to succeed to the property left by their mother, Mt. Subhano, in preference to the collaterals of their father. It was alleged in the plaint that their father was succeeded by their mother, Mt. Subhano, who died about 2½ years prior to the institution of the suit. They were four sisters, one of whom, Kher Nishan, had died in the lifetime of their mother leaving her surviving a son, Allah Yar Khan. Of the remaining three sisters, Mt. Ghulam Fatima was still unmarried. Their mother was in possession of a considerable area of land in some of which she had proprietary rights and in some occupancy rights. The land in which Mt. Subhano held occupancy rights was originally in possession of their father as a tahud khawahi tenant of which the occupancy rights were later conferred by the Government on Mt. Subhano. On the death of their mother they were entitled to succeed to the whole property of their deceased father which was non-ancestral and to which under the Customary law of the district they were entitled to succeed in preference to their father's collaterals. It was further alleged that in a previous suit between Riaz-ud-Din and Lashkar on the one hand and Mt. Subhano and her alienee on the other, it was held by the Chief Court of the Punjab that in the matter of succession to the non-ancestral property, the daughters had a preferential right to succeed and that that judgment operated as res judicata. They were still in possession of the land but as a cloud had

been cast upon their right, this declaration was being sought to remove that cloud.

Five defendants were originally impleaded in the suit, of whom Allah Yar was made a plaintiff by an order dated 21st December 1935. Of the remaining four defendants, Mt. Sadan, daughter of Riaz-ud-Din, appeared in Court on 7th May 1936, and made a statement to the effect that although half of the property left by Mt. Subhano had been mutated in the name of her father, she disclaimed all connexion with that land and as the property was acquired by Ghulam Farid Khan the plaintiffs were entitled to succeed to it in preference to his collaterals. Muhammad, Sadiq and Sikandar, sons of Lashkar, were thus the only defendants who remained to contest the suit. These defendants raised several defences contending inter alia that under S. 21 (a) of Act 5 of 1912 they had been nominated by the Collector and as he was empowered to nominate a successor to Mt. Subhano as regards the occupancy rights that she held, the plaintiffs were not in a position to contest the Collector's action. So far as the proprietary lands were concerned, married daughters were excluded by collaterals and inasmuch as all the plaintiffs had married, they had no rights left. As regards the previous judgment of the Punjab Chief Court, it was urged that it did not operate as *res judicata*. It may be remarked that these defendants mainly based their case on the custom applicable to the Rajput tribe living in the Pakpattan Tahsil of the Montgomery District, although in the heading of the plaint it had been stated that the parties belonged to the Dipalpur Tahsil of the Montgomery District.

In the first instance certain preliminary issues raised by the defendants were disposed of and it was held that the suit as framed lay, that the plaint was properly valued for the purposes of jurisdiction, that the Secretary of State was not a necessary party and that the suit was not barred under S. 36 of Act 5 of 1912. Later, issues of facts were framed and after the parties had produced both oral and documentary evidence, the Senior Subordinate Judge came to the conclusion that the decision in the previous suit operated as *res judicata* and that among Khokhars daughters excluded male collaterals in succession to the self-acquired property of their father. He consequently granted the plaintiffs a decla-

ratory decree in terms of the relief prayed for. Sikandar alone has appealed. It may be remarked at the outset that the present appeal does not affect more than 1/12th of the property in suit. Riaz-ud-Din, in whose favour half of the property in suit was mutated, left only one daughter, Mt. Sadan, and as stated above she has confessed judgment. Similarly Allah Yar, who had succeeded to 1/4th of the property, has been joined as a plaintiff in the suit. Of the three sons of Lashkar, whose names were entered as owners of the remaining 1/4th of the property, Sikandar alone has appealed and he is not entitled to more than 1/12th. He has not submitted his appeal on behalf of his two other brothers under O. 41, R. 4, Civil P. C., and the suit being not one by the reversioners in which a declaration obtained by one would enure for the benefit of all, the appellant, even if successful, cannot claim any relief in respect of more than 1/12th of the land in suit.

It may also be observed that although an allegation was made in the plaint that one of the plaintiffs, Mt. Ghulam Fatima, was still unmarried, this position cannot be maintained in the present appeal. The allegation in the plaint was resisted by the defendants who had even at the time of the mutation urged that Mt. Ghulam Fatima had married and their plea was upheld. In spite of this clear denial by the defendants, the plaintiffs do not appear to have pressed the matter further and no issue was framed. Consequently, we shall proceed on the assumption that Mt. Ghulam Fatima's claim, if any, is on a line with her other sisters. In the disposal of this case it would be necessary to keep the two kinds of properties in suit apart from each other as different incidents attach to each. As stated above the bulk of the property consists of occupancy rights in the lands which were originally held by Ghulam Farid Khan as a *tabud khawahi* tenant. In order to understand how *tabud khawahi* tenants were dealt with at the time of the colonization of this district, reference may be made to Para. 201 of the Punjab Colony Manual (revised edition), the material portion of which reads as follows :

There was also in the Nill Bar area a large number of lessees of Government waste land, of areas varying between 6000 acres and 4 or 5. Detailed inspections of all these leased lands were carried out, and recommendations made according to the extent to which the conditions of the leases had been fulfilled. Eventually, Government sanc-

tioned, for the smaller lessees, allotment on ordinary peasant conditions of 150 per cent. of the existing cultivated area . . . There was also an immediate conferment of occupancy rights. The price to be eventually charged for proprietary rights was the ordinary peasant price . . . The same principles were applied to most of the large leases.

It was in pursuance of this policy that occupancy rights were conferred upon Mt. Subhano by an order of the Government dated 22nd December 1927, and it is in these circumstances that it is now to be determined as to how the succession to the occupancy rights will follow. The two principal Sections which deal with succession to tenants under the Colonization of Government Lands Act are Ss. 20 and 21. S. 20 comes into play only when an original tenant dies. The term 'original tenant' excludes a female tenant and consequently it is not to be considered in this case. S. 21 unfortunately is not happily worded and before coming to a definite conclusion as to whether it governs the present case and if so which part of it, it will be necessary to reproduce it at length. It is couched in the following terms :

When, after the commencement of this Act, any male tenant, who is not an original tenant, dies, or any female tenant dies, marries or re-marries, the succession to the tenancy shall devolve

(a) in the case of a female, to whom the tenancy has been first allotted, on the successor nominated by the Collector from the issue of such female tenant, or from the male agnates of the person on account of whose services the tenancy was allotted to her ;

(b) in all other cases on the person or persons, who would succeed if the tenancy were agricultural land acquired by the original tenant.

The substantive part of this Section evidently applies as this is a case where a female tenant has died. So far the matter is clear but the question whether Cl. (a) or Cl. (b) would come into play is not free from difficulty. On the one hand, it is contended for the appellant that Cl. (a) applies and as the Collector was fully empowered to nominate a successor to Mt. Subhano by virtue of the powers conferred upon him by Cl. (a) and inasmuch as he has made a nomination, the plaintiffs have not a leg to stand on. On the other hand, it is urged by the respondents that Mt. Subhano not being the tenant to whom the tenancy was first allotted, Cl. (b) will come into operation and inasmuch as under the custom applicable to the parties daughters succeed to the self-acquired property of their father in preference to the collaterals, they would be preferential heirs in this

case and would exclude the collaterals both in the case of proprietary and in the case of occupancy rights. After giving full weight to the arguments addressed to us, we have come to the conclusion that in the matter of succession to the occupancy rights held by Mt. Subhano, Cl. (a) of S. 21 is applicable and not Cl. (b); but at the same time we are disposed to hold that the nomination of the reversioners of Ghulam Farid Khan by the Collector was ultra vires and that he could make his choice only from among the daughters of Mt. Subhano and from none else. The Collector exercised his power of nomination on the ground that although Mt. Subhano was the person to whom the tenancy was first allotted it was allotted to her in recognition of the services of her husband or his father and the fact of their being the original lessees was treated as tantamount to their having rendered a service within the meaning of Clause (a).

On appeal the Commissioner merely contented himself by saying that the tenancy was first allotted under the Act to Mt. Subhano and that the persons nominated by the Collector were the proper persons to have been nominated under S. 21 (a). We are inclined to agree both with the Collector and the Commissioner to this extent that it was Mt. Subhano to whom the tenancy was first allotted under the Act, but we are not prepared to concede that it was on account of the services of either Ghulam Farid Khan or his father that the tenancy was so allotted. The fact of a person being the recipient of a lease and his continuance in possession as such is to render no service to the Crown. The word 'services' as used in this clause evidently refers to some sort of signal service rendered either in the Military or the Civil Departments or in any other way which may deserve the recognition of the Government, but it definitely does not allude to the mere fact of being a lessee from the Government. Consequently the Collector was not empowered under the law to make a nomination from among the male agnates of either Ghulam Farid Khan or his father. His choice, in these circumstances, was confined under S. 21 (a) to the issue of the female tenant to whom the tenancy was first allotted and it was the plaintiffs who came under this category and none else. In this view of the law it is not necessary to discuss Cl. (b) of S. 21 as that clause comes into play only if Cl. (a) does not apply. We have no hesi-

tation in holding therefore that the proper group from which a successor could be nominated was that of the plaintiffs and inasmuch as they are in possession of the property they are entitled to the relief prayed for. It was argued in this connexion that in so far as the Collector could make his nomination from the issue of Mt. Subhano, he could nominate only one of the plaintiffs and that inasmuch as all plaintiffs were claiming the relief, it could not be granted to them. This however is an erroneous view of looking at the matter. In our opinion, the Collector could, if he so desired, make his choice of all the plaintiffs and was not enjoined to confine his choice to one only from among this group.

We may in passing refer to the authorities which were relied upon by the parties in the matter of the applicability or otherwise of S. 21 (a). In 11 Lah 282¹ the land was originally allotted to one D in 1899 as abadkar, who however died before he had fulfilled the conditions of the grant. The land was then mutated in the name of his widow who acquired the tenancy rights in 1904. On her death in 1923 a question arose as to whether her daughter or the brother of her deceased husband succeeded to her. A Division Bench of this Court held that the tenancy had been first allotted to a female and consequently S. 21 (a) applied. This decision was relied upon in 12 Lah 529² by another Division Bench of this Court where also a widow had been granted occupancy right in the land of which her husband was the abadkar. In 14 Lah 168³ however a Division Bench of this Court differed from the reasoning employed in the two judgments referred to above and remarked that the words "first allotted" described its creation. We are in respectful agreement with the principle of law enunciated there and it is on that basis that we have treated Mt. Subhano as the person to whom the tenancy was first allotted. In A I R 1933 Lah 293,⁴ it was observed that where the widow of an original grantee is in possession in accordance with S. 20 (b), the succession would

prima facie be governed by the provisions of S. 21. This judgment is beside the point. 18 Lah 220,⁵ so far as it goes, is correct but it affords no help in the decision of the present case.

It now remains to consider whether the daughters exclude collaterals in the matter of succession to the land held in proprietary rights. The appellant mainly relied upon the Answer to Question 59 in the Customary law of the Pakpattan and Dipalpur Tahsils of the Montgomery District compiled in 1925, which says that among Rajputs daughters in the absence of sons get a share only until their marriage and that after their marriage the reversioners exclude them. It is true that Khokhars are described as Rajputs by some witnesses and that the answer to the question so far as it goes creates an initial presumption in favour of the reversioners, but in this case we consider that this presumption has been rebutted by a large number of instances in the family itself. It cannot be denied that when Mt. Subhano alienated a part of her property to one Sham Din, it was held by the Chief Court of the Punjab that according to the customary rules generally prevailing among the agricultural tribes of this province, daughters have a preferential right of succession to it as against the reversioners and that the statement in the Customary law referred to ancestral immovable property only and not to acquired property. It is also proved that when the present plaintiffs contested the gift which Mt. Subhano had made in favour of one Kunda Wattu, it was held that the daughters had a preferential right to succeed and were consequently empowered to challenge the gift. It is further in evidence that Mt. Subhano gifted a considerable area of the proprietary land in favour of the present plaintiffs and that the reversioners did not consider it expedient to challenge that alienation. Only recently when one of the reversioners, Riaz-ud-Din, died, his daughter, Mt. Sadan, was held entitled to succeed to him in preference to the collaterals. It is true that both the oral and the documentary evidence led by the plaintiffs is of a very inconclusive character and does not throw much light upon the matter in issue, but in the face of what had happened in the family itself and in the absence of any instances to the

1. *Hira v. Jai Kaur*, (1930) 17 A I R Lah 474 = 122 I O 566 = 11 Lah 282 = 31 P L R 127.

2. *Mt. Jowali v. Mangal Singh*, (1931) 18 A I R Lah 271 = 134 I O 126 = 12 Lah 529 = 32 P L R 249.

3. *Dewa Singh v. Gian Singh*, (1932) 19 A I R Lah 412 = 138 I O 306 = 14 Lah 168 = 33 P L R 595.

4. *Gurdit Singh v. Mt. Man Kaur*, (1933) 20 A I R Lah 293 = 150 I O 634.

5. *Harnamo v. Dewa Singh*, (1937) 24 A I R Lah 329 = 170 I O 978 = I L R (1937) 18 Lah 220 = 89 P L R 3.

contrary, we consider that we will not be justified in reversing the judgment of the Subordinate Judge on the question of custom.

In this view of the case it does not appear to us to be necessary to discuss whether the previous decision of the Chief Court in Sham Din's case operated as res judicata or not as regards the proprietary land, although if it had been necessary to arrive at a decision on the point, we would have been inclined to hold that it did not operate as res judicata inasmuch as the plaintiffs derived their title as regards that land from their father and not from Mt. Subhano. Further, Mt. Subhano as an alienor was a pro forma defendant and not a necessary party, and for that reason too the decision in the previous case will be no bar in this case. Reference in this connexion may be made to 23 P R 1907,⁶ 84 I C 257,⁷ A I R 1928 Lah 493,⁸ 41 P R 1899⁹ and 65 P R 1916.¹⁰ We are conscious of the fact that there are certain authorities, like 140 I C 796,¹¹ where it has been laid down that a decision in a suit by a daughter to set aside a mortgage made by the widow of her deceased husband's estate operated as res judicata in a subsequent suit by the daughter brought to challenge the gift made by the same widow, but those circumstances do not exist in the present case. On the grounds stated above we maintain the decision of the Court below and dismiss this appeal with costs.

D.S./R.K.

Appeal dismissed.

6. *Hira v. Karam Kaur*, (1907) 23 P R 1907=35 P L R 1908=130 P W R 1907.
7. *Ahmad Khan v. Jawahar Singh*, (1923) 10 A I R Lah 16=84 I C 257.
8. *Dogar Singh v. Mt. Dhanti*, (1928) 15 A I R Lah 493=110 I C 394.
9. *Labhu v. Hira Singh*, (1899) 41 P R 1899.
10. *Gokal Chand v. Milkhi*, (1916) 3 A I R Lah 13=35 I C 543=65 P R 1916=1 P L R 1917.
11. *Bhagwan Singh v. Mt. Ishar Kaur*, (1933) 20 A I R Lah 66=140 I C 796=34 P L R 19.

A. I. R. 1938 Lahore 846

SKEMP J.

Lachhmi Narain and others —

Plaintiffs — Appellants.

v.

Manak Chand and others —

Defendants — Respondents.

Second Appeals Nos. 196 and 229 of 1938, Decided on 30th June 1938, from decree of Dist. Judge, Hissar, D/- 15th November 1937.

(a) Evidence Act (1872), S. 13 — Recitals in documents of transfer by sale or mortgage are admissible in proof of title as assertions of right though assertions may be in favour of person relying.

An act of transfer by way of sale or mortgage of property necessarily involves an assertion that the transferor owns the interest transferred and is therefore a transaction by which such a right is claimed or asserted. Hence recitals in the documents of such transfer are admissible in evidence under S. 13, though assertions in those documents may be in favour of the person relying upon them. The more recent the transaction, the less value to be attached to it : A I R 1937 Lah 688, *Rel. on* ; A I R 1921 Mad 383; A I R 1928 Cal 315 and 16 I C 746, *Ref.* [P 848 C 1]

(b) Highway—Street belonging to individual but accessible to public—Persons having wall facing street have right to make openings in wall.

Where a street which is the private property of an individual is accessible to the public, any one has a right to make openings in his own wall facing such a street. Hence the owner of such street cannot obtain injunction restraining such person from making such openings. [P 848 C 2]

J. N. Aggarwal — *for Appellants.*

M. C. Mahajan and Manohar Lal Mehra
— *for Respondents.*

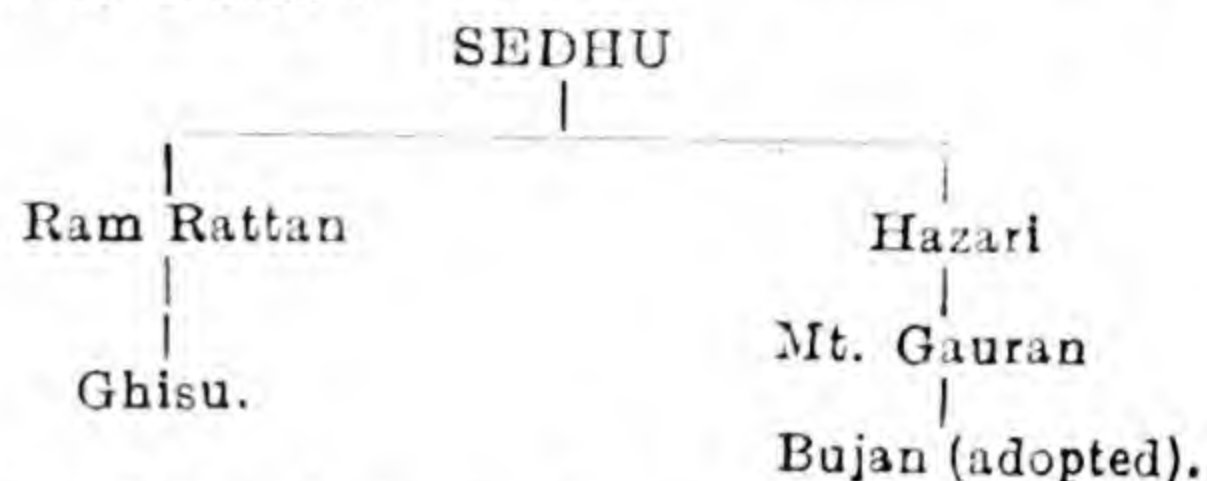
Judgment. — The plaintiffs, Lachhmi Narain and others, originally sued for a perpetual injunction restraining defendant 1, Manak Chand, from opening any door or *jhanki* in a wall overlooking a blind alley, which the plaintiffs claimed as their own. They also sought a mandatory injunction directing Manak Chand to close a lattice and a *parnala*, which he had opened shortly before suit. Subsequently the plaint was amended, as Manak Chand had opened two windows and a door in the lower storey. The amendment is now of no great importance, but it is convenient to note that the suit concerns a *jhanki* (lattice) and a *parnala* (water-spout) in the upper storey of the defendant's house, and a door and two windows in the lower storey. The plaintiffs sought an injunction directing the defendant to close all these things and not to open any more in the future. Manak Chand pleaded that the *jhanki* and *parnala* first mentioned were old, that the blind alley in question was the property of the Municipal Committee of Bhiwani and that the Committee had given him permission to make the more recent openings. After the suit had been pending for about 18 months, defendant 1 assigned his rights to one Mt. Rama Nandi, who was then impleaded as defendant 3. The plaintiffs also impleaded the Municipal Committee of Bhiwani as defendant 2, because the

Committee had claimed that the alley was a public street, and had given permission to Manak Chand to construct the openings. The learned trial Judge, the Senior Subordinate Judge of Hissar, found that the plaintiffs were owners of two-thirds of the blind alley and the Municipal Committee of the remaining third, adjacent to the public street. He granted the plaintiffs an injunction directing defendant 3 to close the *jhanki* and such parts of the door and windows as opened on what he had found to be the plaintiff's private property. All three parties appealed to the learned District Judge of Hissar. He found that the *jhanki* and water-spout in the upper storey were more than 20 years old, and that defendant 1 and his successor, defendant 3, had acquired a right of easement about them. As to the blind alley, he found that the plaintiff had not been able to prove his exclusive ownership, nor had the Municipal Committee. He held, professing to follow A I R 1927 Lah 351,¹ that it was jointly owned by all the parties whose houses abutted on it. This was not incorporated in the decree, which merely dismissed the plaintiffs' suit for an injunction.

The principal plaintiff, Lachhmi Narain, has appealed to this Court through Mr. Jagan Nath Aggarwal, and the Municipal Committee has appealed through Mr. B. C. Varma. The defendant-respondents are represented by Mr. Mehr Chand Mahajan. This judgment will dispose of both appeals (Nos. 196 and 229 of 1938). Mr. Jagan Nath Aggarwal first pointed out that it was not open to the learned District Judge to hold that the blind alley was the property of the persons whose houses abutted thereon, as Manak Chand, like the Municipal Committee, had pleaded that the blind alley was the property of the Municipal Committee. This finding must therefore be set aside. He also argued that recitals in various title-deeds relative to the property, admissible under Sec. 13, Evidence Act, proved that the blind alley was the private property of the plaintiffs.

Mr. Varma urged that a plan of Bhiwani, not relied upon by the lower Courts, ought to have been relied upon and that the blind alley was the property of the Committee. Mr. Mehr Chand Mahajan pointed out that the finding that the *par-*

nala and *jhanki* in the upper storey had existed for more than 20 years was binding on me as a finding of fact and that the District Judge's judgment must be accepted on this point. The following pedigree table will be useful :



The following are the recitals on which Mr. Jagan Nath relies : Ex. P. 10 (called by me Ex. P. 10/1 to distinguish from another Ex. P. 10) is a deed of 1856, whereby Ram Rattan bought the property from one Bhupan. It refers to the site in dispute as *gali share am milkiyat wa maq-buziat muzhir mukirka*. Ex. P. 10, is a deed of mortgage effected by Ghisu in favour of the father of Lachhmi Narain. This simply speaks of the site in dispute as a *gali*, but in the plan attached it is described as *gali mushtarika zauja Hazari*. This description *gali mushtarika zauja Hazari* is repeated in another mortgage deed of 1907, Ex. P. 8, executed by Ghisu in favour of Khubi Ram, and in a sale deed in favour of Lachhmi Narain himself, executed in 1911, Ex. P. 9. The deeds, Exs. P. 8, P. 9 and P. 10 refer to half the property. The other half of the property was sold to Joti Ram, father of Lachhmi Narain, by Bujan in the year 1931 by another deed, Ex. P. 7. The operative part of this deed speaks of half the share in a *gali* in which the vendor is owner, the boundary describes it as *gali share am*. These documents were relied upon by the trial Judge, but the learned District Judge discounted them with the remark that the weight to be attached to an admission in one's own favour cannot be much.

Mr. Jagan Nath Aggarwal quoted A I R 1937 Lah 688,² 70 I C 389,³ 55 Cal 355⁴ and 16 I C 746⁵ to the effect that such recitals are admissible in evidence under S. 13, Evidence Act. It is unnecessary to enter into any legal discussion in detail,

2. *Ihsan Ilahi v. Ataullah*, (1937) 24 A I R Lah 688=172 I C 769=39 P L R 389

3. *Nallasiva Mudaliar v. Ravan Bibi*, (1921) 8 A I R Mad 383=70 I C 389.

4. *Manmatha Nath v. Rajeshwar Rai*, (1928) 15 A I R Cal 315=107 I C 81=55 Cal 355=32 C W N 184.

5. *Rama Iyengar v. Kasnivenda Iyengar*, (1912) 23 M L J 327=16 I C 746.

1. *Prabhumal v. Banwari Lal*, (1927) 14 A I R Lah 851=102 I C 492=28 P L R 230.

because Mr. Mehr Chand Mahajan admitted this proposition. It is sufficient to refer to A I R 1937 Lah 688,² which lays down that an act of transfer by way of sale or mortgage of property necessarily involves an assertion that the transferor owns the interest transferred and is therefore a transaction by which such a right is claimed or asserted. It may be an assertion in one's favour, and broadly speaking the more recent the transaction, the less value to be attached to it; but the oldest assertion of title in this case was in the year 1856, and there are subsequent assertions of the years 1899, 1907 and 1911. The lower Courts did not mention the deed of 1856. It was argued in the trial Court and again before me that this deed was a forgery. The trial Judge gave no distinct finding but accepted the document. The District Judge did not mention it, and there is no finding of fact. Having inspected the document, which was given by Ghisu to Khubi Ram, and having read the evidence about it, I am of opinion that it is genuine. The genuineness of the other documents was never questioned. To my mind these assertions repeated at such long periods of time leave no doubt that the blind alley was and is private property and is now the property of the plaintiffs. The assertions however state not only that it is private property but that it is *gali share am*, and this leads me to the appeal preferred by the Municipal Committee. A street is defined in S. 3 (13) (a), and a public street in Sec. 3 (13) (b), Municipal Act 3 of 1911:

A street shall mean any road, footway, square, Court, alley, or passage, accessible, whether permanently or temporarily to the public and whether a thoroughfare or not; and shall include every vacant space, notwithstanding that it may be private property.

A "public street" means any street inter alia paved or metalled out of municipal or public funds, and vests in the Committee. These definitions were substituted by an Amendment Act of 1933. The definitions of "street" and "public street" were made for the first time in the Punjab Municipal Act of 1911, not being found in the previous Act of 1891. In 1856 there were of course no municipalities at all. It appears to me that the expression "*gali share am*" in the deeds cannot be held to mean a public street as defined in recent legislation, but merely a street to which the public have access. The learned District Judge found that the Committee had failed to prove that it was a public street, and I

agree. I would hold that it is a street but the property of the plaintiff. It is in evidence that the street was being cleansed by a sweeper of the Committee for ten years, but this does not make any difference. It is also in evidence that one-third of the street is paved, and this is why the learned trial Judge found that this one-third was the property of the Committee. It is however not a finding of fact binding on me, for the District Judge has held otherwise, and according to the evidence the pavement in the blind alley is of small vertical bricks, while the public street is paved with large modern bricks, which were laid down only a year ago. My finding is that it is a street accessible to the public, but at the same time the private property of the plaintiffs.

The learned counsel for the Committee wished to rely on the Committee's map, but it is inadmissible in evidence. Sec. 36, Evidence Act, lays down that maps and plans generally offered for public sale, or prepared under the authority of Government, are admissible. Other maps and plans have to be proved in the ordinary way. So far from being proved, it is not known when or by whom this plan was prepared, though the words "District Engineer, Hissar" can be deciphered on it. It is material that in the year 1921 the Municipal Committee passed a resolution that it was unsatisfactory, in fact applying to the map the epithet "*naqis*." This map is inadmissible in evidence. Now I find that the blind alley in suit is a street, although the private property of the plaintiffs and the plaintiffs cannot obtain an injunction restraining defendants 1 or 3 from making openings in the wall of their own house. Anyone has a right to make such openings in his own wall facing on a street. Both the appeals are therefore rejected. In the circumstances the parties are to bear their own costs throughout.

N.S./R.K.

Appeals rejected.

A. I. R. 1938 Lahore 848

BHIDE J.

*Ghulam Ahmad and another — Accused
Petitioners*

v.

Emperor.

Criminal Revn. No. 242 of 1938, Decided on 28th June 1938, from order of Sess. Judge, Ludhiana, D/. 10th January 1938.

Penal Code (1860), S. 448—Person entering another's house in his absence in assertion of his own right — Intention to annoy can be presumed.

Where a person enters a house in the absence of the person in possession and in assertion of his own rights, such entrant must be taken to have known that by his conduct he was likely to annoy the person in possession and legally he must be presumed to have the intention to 'annoy' at any rate : *A I R 1923 Rang 157* ; *A I R 1925 All 540* and *A I R 1938 Lah 534, Disting.* [P 849 C 1]

S. M. Saddozai — for Petitioners.

Order. — This petition has been heard *ex parte* as none appeared for the respondent. The petitioners entered a house about which there was a dispute, in the absence of the complainant and took possession of it in the assertion of their claim. The learned counsel's contention is that they had no such intention as is necessary for an offence under Sec. 448, I. P. C. I am unable to accept this contention. The petitioners must have known that their conduct was bound to annoy the complainant, who was admittedly in possession and legally they must be presumed to have the intention to 'annoy' at any rate. *A I R 1923 Rang 157*¹ and *88 I C 1049*² are clearly distinguishable on facts and so also is the recent Full Bench ruling in *Cri. Revision No. 1472 of 1937*.³ The dispute was however between near relatives and in view of all the circumstances, I accept the petition to the extent of reducing the period of the bond taken under S. 562, Criminal P. C., to this day.

B.D./R.K.

Order accordingly.

1. *Mg. Shwe Ku v. Emperor*, (1923) 10 *A I R Rang 157*=75 *I C 353*=24 *Cr L J 929*.
2. *Moti Lal v. Emperor*, (1925) 12 *A I R All 540*=88 *I C 1049*=26 *Cr L J 1273*=47 *All 855*=28 *A L J 679*.
3. *Abdul Majid v. Emperor*, *Reported in* (1938) 25 *A I R Lah 534*=176 *I C 497*=40 *P L R 806* (F B).

A. I. R. 1938 Lahore 849

BECKETT J.

Dasaundhi and others — Plaintiffs —
Appellants.

v.

Lal Singh and another — Defendants —
Respondents.

Second Appeal No. 1123 of 1937, Decided on 9th May 1938, from decree of Dist. Judge, Ludhiana, D/- 29th June 1937.

— (a) Punjab Courts Act (6 of 1918), S. 41 —
Order granting certificate — Clerical error —
Appeal cannot be excluded.

1938 L/107 & 108

When the real nature of the dispute is evident from the order of the District Judge granting the certificate, the appeal cannot be excluded by a defect resulting from a clerical error in the certificate : *A I R 1924 Lah 365, Ref.* [P 850 C 1]

(b) **Riwaj-i-am—Scope — Entries — Evidentiary value.**

When the Customary law is silent on a certain point, there is no reason why the local *riwaj-i-am* should not be accepted. As the entries are public documents, these entries can be used as evidence of the existence of a custom, whether instances exist or not. [P 850 C 1]

(c) **Custom (Punjab) — Succession — Jats of village Sholewal in Ludhiana District—Sisters' sons do not succeed to self-acquired or ancestral property in any case.**

Among Jats of village Dholewal which is situated in Tahsil Ludhiana of the Ludhiana District, sisters and their sons do not succeed even in the absence of collaterals to the self-acquired as well as the ancestral property : *A I R 1933 Lah 553, Rel. on.* [P 850 C 2]

Mela Ram Aggarwal and Nathu Lal
Wadehra—*for Appellants.*

Dr. Nand Lal — *for Respondents.*

Judgment. — The land in suit was held by Jaimal, a childless Jat proprietor of patti Jassa in village Dholewal, which is situated in the Ludhiana Tehsil of the Ludhiana District. The land is now occupied by the khewatdars of the patti, but has been claimed by the defendants as the sons of Jaimal's sister. The plaintiffs are consequently suing for a declaration of ownership. They do not appear to be related to Jaimal, but sue in their capacity as proprietors. The general compilation of Customary law merely states that sister's sons do not succeed in the presence of collaterals, but does not state whether they have any rights in the absence of collaterals. There is however a separate compilation of Customary law applicable to Jats in certain parganas, one of which includes the village Dholewal, and this states that sisters and their sons do not succeed in any circumstances. The same answer was given in 1882 and again in 1910. There are certain instances of gifts to sisters but none of succession by them or their sons. The plaintiffs were accordingly granted a decree by the trial Court. This decision was reversed in appeal by the District Judge, who held the alleged custom excluding sisters to be doubtful and applied the personal law of the parties in favour of the defendants.

The plaintiffs have now come up on second appeal. A preliminary objection has been raised on the ground that the appeal is not within the scope of the certificate granted by the District Judge. The certifi.

cate is certainly defective, for, it states that the question involved is whether distant collaterals exclude the sons of a sister. It will be seen from the summary of the case given above that this is not the matter in issue between the parties, the only question being whether sisters or their sons are entitled to succeed in the absence of collaterals. This is further brought out by the order of the District Judge for the grant of the certificate, which makes it clear that the real question is whether sisters do not succeed in any case, and it is not suggested that there is any conflict on the question whether they are debarred from succeeding in the presence of collaterals. If the plaintiffs had relied upon this order in accordance with 4 Lah 434,¹ they would have been entitled to appeal. The reference to collaterals in the certificate itself is clearly the result of a clerical error; and when the real nature of the dispute is evident from the order of the District Judge granting the certificate, I do not think that the appeal can be excluded by a defect of this kind.

On the merits I am in agreement with the finding of the trial Court. The entry in the Customary law for the whole district does not contradict the local entry. It is merely silent on the question whether sisters or their sons succeed in the absence of collaterals. When the Customary law is silent on a point of this kind, which must be of rare occurrence, there is no reason why the local *riwaj-i-am* should not be accepted. As the entries are public documents, these entries can be used as evidence of the existence of a custom, whether instances exist or not. The failure to produce any instances of true succession by a sister is in itself sufficient to corroborate the existence of the custom. The local custom in the village therefore is that sisters do not succeed in any circumstances at all. It has been found that the property in suit was acquired by Jaimal and the learned District Judge has attached importance to this fact. In the ordinary way, an entry in the *riwaj-i-am* would cover only ancestral property. The present entry however lays down that sisters are not to succeed in any circumstances and the application of the general rule to such an entry has been discussed in A I R 1933 Lah 553,² a case

which also relates to Jats of the Ludhiana District, although from another tehsil. When it is stated that females do not succeed in any case, it has been held that this covers the self-acquired property as well as the ancestral property.

It has been further argued that the exclusion of a sister is not in itself sufficient to prove that the plaintiffs have any right to succeed to the land and that the plaintiffs have even less claim than usual, since the village is heterogeneous. To this there are two answers. In the first place, the plaintiffs are in possession of the land, and if the defendants are altogether excluded from succession, they are entitled to rely upon their possessory title as against the defendants. It might be otherwise if an escheat was claimed by the Crown but that question does not arise in the present proceedings. In the second place, the plaintiffs have succeeded in finding a judicial instance of 1861 whereby the proprietors of the patti were allowed to succeed in preference to a person claiming a connexion through a female, and this itself refers to an earlier instance. Further one of the witnesses appearing for the defendants has deposed to a third instance in which the proprietors were preferred to a sister's son. It may be true that there is no general rule under which the proprietors of a heterogeneous village can claim to succeed for want of a better claimant, but the plaintiffs are not relying upon any such general rule. It seems to me that the plaintiffs have succeeded in proving that they cannot be ousted by the defendants, and I see no reason why they should not be granted a decree in the form in which they have asked for it to be given, in view of the local instances of similar succession. For these reasons I accept the appeal and restore the decree of the trial Court with costs throughout. Counsel for the defendants has asked for a certificate which would enable him to file a Letters Patent Appeal. This prayer is granted.

N.S.D./R.K.

Appeal accepted.

A. I. R. 1938 Lahore 850

ADDISON AND DIN MOHAMMAD JJ.

Ghulam Nabi — Convict — Appellant.

v.

Emperor.

Criminal Appeal No. 1167 of 1937, Decided on 15th December 1937, from order of Session Judge, Rawalpindi, D/- 28th September 1937.

1. *Bashu Ram v. Piara Chand*, (1924) 11 A I R Lah 865=75 I O 938=4 Lah 434.

2. *Jatan v. Jiwan Singh*, (1938) 20 A I R Lah 553 = 14 Lah 680 = 34 P L R 753.

(a) Criminal Trial — Judgment — Proper course of dealing with criminal case stated— Judge dealing first with accused's statement and then with prosecution evidence believing that part which supported accused's admission of guilt—Procedure held illegal.

The proper course for a Magistrate to deal with a criminal case is first to discuss the prosecution evidence and come to an independent finding on the truth or falsity of the story related by them and should then examine the statement of the accused and criticize it in the light of the circumstances brought on the record. After having weighed the prosecution evidence and the statement of the accused, he should then formulate his conclusion as to the guilt or innocence of the accused. [P 851 C 2]

Where the Sessions Judge dealt with the statement of the accused first and having found it untrustworthy, except to the extent of his admission that he had killed his wife, he then animadverted upon the prosecution evidence and finding it to be entirely unreliable, he believed the evidence only to the extent to which it agreed with the admission of the accused :

Held that the Sessions Judge had approached the case in an illegal manner. [P 851 C 1]

(b) Criminal Trial—Confession—Exculpatory part inherently improbable — Court can act upon only inculpatory part.

Where there is evidence to show that any portion of the exculpatory statement in a confession of the accused is inherently improbable, the Court is at liberty to reject that portion of the statement which appears to it to be so improbable and to act only upon that part of the statement which is inculpatory: *A I R 1931 All 1 (F B), Rel. on.* [P 851 C 2]

Anant Ram Khosla for Advocate-General — *for the Crown.*

Din Mohammad J.—Ghulam Nabi has been convicted of an offence under S. 302, I. P. C., for having caused the death of his wife, Mt. Akbar Jan, and sentenced to transportation for life. He has appealed through the jail authorities. After going through the record and hearing counsel for the Crown we have arrived at the conclusion that this appeal must fail. There is ample material on the record to justify his conviction. We cannot however help remarking that the Sessions Judge approached the case in an entirely illegal manner in so far as he dealt with the statement of the accused first and having found it untrustworthy, except to the extent of his admission that he had killed his wife, he then animadverted upon the prosecution evidence and finding it to be entirely unreliable, he believed the evidence only to the extent to which it agreed with the admission of the accused. This is, to say the least, a topsy-turvy way of dealing with a criminal case. He should have first discussed the prosecution evidence and

come to an independent finding on the truth or falsity of the story related by them and should then have examined the statement of the accused and criticized it in the light of the circumstances brought on the record. After having weighed the prosecution evidence and the statement of the accused, he would then have been justified in formulating his conclusion as to the guilt or innocence of the accused. We are not prepared to reject the prosecution evidence altogether nor do we consider that the prosecution witnesses without any exception deserve all the epithets used by the Sessions Judge while discussing their individual testimony. Even if the statements of some of the prosecution witnesses were discarded in certain particulars, the accused, in view of the admission made by him, would escape punishment only if his statement satisfied all the requirements of the law. No doubt the admission of an accused is to be taken as a whole, but a Court of law is not bound to accept even those portions of the statement made by the accused which in face of the evidence led by the prosecution appear to be palpably absurd. The leading authority on this subject is 52 All 1011.¹ There five Judges of the Allahabad High Court, including the present Chief Justice of this Court, observed as follows :

Where there is no other evidence to show affirmatively that any portion of the exculpatory element in the confession is false, the Court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible.

This would evidently show that where there is evidence to show that any portion of the exculpatory statement is inherently improbable, the Court is at liberty to reject that portion of the statement which appears to it to be so improbable and to act only upon that part of the statement which is inculpatory. Tested in the light of these remarks, the admission of the accused would clearly establish the offence with which he was charged, inasmuch as the evidence on the record, even if partially disbelieved, is sufficient to justify a Court of law in excluding those portions of his admission on the basis of which he claims grave and sudden provocation. With these remarks we dismiss this appeal.

N.S./R.K.

Appeal dismissed.

1. Balmakund v. Emperor, (1931) 18 A I R All 1=1931 Cr C 1=129 I C 258=32 Cr L J 362=52 All 1011=1930 A L J 1481 (F B).

* A. I. R. 1938 Lahore 852

ADDISON AND DIN MOHAMMAD JJ.

*Punjab Co-operative Bank Ltd.,
Amritsar* — Petitioner.

v.

Commissioner of Income-tax, Lahore —
Respondent.Civil Ref. No. 31 of 1937, Decided on
3rd February 1938, referred by Commis-
sioner of Income-tax, Punjab, North-West
Frontier and Delhi Provinces, D/. 13th
November 1937.* Income-tax — Banking concern dealing in
securities and shares as part of its business,
selling some of them and earning profits—Pro-
fits held trading profits and hence taxable
though utilized in increasing reserve fund —
Net interest received from vendees of securi-
ties on de die in diem basis held taxable.In every case that arises, it is to be determined
on its own facts whether the investment was a
part of the ordinary business of the investor or
otherwise, and in this matter the finding of fact
arrived at by the income-tax authorities is con-
clusive unless it is found that the finding was
based on no material: *A I R 1938 Lah 44,*
Approved. [P 854 C 2]An assessee was a banking concern. It sold
some securities and shares and earned profits. The
income-tax authorities found that though these
profits were utilized in increasing the reserve fund
they were trading profits as the assessee had been
dealing in securities and shares as part of his
business for several years. There was evidence that
the assessee had securities worth several laos as
part of its circulating capital and that the securi-
ties which were sold were not earmarked :*Held* that in view of this evidence it could not
be said that the finding of the income-tax autho-
rities that the profits were trading profits was
based on no material. The fact that the profits
had not been utilized in the revenue account and
that they had been carried to the reserve capital
en bloc was quite consistent with the finding that
they were trading profits. The income derived by
the assessee could not be deemed to be casual. The
amount of profits was therefore taxable.

[P 854 C 2]

Held further that the net interest received
from vendees of securities on de die in diem basis
was taxable : *A I R 1937 Lah 435, Rel. on.*

[P 852 C 2 ; P 854 C 2 ; P 855 C 1]

*Mehr Chand Mahajan and Ratan Lal
Chawla* — for Petitioner.*J. N. Aggarwal and S. M. Sikri* —
for Respondent.**Din Mohammad J.**—The facts involved
in this reference are fully set out in the
statement of the case drawn up by the
Commissioner of Income-tax under S. 66 (2),
Income-tax Act, and need not be recapitu-
lated. The questions propounded by the
Commissioner are :

(1) Whether in the circumstances of the case

the amount of Rs. 1,42,588 realized by the assessee
on the sale of securities and shares over their cost
price is taxable ;

and

(2) Whether under the circumstances of the
case the net interest amounting to Rs. 2764
received from vendees of securities on de die in
diem basis is taxable ?We may at the outset point out to the
Commissioner the desirability of framing
questions on a more precise and definite
basis so that the issues of law referred to
this Court may not admit of any ambi-
guity. The words "in the circumstances of
this case" inserted in both the questions
reproduced above leave the matter vague
and indefinite. The facts are to be deter-
mined finally by the income-tax authori-
ties and the findings of fact arrived at by
them are not liable to be disturbed by this
Court. By using the words "in the cir-
cumstances of the case" the duty is, so to
say, cast upon this Court to search out the
circumstances on which the questions are
founded and this is not the right way of
dealing with the matter. It is common
ground that the assessee is a banking con-
cern and that the profits in question accrued
from the sale of securities and shares. The
only question that falls to be judged there-
fore is whether these profits form part of
the capital or the revenue account of the
assessee. If they are in the nature of capi-
tal, they are exempt, but if on the other
hand they are in the nature of revenue,
they are taxable. The Income-tax Officer
while dealing with these profits observed:Apart from bringing in any such considerations
whether the Bank is dealing in securities or not,
the income is taxable on the footing that when a
person is dealing not in goods but in money and
is taking money from his customers, and has to
hold that money as a part of his business, and
does so in the ordinary business course in the
form which is most profitable having in mind the
security and the requisite degree of liquidity, then
all his dealings in that money lie in revenue
account with this difference that investments are
not stock-in-trade and to be valued as stock, but
only brought in when there is realization in some
form. I therefore hold that the profit is taxable.On appeal the Assistant Commissioner
also adopted the same view and upheld
the decision of the Income-tax Officer ;
while disposing of the assessee's applica-
tion under S. 66 (2), the Commissioner has
stated that although the profits realized
from the sale of securities and shares were
utilized in increasing the reserve fund, the
only inference possible is that the assessee
had been dealing in securities and shares
as part of his business since 1934. The

Commissioner however did not reject the conclusions arrived at by the Income-tax Officer and the Assistant Commissioner and considered that that was also a permissible way of looking at the matter. The assessee contends that the opinion of the Commissioner as well as that of his subordinate officers is wrong and that inasmuch as the profits have admittedly gone to swell the reserve fund, they cannot be taxed. In support of his contention he has relied on 16 Tax Cas 381,¹ 2 I T C 184,² 18 Lah 706,³ 8 I T C 395⁴ and 19 Tax Cas 390.⁵ In 16 Tax Cas 381¹ the assessee was an insurance company and like most insurance companies it had a reserve fund. The company sold a small part of the Government securities in which that reserve fund was invested and invested the proceeds in other Government securities of a different denomination, making a substantial profit. The question arose whether the profit so made was a profit of the company's business. The General Commissioners held that it was not a trading profit. On appeal, the Lord President remarked that the question whether a person is or is not engaged in a trade is not a question of law but a question of fact and that the finding is only open for consideration if it was possible to say that there was no evidence before the Commissioners upon which they could reasonably arrive at their conclusion. In this connexion his Lordship did not attach any importance to the fact that under the Articles of Association there was a power to invest the funds of the company in certain classes of securities and also to vary the investments of the company and observed:

It does not necessarily follow from the circumstance that the company sees fit to sell a block of its Government securities, whether the purpose be to get a better return, or whether the purpose be to increase the reserve fund by taking profit from the realization of a particular block, that therefore the company is trading in the purchase and sale of the securities forming its reserve fund.

In a concurring judgment delivered by Lord Sands, it was said:

If the directors treat the profit from appreciation just as a trading profit, this may help the inference that the company was trading.

On the finding that the assessee company was not carrying on the business of an investment company, the appeal was disallowed. In 2 I T C 184² the assessee, a banking concern, claimed deduction on account of depreciation in the value of Government securities held by it, and it was held that the deduction claimed was not permissible under the Act as the securities are permanent investment of part of the fixed capital so retained as an emergency reserve and not part of the stock-in-trade. In 18 Lah 706³ this Court considered the true implications in 2 I T C 184² and remarked that it was not possible to lay down a rule of general application that in every case an investment in securities should be treated as fixed capital. It was however observed that if it could be found that an investment had been made for the purpose of permanently excluding a certain sum from the floating capital of a concern, it might be permissible to hold that that sum had no concern with the stock-in-trade. It is upon this observation that the assessee relies in connexion with this case. In 8 I T C 395⁴ where the assesseees who were general produce dealers trading in salt had on the abolition of the system of deferred payment for salt sold the Government securities deposited by them with the Commissioner of Salt, it was held that the loss incurred by the sale was a capital loss and not one sustained in business. In 19 Tax Cas 390⁵ Lord Macmillan drew a distinction between fixed and circulating capital in the following terms:

Circulating capital is capital which is turned over and in the process of being turned over yields profits or loss. Fixed capital is not involved directly in the process and remains unaffected by it.

The assessee has further relied on 6 I T C 178⁶ and urged that in view of the definition of income as given by their Lordships of the Privy Council, such casual and irregular monetary return in the shape of profits on the sale of securities as is involved in this case cannot be treated as assessable income under the Act. On behalf of the Commissioner, reliance has been placed

1. Commissioners of Inland Revenue v. Scottish Automobile & General Insurance Co. Ltd., (1932) S O 87 = 1932 S O L T 7 = 16 Tax Cas 381.

2. Punjab National Bank Ltd. v. Emperor, (1926) 13 A I R Lah 373=96 I C 380=7 Lah 227=27 P L R 416=2 I T C 184.

3. In re Amritsar Produce Exchange Ltd., (1938) 25 A I R Lah 44=175 I C 644=I L R (1937) 18 Lah 706=40 P L R 256.

4. Hiranand Jairam Singh v. Commissioner of Income-tax, (1936) 23 A I R Lah 452 = 165 I C 671=8 I T C 395=38 P L R 1085.

5. Van Den Berghs Ltd. v. Clark, (1935) 19 Tax Cas 390.

6. Commissioner of Income-tax, Bengal v. Shaw Wallace & Co. Ltd., (1932) 19 A I R P C 138 =186 I C 742=59 Cal 1343=59 I A 206=6 I T C 178 (P C).

on 1 I T C 152,⁷ 3 Tax Cas 231,⁸ 5 Tax Cas 159,⁹ 13 Tax Cas 378,¹⁰ 14 Tax Cas 22¹¹ and 17 Tax Cas 381.¹² In 1 I T C 152⁷ the assessee, a banking concern, claimed to deduct from the taxable profits a certain sum said to be the amount of depreciation on war bonds and securities belonging to it and its claim was rejected. In 3 Tax Cas 231⁸ it was held that if an Investment Trust Company takes powers in its Memorandum of Association to vary its investments and generally to sell or exchange any of its investments, the net gain by realizing investments at larger prices than were paid for them constitutes profits chargeable with income-tax. It was remarked by the Lord President who delivered the judgment that the power of varying the investments and turning them to account

took their place among what are the essential features of the assessee's business and were the appointed means of the company's gains.

In 5 Tax Cas 159⁹ a company formed for the purpose, inter alia, of acquiring and reselling mining property after acquiring and working various property, resold the whole to a second company, receiving payment in fully paid shares of the latter company. It was held that the difference between the purchase price and the value of the shares for which the property was exchanged is a profit assessable to income-tax. While differentiating between cases where enhanced values on realization of investments are assessable and those where they are not, Lord Justice Clerk observed:

What is the line which separates the two classes of cases may be difficult to define and each case must be considered according to its facts; the question to be determined being, 'Is the sum of gain that has been made a mere enhancement of value by realizing a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making'?

In 13 Tax Cas 378¹⁰ Scrutton L. J. at pages 390.91 of the report observed that the question whether a trade is being

carried on is a question of degree and fact and it was impossible to say that there was no evidence on which the Commissioners could find that the transactions were part of, incidental to and arose out of the appellants' trade or business. In 14 Tax Cas 22¹¹ it was held that the surrender of the old stocks enabled the result of the company's holding of those investments to be definitely ascertained and was equivalent to a realization. In this case the company admitted that any profit made on the realization of an investment was part of its profits for income-tax purposes. In 17 Tax Cas 381,¹² it was held that the conversion of war bonds was equivalent to the realization of investments. Here also it was admitted by the assessee that profits on realization of investments should be included in their profits for income-tax purposes.

On a review of the authorities cited at the Bar, we are again led to the same conclusion as was arrived at in 18 Lah 706,³ viz. that in every case that arises it is to be determined on its own facts whether the investment was a part of the ordinary business of the investor or otherwise, and in this matter the finding of fact arrived at by the income-tax authorities is conclusive unless it is found that that finding was based on no material. On going through the two balance-sheets put in by the assessee as also the auditor's note, Ex. F, and taking into consideration the fact that the assessee held securities worth more than 30 lacs as part of its circulating capital and that the securities which were sold were not earmarked, it is difficult to say that the opinion of the income-tax authorities is based on no material. It is true that the profits have not been utilized in the revenue account and that they have been carried to the reserve capital en bloc, but that circumstance is quite consistent with the finding of the income-tax authorities that they were trading profits. The fact that no securities were sold during the first six years of their purchase was also present to their minds, and if they still did not draw a conclusion favourable to the assessee, they were at liberty to do so. In this view of the case the income derived by the assessee as remarked in 18 Lah 706³ can on no account be deemed to be casual. We consider therefore that the answer to the first question should be in the affirmative and we answer it accordingly. The assessee admits that the answer to the second question depends on the decision given on the

7. In re Tata Industrial Bank Ltd., (1922) 9 A I R Bom 75=66 I C 979=46 Bom 567=24 Bom L R 118=1 I T C 152.

8. Scottish Investment Trust Co. v. Forbes, (1891-98) 3 Tax Cas 231=31 Sc L R 219.

9. Californian Copper Syndicate Ltd. v. Harries, (1905-11) 5 Tax Cas 159=6 F 894.

10. Rees Roturbo Development Syndicate Ltd. v. Commissioner of Inland Revenue, (1929) 13 Tax Cas 378.

11. Royal Insurance Co. Ltd. v. Stephen, (1929) 44 T L R 630=14 Tax Cas 22=165 L T 539=66 S J 47.

12. Westminster Bank Ltd. v. Osler, (1932) 17 Tax Cas 381.

first question and we answer that question too in the affirmative. Even otherwise there is against the assessee a clear authority of this Court reported in A I R 1937 Lah 435.¹³ The Commissioner will get his costs from the assessee.

D.S./R.K. *Answer in the affirmative.*

13. *Haveli Shah Sardari Lal v. Commissioner of Income-tax, Punjab*, (1937) 24 A I R Lah 435.

A. I. R. 1938 Lahore 855

TEK CHAND J.

Firm G. D. Gianchand Perambulators and Tricycle Manufacturers —
Petitioners.

v.

Abdul Hamid — Respondent.

Civil Revn. No. 159 of 1938, Decided on 10th May 1938, from order of Senior Sub-Judge, Amritsar, D/- 5th November 1937.

(a) Workmen's Compensation Act (1923), S. 20 — Commissioner appointed under Workmen's Compensation Act is "Court subordinate to High Court."

A Commissioner appointed under the Workmen's Compensation Act and adjudicating a claim made under the Act is a "Court subordinate to the High Court" within the meaning of Sec. 115, Civil P. C. or S. 44, Punjab Courts Act, and a petition for revision lies against an order passed by him provided all the other necessary conditions are present. [P 855 C 2; P 856 C 1]

(b) Workmen's Compensation Act (1923), S. 2 (1) (n), Sch. 2, Cl. (iii) — Workman claiming compensation under S. 2 (1) (n) and Sch. 2, Cl. (iii) — It must be shown that fifty or more persons are employed in the premises or precincts.

Before a person can claim compensation under S. 2 (1) (n) and Sch. 2, Cl. (iii), Workmen's Compensation Act, it is not necessary for him to show that the number of persons employed is fifty or more in the whole business or the factory concerned; what is necessary is that this number should be employed in the 'premises' or within the 'precincts'. [P 856 C 1]

Where the facts found were that the employer carried on business in two factories, in one of which 40 persons were employed and in the other 11 persons, and that both the factories were really branches of one and the same business :

Held that the finding was insufficient to bring the case within S. 2 (1) (n), Sch. 2, Cl. (iii) and the real question was whether the two buildings were in one and the same premises. [P 856 C 1]

C. L. Aggarwal — *for Petitioners.*

A. D. Malik — *for Respondent.*

Order.—The petitioners before me, Firm G. D. Gian Chand, are manufacturers of perambulators in Amritsar. The opposite party, Abdul Hamid, was employed as a

hammer-man in the firm's workshop on a salary of Rs. 10 per mensem. On 30th August 1936, Abdul Hamid was beating a piece of iron with a hammer in the workshop, when a small bit went off and injured one of his eyes. As a result of this injury Abdul Hamid lost the sight of this eye permanently. He accordingly presented before the Senior Subordinate Judge, Amritsar (who is the Commissioner appointed under the Workmen's Compensation Act) for award of compensation to him under S. 19 of the Act. The firm contested the application on numerous grounds. They pleaded inter alia that the applicant was not a "workman" within the meaning of the Act, and therefore he had no locus standi to apply; that the injury in question was not caused by an accident arising out of, and in the course of, his employment with the firm; and that the injury had not resulted in such disablement as to entitle the applicant to compensation under the Act. The Senior Subordinate Judge has decided all these points against the firm and has awarded the applicant Rs. 210 as compensation.

The firm has presented in this Court a petition for revision of the order of the Senior Subordinate Judge. In the petition, several Sections of different Acts were mentioned, but at the time of the argument, counsel for the petitioners stated that the petition was under S. 115, Civil P. C. (Sec. 44, Punjab Courts Act). Counsel for the respondent raises a preliminary objection that no revision is competent as (a) an officer acting as a Commissioner under the Workmen's Compensation Act is not a "Court"; and (b) that even if he is a "Court", he is not a Court subordinate to the High Court. After hearing counsel, I am of opinion that this contention is without force. It is clear from Ss. 23 to 30-A of the Act, that in adjudicating a claim of this kind, the Commissioner acts judicially, and for several purposes he has all the powers of a Civil Court. It is also provided that the orders passed by the Commissioner in this behalf, are under certain circumstances, subject to appeal to the High Court. It is thus clear that the Commissioner is, for these purposes, a "Court subordinate to the High Court" and as in this particular case no appeal lies, the amount awarded being below Rs. 300, a revision is competent under S. 115, if the Commissioner had no jurisdiction to entertain the application, or has acted illegally or with material irregularity in the exercise of his jurisdiction. I

therefore overrule the preliminary objection. Counsel for the petitioner firm ought to argue three points before me :—(i) That the applicant Abdul Hamid was not a "workman" as defined in the Act, and therefore the Senior Subordinate Judge, as Commissioner under the Act, had no jurisdiction to entertain the application; (ii) that the accident occurred between 12 noon and 2 P. M. when the factory was closed, and not at 11 A. M. as found by the lower Court; and (iii) that no notice was given by the applicant to the firm before presenting the application to the Commissioner and therefore the application was incompetent. The last two of these points are concluded by findings of fact, based on evidence on the record and I find no substance in them. The first question however requires consideration. It is common ground that this workshop is not governed by the Factories Act. The applicant can therefore claim compensation under S. 2 (1) (n) and Sch. II, Cl. (iii) if he was employed for the purpose of making . . . for use, transport or sale, any article, or part of an article in any premises wherein, or within the precincts whereof on any one day of the preceding twelve months, fifty or more persons have been so employed.

It must therefore be found out that at any time during the preceding year fifty or more persons must have been employed in the "premises" wherein, or within the precincts whereof, the respondent worked. There is no clear finding on this all important point by the lower Court. The facts found are that the employer carried on business in two factories in one of which 40 persons were employed for making perambulators and in the other 11 persons were employed for nickel-plating, and that both the factories are really branches of one and the same business. This finding however is insufficient to bring the case within the definition mentioned above. The definition does not say that the number of persons employed should be fifty in the whole business or in the factory concerned, but what is necessary is that this number should be employed "in the premises" or within the precincts thereof. The attention of the parties or the learned Judge does not appear to have been directed towards this essential point. One of the witnesses no doubt says that the two branches of the business are in separate buildings, but another says that the buildings are contiguous. The real question however is whether the two buildings are in one and the same premises.

As the decision of the case turns upon this matter and the evidence led by the parties is vague and indefinite, I think it proper to remit the case to the Senior Subordinate Judge for further inquiry. A plan shall be got prepared showing the situation of the two buildings, and both parties shall be allowed to produce such further evidence bearing on the point as they wish to do, and the Subordinate Judge will give his finding thereon. Counsel have been directed to cause their respective clients to appear before the Senior Subordinate Judge, Amritsar, on 6th June 1938, when a date for further proceedings will be fixed. The return shall be made in three months.

R.M./R.K.

Case remanded.

A. I. R. 1938 Lahore 856

BHIDE J.

*Din Mohammad — Plaintiff —**Appellant.*

v.

*Mt. Walait Begum and another —**Defendants — Respondents.*

Second Appeal No. 950 of 1937, Decided on 24th February 1938, from decree of Addl. Dist. Judge, Lahore, D/- 15th May 1937.

(a) Transfer of Property Act (1882), S. 53 — Suit by creditor impeaching transfer by debtor as fraudulent — Debtor subsequently adjudged insolvent — Receiver is necessary party to suit or appeal therefrom.

In a suit by a creditor impeaching a transfer by his debtor as being fraudulent under S. 53 or in an appeal passed from a decree passed in such suit, the receiver, where the debtor has been subsequently adjudged insolvent, is a necessary party and such a suit or appeal is incompetent when the receiver, who is a necessary party is not impleaded : *A I R 1934 Lah 36 and A I R 1926 All 29, Ref. ; A I R 1926 Lah 167 and A I R 1935 Cal 15, Disting.* [P 857 C 2]

(b) Provincial Insolvency Act (1920), S. 28 — Creditor seeking relief against debtor by way of suit for realization of his debt — Leave to sue is necessary before suit can be instituted (*Obiter*).

Where a creditor seeks any relief against his debtor by way of suit, which is intended to secure directly or indirectly the realization of his debt in the insolvency proceedings, leave to sue from the insolvency Court is necessary before such a suit can be instituted : *A I R 1919 Mad 167 and A I R 1930 Rang 317, Rel. on.* [P 858 C 1]

Mohammad Amin and Hamid Ullah —
for Appellant.

J. G. Sethi — *for Respondents.*

Judgment. — The material facts of the case giving rise to this appeal may be

briefly stated as follows : On 25th November 1930, Malak Hira, defendant 2, mortgaged a plot of land for Rs. 3500 in favour of his own daughter Mt. Walait Begam, defendant 1. The plaintiff Din Mohammad, who is a creditor of the mortgagor, instituted this suit under S. 53, T. P. Act, for a declaration that the mortgage was intended to defeat and delay the creditors of Malak Hira, and was therefore void as against the creditors. This suit was instituted after Malak Hira had been adjudged an insolvent and the Official Receiver was also impleaded as a party in the trial Court. The trial Court decreed the plaintiff's suit. From this decision an appeal was preferred by Mt. Walait Begam to the District Court, but the Official Receiver was not impleaded as a respondent to the appeal. A preliminary objection was taken before the learned District Judge that the appeal was incompetent as the Official Receiver, who was a necessary party, had not been impleaded. He rejected this objection. On merits he found that the mortgage in question has been effected to defeat and delay the creditors as held by the trial Court, but he further held that the suit itself was incompetent without the leave of the Insolvency Court and as such leave had not been obtained, he accepted the appeal and dismissed the plaintiff's suit, leaving the parties to bear their own costs throughout. From this decision the present appeal has been preferred. The learned counsel for the plaintiff-appellant has urged two points ; (1) that the learned District Judge was not right in holding that the Official Receiver was not a necessary party to the appeal before him and (2) that no leave of the Insolvency Court was necessary for the purposes of this suit.

As regards the first point reliance was placed by the learned counsel for the appellant on 148 I C 329¹ and A I R 1926 All 29.² The learned counsel for the respondent urged in reply that these cases were distinguishable as they arose out of proceedings taken under the Provincial Insolvency Act. He urged that the Official Receiver was not a necessary party to the present suit which could be instituted by any creditor under S. 53, T. P. Act, in the interest of all the creditors. In support of

his contention that the Official Receiver was not a necessary party, the learned counsel relied on 7 Lah 12³ and A I R 1935 Cal 15.⁴ On the second point the learned counsel for the appellant relied firstly on the provisions of S. 28 (2), Provincial Insolvency Act, and also on 141 I C 146⁵ and 119 I C 46.⁶ The learned counsel for the respondent on the other hand relied on 9 Rang 7⁷ and 42 Mad 684.⁸ He also cited certain other authorities, which were to the same effect, but it is unnecessary to refer to them here. I shall now deal with these points separately.

As regards the first point, I am of opinion that the Receiver was a necessary party to the appeal. The transaction sought to be set aside in the present case was a mortgage and the mortgagor had still a subsisting interest in the property. On the mortgagor being adjudged insolvent the property vested in the Receiver under Sec. 28, Provincial Insolvency Act, though subject to the mortgage and consequently the Receiver was, in my opinion, a necessary party to the suit and also to the appeal. It is true that a creditor has a right to impeach a fraudulent transfer under Sec. 53, T. P. Act, and such a suit can be instituted by any creditor in the interests of all the creditors. But after adjudication of the debtor as an insolvent, it is the Receiver, who is the proper representative of the creditors for the administration of the insolvent's estate and consequently even, if he does not himself institute the suit, he must, I think, be considered to be, at least a necessary party to the suit. The cases relied upon by the learned counsel for the respondents, viz. 7 Lah 12³ and A I R 1935 Cal 15,⁴ are not in point. In the former case, the question whether the Receiver was or was not a necessary party does not

3. *Sunder Singh v. Ram Nath*, (1926) 13 A I R Lah 167=93 I C 1013=7 Lah 12=27 P L R 219.

4. *Protiva Sundari Debi v. Sarada Charan*, (1935) 22 A I R Cal 15=155 I C 848=38 C W N 996.

5. *Harnam Chandar v. Rup Chand*, (1932) 19 A I R All 382=141 I C 146=54 All 532=1932 A L J 361.

6. *Subramannayam v. Narasimham*, (1929) 16 A I R Mad 323=119 I C 46=56 M L J 489.

7. *Mahomed Adjum Nacoda v. E. M. Chettyar Firm*, (1930) 17 A I R Rang 317=128 I C 382=9 Rang 7.

8. *Vasudeva Kamath v. Lakshmi Narayana Rao*, (1919) 6 A I R Mad 167=52 I C 442=42 Mad 684=36 M L J 453.

1. *Ghulam Sharaf v. Lachhman Dass*, (1934) 21 A I R Lah 86=148 I C 329.

2. *Basanti Bai v. Nanhe Mal*, (1926) 13 A I R All 29=89 I C 357=47 All 864=28 A L J 792.

appear to have been raised or considered. In A I R 1935 Cal 15,⁴ a Single Bench ruling of the Calcutta High Court, there was no question of any insolvency and consequently there was no occasion to consider the position of a Receiver under the insolvency law. It seems to me that in view of the dual position held by such a Receiver, as the representative of the creditors as well as the insolvent, he has an interest not only in any property which is actually in his possession, but which can be made available for the insolvent's estate. It would be obviously dangerous to leave litigation in such circumstances in the hands of a creditor, who may perhaps collude with the alienee and serve his own interests to the prejudice of the interests of the other creditors and the insolvent. I hold accordingly that the Receiver was a necessary party to the appeal before the learned District Judge. On the above finding the appeal must, I think, succeed.

It is unnecessary on the above finding to consider the other point argued, viz. whether leave to sue was necessary, on which there seems to be a conflict of authority. But I may add that though the wording of Sec. 28, Provincial Insolvency Act, is not very happy, I incline to the view that leave to sue would be necessary when a creditor seeks any relief, which is intended to secure directly or indirectly the realization of his debt in the insolvency proceedings.

On the whole the better view in the interests of the administration of the insolvent's estate appears to me the one taken in 42 Mad 684⁸ and 9 Rang 7⁷ and I should have upheld the decision of the learned District Judge on this point, if it were necessary to decide it. But as stated above I am of opinion that the appeal before the learned District Judge was incompetent owing to the fact that the receiver, who was a necessary party, was not impleaded. I accordingly accept this appeal and affirm the decision of the trial Court, but in view of all the circumstances leave the parties to bear their costs throughout.

R.M./R.K.

Appeal allowed.

A. I. R. 1938 Lahore 858

BECKETT J.

Ali Mohammad — Plaintiff —
Appellant.

v.

Nur Mohammad and another —
Defendants — Respondents.

Second Appeal No. 399 of 1938, Decided on 11th July 1938, from decree of Dist. Judge, Jullundur, D/- 12th January 1938.

Custom (Punjab)—Alienation—Legal necessity — Joint debts incurred by members of a family for ordinary household necessities is just antecedent debt, unless expenditure covered by debt has been wastefully extravagant.

It is quite a usual practice for agricultural families to incur joint debts for ordinary household necessities and both parties commonly gain the benefit of the joint credit so obtained. Where there is no reason to suppose that the expenditure covered by a joint debt has been wastefully extravagant, a joint debt can be regarded as a just antecedent debt: 112 P W R 1906 and A I R 1928 Lah 702, *Disting.* [P 858 C 2; P 859 C 1]

Achhru Ram — for Appellant.

Sheikh Abdul Aziz — for Respondent 1.

Judgment.—The only question for decision in this second appeal is whether one of the items of consideration mentioned in a sale deed should be regarded as a matter of legal necessity under Customary law. This item consisted of a sum due on a previous mortgage. The mortgage deed had been executed jointly by the vendor and his brother and the consideration for the mortgage consisted of payments to the creditors in respect of debts, some of which were due from both the brothers and one from the vendor alone.

Mr. Achhru Ram for the appellant seeks to draw an analogy from the cases reported in 112 P W R 1906¹ and A I R 1928 Lah 702,² in which it was held that the payment of a debt incurred as a surety is not a matter of legal necessity. When a person stands surety, this is usually a purely gratuitous transaction and there may be good reasons for holding that a debt so incurred is not a just antecedent debt. On the other hand, it is quite a usual practice for agricultural families to incur joint debts for ordinary household necessities and both parties commonly gain the benefit of the joint credit so obtained. If there is no reason to suppose that the expenditure

1. Hemraj v. Ganda Singh, (1906) 112 P W R 1906.

2. Thaman Singh v. Bachna, (1928) 15 A I R Lah 702=108 I C 614.

covered by a joint debt has been wastefully extravagant, there does not seem to be any particular reason why a joint debt should not be regarded as a just antecedent debt; and I do not think that the analogy of debts incurred by a person standing surety can be extended to cover this class of cases. The appeal is accordingly dismissed with costs.

R.M./R.K.

Appeal dismissed.

*** A. I. R. 1938 Lahore 859**

ADDISON AG. C. J. AND

DIN MOHAMMAD J.

Firm Salig Ram-Bhagat Ram —
Defendant—Appellant.
v.

Firm Kishen Singh-Sant Ram —
Plaintiff—Respondent.

Letters Patent Appeal No. 49 of 1938, Decided on 16th June 1938, from Judgment of Bhide J. in F. A. No. 217 of 1937, D/- 8th February 1938.

* Civil P. C. (1908), Sch. 2, Paras. 17 and 19—Agreement to refer dispute to arbitrators nominated by each party—Agreement not providing for nomination of another arbitrator in case one nominated refuses to act—One of nominated arbitrators refusing to act—Court cannot replace him by appointing another.

If parties to an agreement to refer a dispute to arbitration leave a contingency unprovided for, the Court will not be proceeding consistently with the agreement if it makes a provision for such contingency. The lacuna, if any, is to be filled by parties themselves, and not by the Court. Where therefore parties agree to refer their dispute to arbitrators nominated by each party but the agreement does not make any provision for the nomination of an arbitrator in case any arbitrator already nominated refuses to act, and one of the nominated arbitrators refuses to act, the Court has no power to make the necessary appointment so as to make the agreement operative and effectual: *A I R 1916 Lah 70*; *A I R 1919 Lah 231*; *A I R 1931 Mad 28* and *A I R 1937 Cal 388*, *Rel. on*; *A I R 1922 All 133*; *17 Mad 498* and *A I R 1937 Lah 851, Expl.* [P 861 O 1]

R. C. Soni and Achhru Ram —
for Appellant.

Dev Raj Sawhney—*for Respondent.*

Din Mohammad J.—This Letters Patent Appeal has arisen in the following circumstances: The Firm Salig Ram-Bhagat Ram of Patiala, had dealings in forward contracts with the Firm Kishen Singh-Sant Ram. One of the conditions of their business was that in case any dispute arose between them, it would be referred to two members of either of the Produce Mer-

chants Association or the Traders Association or both, one to be nominated by each party. In case any party failed to nominate an arbitrator within seven days of the date when requested to do so, the party making the request would be entitled to nominate both. In the case of the arbitrators' disagreement, they would select an umpire and the award of the arbitrators or the umpire, as the case may be, would be binding on both parties. Differences between the two firms arose and according to the plaintiff firm, Kishen Singh-Sant Ram, they nominated Sundar Singh as their arbitrator and requested the defendant firm, Salig Ram-Bhagat Ram, to nominate an arbitrator of their own. This happened on 9th June 1936. On 17th July the defendant firm informed the plaintiff firm that they had nominated one Sohan Lal. A draft agreement was then drawn up by the plaintiff firm and was forwarded to the defendant firm for signature. The defendant firm however refused to sign this agreement and on 2nd October the plaintiff firm nominated the same Sohan Lal on behalf of the defendant firm and referred the matter in dispute to the arbitration of the two arbitrators so nominated. Sohan Lal refused to act and consequently the plaintiff firm made an application under Para. 17 of Sch. 2, Civil P. C. Various defences were taken by the defendant firm, but at present we are mainly concerned with the contention of the defendant firm, that inasmuch as one of the arbitrators had refused to act, the Court had no power to nominate an arbitrator or to refer the matter to arbitration. The Subordinate Judge, holding on another issue that the application was not competent, dismissed the application remarking at the same time that if he had not taken that action, he would have found that the Court was competent to nominate an arbitrator in place of the one who had refused to act and refer the matter to the arbitration of the two arbitrators, one appointed by the plaintiff firm and the other by the Court. The plaintiff firm appealed to this Court and the appeal came for hearing before Bhide J. He set aside the judgment of the Court below on the point on which it had been decided against the plaintiff firm and holding at the same time that the application could be entertained in spite of the objection of the defendant firm he remanded the case to the Court below to dispose of it in accordance with law. Hence this Letters Patent Appeal.

Counsel for the appellant has urged that although the provisions relating to 'arbitration in suits' apply mutatis mutandis to 'order of reference on agreement to refer' by virtue of Para. 19 of Sch. 2, yet in this case no reference could be made inasmuch as the agreement between the parties did not contemplate the appointment of an arbitrator in case an arbitrator nominated by the party refused to act and the action of the Court in this respect would accordingly be inconsistent with the agreement. In support of his contention he referred to 71 P R 1918,¹ 155 P R 1919,² 54 Mad 469³ and A I R 1937 Cal 388.⁴ In 71 P R 1918¹ it was held by a Division Bench composed of Scott-Smith and Le Rossignol, JJ. that an agreement to refer a matter in dispute to several specified arbitrators becomes incapable of performance when one of those arbitrators dies, and if such death takes place before an application is made under Para. 17, Sch. 2, Civil P. C., this is sufficient reason for refusing to file the agreement in Court. It was further observed that Para. 19 only comes into operation when an order of reference has been made under Para. 17. In 155 P R 1919² it was held that under Para. 17 of Sch. 2 an agreement to refer to arbitration may be filed in Court notwithstanding one of the arbitrators named therein has declined to act if the agreement makes provision for another arbitrator being appointed in place of one declining to act. In 54 Mad 469³ a Division Bench, in a case where parties had privately agreed to refer their disputes to certain named arbitrators and to abide by their unanimous decision and one of the arbitrators had died in the course of arbitration proceedings and prior to the matter being brought before the Court, held that the agreement became inoperative and came to an end on the death of the arbitrator inasmuch as it did not contain any provision as to what should be done in case any of the arbitrators died in the course of the arbitration proceedings. The agreement could not be filed in Court under Para. 17, for the Court could

not thereafter make an order of reference in accordance with the agreement within the meaning of Cl. (4) of Para. 17 and consistently with it within the meaning of Para. 19 of that Schedule. In A I R 1937 Cal 388⁴ it was held by Cunliffe and Henderson JJ. that where in a dispute the parties agree that the dispute should be decided by certain named persons, the Court is not entitled to appoint another in the event of one of the arbitrators being unable or unwilling to act. 54 Mad 469³ was referred to in this case with approval. The learned Judge of this Court has sought to distinguish these cases on the ground that here no arbitrators were specified and as they were to be chosen from among the members of the two associations named in the agreement, the Court had full authority to make a choice from among the persons so specified and that consequently if it did, the action of the Court would be consistent with the agreement so as to attract the provisions of Para. 5 of Sch. 2. We are however unable to agree. A choice had been made under the agreement and specified persons had been nominated by the parties and it was only after that choice had been made and that nomination had taken place that one of the persons so nominated had refused to act. It cannot be said therefore that no specified person had been named in the agreement, in fact the draft agreement contains the names of these two persons and, in these circumstances, we do not consider that it is possible to distinguish the present case from the cases mentioned above.

On behalf of the respondents our attention has been drawn to 44 All 523,⁵ 17 Mad 498⁶ and A I R 1937 Lah 851.⁷ In 44 All 523⁵ a Division Bench of the Allahabad High Court observed that in the case of a private arbitrator refusing to act, the Court may, on the application of either party to the reference, make an order under Paragraph 17 and take action under Para. 5 by appointing a new arbitrator, although there is no provision to that effect in the deed of agreement. Reference in this case was made to 17 Mad 498⁶ with approval. In that case the words "so far

1. Mohan Lal v. Damodar Das, (1919) 6 A I R Lah 70=44 I O 866=71 P R 1918.

2. Sriram v. Sorabji, (1919) 6 A I R Lah 231=51 I O 636=155 P R 1919.

3. Narayanappa v. Ramchandrapa, (1931) 18 A I R Mad 28=129 I O 638=54 Mad 469=60 M L J 676.

4. Rajani Kanta Karati v. Panchanan Karati, (1937) 24 A I R Cal 388=172 I O 248=I L R (1937) 2 Cal 484=41 C W N 981.

5. Fazal Ilahi v. Prag Narain, (1922) 9 A I R All 133=67 I O 739=44 All 523=20 A L J 927.

6. Balapattabhirama Chetti v. Seetharama Chetti, (1894) 17 Mad 498.

7. Jowahir Singh Sundar Singh v. Fleming Shaw & Co. Ltd., (1937) 24 A I R Lah 851=176 I O 352.

as they are consistent with any agreement so filed" were given a wide interpretation and it was remarked that the reasonable construction is that the action of the Judge should not be inconsistent with the agreement if it contains any special provision on the subject. It is noteworthy however that a Division Bench of the same High Court in a later case reported in 17 I C 389⁸ held that where certain matters in dispute had been referred to three named arbitrators, two of whom had expressed their unwillingness to act, the agreement did become inoperative and ineffectual, inasmuch as it did not contain any provision to appoint arbitrators in the place of those unwilling to act. A I R 1937 Lah 851,⁷ so far as we can see, proceeds on different grounds. These authorities therefore can be of no avail in the present case. Even otherwise we are disposed to think that if parties to an agreement leave a contingency unprovided for, the Court will not be proceeding consistently with the agreement if it makes a provision for such contingency. The lacuna, if any, is to be filled by the parties themselves and not by the Court and inasmuch as the agreement now before us made no provision for the nomination of an arbitrator in case any arbitrator already nominated refused to act, the Court had no power to make the necessary appointment so as to make the agreement operative and effectual. We accordingly accept the appeal, set aside the order of the learned Judge of this Court as well as that of the trial Judge and dismiss the application. In view of the peculiar circumstances of the case however we leave the parties to bear their own costs throughout.

D.S./R.K.

Appeal accepted.

8. Jaitum Bibi v. Nabl Saheb, (1912) 24 M L J 15=17 I C 389=1912 M W N 957.

* A. I. R. 1938 Lahore 861

YOUNG C. J. AND TEK CHAND J.

Ismail — Petitioner.

v.

Jagat Singh and others — Respondents.

Criminal Revn. No. 800 of 1937, Decided on 28th April 1938, case referred by Coldstream J., D/- 29th September 1937.

* Criminal P. C. (1898), Sec. 107 — Petition under Sec. 107 for taking proceedings against certain person — Magistrate can ask police to make preliminary enquiry and submit report :

A I R 1928 Lah 694=111 I C 450=29 Cr L J 866=29 P L R 666 and Cri. Revn. No. 703 of 1936, Overruled.

The action of a Magistrate asking the police to hold a preliminary enquiry and submit a report in connexion with a petition made to him for taking action against certain person under S. 107 is not illegal because there is nothing in the Criminal Procedure Code which forbids a Magistrate before whom information has been lodged for taking proceedings under S. 107 to refer the matter to the police for preliminary enquiry: A I R 1924 Lah 630; A I R 1932 All 670 and 2 Weir 51, Rel. on; A I R 1926 Mad 521, Expl.; A I R 1928 Lah 694=111 I C 450=29 Cr L J 866=29 P L R 666 and Criminal Revn. No. 703 of 1936, Overruled. [P 863 C 1; P 864 C 1]

Mohd. Monir, Assistant to Advocate-General—for the Crown.

Tek Chand J. — The facts of the case which has given rise to this reference are as follows: Ismail, petitioner, presented a petition before a Magistrate of the First Class at Gurdaspur alleging that owing to enmity with him the respondent, Jagat Singh, was threatening to assault him, and as there was apprehension of a breach of the peace, he prayed that the respondent be bound down under Sec. 107, Criminal P. C. The Magistrate examined the applicant, but before issuing notice to the respondent to show cause he thought it proper to get a report from the local police. He accordingly passed an order directing that a copy of the petition be sent to the police for local inquiry and report. The petitioner, Ismail, moved the Sessions Judge to set aside this order on the ground that the Magistrate had no jurisdiction to direct the police to make an enquiry into the matter and that if he considered a preliminary enquiry necessary he should have held it himself. Before the learned Sessions Judge the Public Prosecutor conceded that the order was illegal in view of an unreported Single Bench decision of this Court in Cr. R. No. 703 of 1936.¹ The learned Sessions Judge held that the case was covered by the ruling cited, and he has forwarded the case to this Court with the recommendation that the order of the Magistrate be set aside.

The reference was heard in the first instance by Coldstream J. sitting in Single Bench. At the hearing before him neither the petitioner nor the opposite party appeared, but counsel for the Crown opposed the recommendation of the learned Sessions

1. Crown through Ram Sarup v. Kishan Ohand, Cr R No. 703 of 1936.

Judge. He contended that in asking the police to make an enquiry and report, the Magistrate had not contravened any provision of the law, and that the view taken in the Single Bench ruling in Cr. R. No. 703 of 1936,¹ which the Sessions Judge had followed, was not correct. Coldstream J. was inclined to agree with this contention which is supported by rulings of the Allahabad and Madras High Courts. But in view of the conflict of decisions he has referred the case to a Division Bench.

We have carefully considered the matter and have examined the rulings bearing on the point, and the conclusion at which we have reached is that the order of the Magistrate was not illegal. Part 4 of the Code in which Sec. 107 appears deals with "Prevention of Offences" and lays down a procedure which is materially different from that prescribed in Part 6 for "Proceedings in Prosecutions". In this Part the provisions relating to proceedings for security to keep the peace are contained in Ss. 107, 112, 117 and 118. Sec. 107 prescribes the mode for the initiation of these proceedings. Sec. 112 gives the contents of the order calling upon the person from whom breach of the peace is apprehended to show cause why he should not be bound down. S. 117 lays down the mode in which (after such person has been brought before the Magistrate) enquiry as to the truth of the information is to be held; and Sec. 118 gives the terms in which the final order is to be passed. In the present case we have to consider Sec. 107 only which deals with the preliminary stage relating to the initiation of proceedings. It lays down that where a Magistrate (of one of the classes mentioned in the Section) is "informed that any person is likely to commit a breach of the peace or disturb the public tranquillity . . . the Magistrate, if in his opinion there is sufficient ground for proceeding, may require such person to show cause why he should not be ordered to execute a bond," etc. It will be seen that in order to start proceedings under this Section it is not necessary that the Magistrate should have been moved by a written petition. All that is required is that he be "informed" of the apprehended breach of the peace. The information may have been received orally or in writing, by post or in any other way. On receipt of such information the Magistrate has to see if "in his opinion there is sufficient ground for proceeding" and it is after he has satisfied himself that this is

so that he will issue notice to the person, by whom breach of the peace is apprehended, to show cause why he should not be bound down. It will be seen that the Section is very wide in its terms. It does not prescribe any particular mode in which the Magistrate has to satisfy himself of the sufficiency of grounds for taking action under the Section. The Legislature appears to have purposely left the matter open and given a wide discretion to the Magistrate. He may do so, by holding an enquiry himself, or by the police, or through any private person, or in any other manner as he thinks fit. The enquiry may be public or private; it may be held in open Court or *in camera*. Having regard to the wide phraseology of S. 107, and particularly the words underlined (*here italicized*) above, which were added by the Amending Act 18 of 1923, we see no reason to hold that the only way in which the Magistrate might satisfy himself before issuing notice is to hold an enquiry himself and that he is precluded from seeking the aid of a local enquiry by the police in this matter.

The opposite view taken in the ruling cited is based on the ground that S. 202 of the Code, which authorizes a Magistrate to hold a preliminary enquiry into a "complaint" either himself, or by the police or such other person as he thinks fit, does not in terms apply to proceedings under S. 107, as such proceedings do not fall within the definition of a "complaint" as given in Sec. 4 (1) (h) of the Code. This is no doubt so, but, as has been pointed out already, the procedure for proceedings relating to "Prevention of Offences" in Part 4 of the Code is materially different from that relating to "Proceedings in Prosecutions" in Part 6. S. 202, which is included in Part 6 was enacted to make provision for proceedings in the particular form of prosecution for an offence initiated on a "complaint" and not to other forms of prosecution. The omission of a similar specific provision from Part 4 does not indicate in any way that the Legislature intended to lay down that no such enquiry could be held in proceedings under S. 107 and the other preventive Sections of the Code, especially when the wording of these Sections is so wide. In our opinion, the law relating to the matter was rightly laid down by Zafar Ali J. in 76 I C 25² in the following terms:

2. *Shamas-ud-Din v. Ram Dyal Singh*, (1924) 11 A I R Lah 630=76 I C 25=25 Or L J 89.

An application under S. 107, Criminal P. C., does not fall within the definition of a "complaint" under S. 4 (1) (h), Criminal P. C., and Sec. 203 of the Code has therefore no applicability to such an application. But every Magistrate possesses the inherent power of refusing an application which he finds to be groundless, and in the case of an application under S. 107, Criminal P. C., if a Magistrate is satisfied after making an enquiry himself or through some other agency that the apprehension of a breach of the peace complained of does not exist, he need not make an order under Section 112 of the Code and must dismiss the application.

This ruling does not appear to have been brought to the notice of Din Mohammad J. in Cr. R. No. 703 of 1936.¹ The learned Judge based his conclusion principally on a Single Bench decision of Shadi Lal C. J. in A I R 1928 Lah 694.² The judgment in that case is very brief, and the question was not discussed at any length. Reference was made only to Ss. 202 and 207 and it was observed that they apply only to prosecutions brought on a "complaint" as defined in S. 4 (1) (h). A I R 1928 Lah 694³ has since been dissented from by the Allahabad High Court in 54 All 1036⁴ on what appear to us to be very good grounds. It was held there that in proceedings under S. 107 a Magistrate has, independently of Ss. 202 and 203 the right to call for a report from the police before issuing a notice under S. 112. It was pointed out that the proceedings at that stage before the Magistrate were more or less of an administrative nature and it was only after he had passed an order under S. 112 and issued notice to the opposite party to show cause why he should not be bound down that the proceedings before the Magistrate become judicial proceedings. Therefore, if the Magistrate before issuing a notice under S. 112 thinks fit to consult the police in order to form an opinion as to whether or not the matter is one in which such a notice should be issued, there is nothing in the Code to prevent him from doing so. With great respect, we think that this lays down the law correctly.

Din Mohammad J. in the case cited, also referred to 49 Mad 315,⁵ but, so far as we can see, that case in no way supports the

view taken by him. On the contrary there are observations in the judgment, which lead to the opposite conclusion. The real question involved in that case was as to whether statements made in a complaint to a Magistrate under Sec. 107, Criminal P. C., praying that security should be taken from a person for keeping the peace, and repetition of the same statements before a police officer to whom the Magistrate had referred the complaint for enquiry and report, were privileged and no action for defamation in respect of such statements could be maintained. One of the arguments urged before the learned Judges was that the Magistrate before whom a petition for taking proceedings under S. 107 had been made had no authority to order a police investigation and therefore the statement made to the Sub-Inspector was made to an officer who had no authority to hold any investigation. In rejecting this argument one of the Judges comprising the Bench, Viswanatha Sastri J., observed as follows:

Section 107, Criminal P. C., appears in Part. 4 which is headed "Prevention of Offences." The prevention of offences is a part of the administrative machinery for maintaining "law and order," and this task is laid on Magistrates. These Magistrates have control over the police, whose assistance they can seek in the discharge of their duties. Such being the case, it appears to me that it is perfectly open to a Magistrate, who is asked to set in motion S. 107, Criminal P. C., to avail himself of the help which is available to him under S. 202, Criminal P. C., when a complaint of an offence of which he is authorized to take cognizance is made to him.

The other Judge, Coutts-Trotter C. J., did not say anything in his judgment to the contrary but merely remarked that in order to put the matter beyond doubt it was desirable that an express provision be made in the statute conferring power in terms upon Magistrates to refer petitions under S. 107 for investigation. There is also an earlier ruling of the Madras High Court in 2 Weir 51,⁶ in which it was laid down that the action of a Magistrate asking the police to hold a preliminary enquiry and submit a report in connexion with a petition made to him for taking action against a certain person under the security Sections is not illegal.

We hold therefore that there is nothing in the Code, which forbids a Magistrate before whom information has been lodged for taking proceedings under S. 107, to refer the matter to the police for preli.

3. Hari Singh v. Jagta, (1928) 15 A I R Lah 694=111 I O 450=29 Cr L J 866=29 P L R 666.

4. Laxmi Narain v. Emperor, (1932) 19 A I R All 670=1932 Cr O 822=140 I O 536=34 Cr L J 42=54 All 1036=1932 A L J 880.

5. Sanjivi Reddy v. Koneri Reddi (1926) 18 A I R Mad 521=93 I O 8=49 Mad 315=50 M L J 460.

6. Egambara Mudali v. Murugappa Chetti, (1890) 2 Weir 51.

minary enquiry, and that the contrary view taken in Single Bench decisions of this Court in Cr. Rev. No. 703 of 1936¹ and A I R 1928 Lah 694³ cannot be supported either on principle or authority. We hold that the order of the Magistrate in this case was legal and proper. We decline to accept the recommendation of the Sessions Judge and dismiss the petition. Let the records be returned.

D.S./R.K.

Petition dismissed.

A. I. R. 1938 Lahore 864

ADDISON AND DIN MOHAMMAD JJ.

*Messrs. M. and D. Aminoff, London
through Musa Aminoff, Peshawar —
Assessee—Petitioner.*

v.

*Commissioner of Income-tax, Lahore—
Respondent.*

Civil Misc. Petn. No. 626 of 1937, Decided on 25th January 1938.

**Income-tax Act (1922), S. 66 (2) and (3)—
Application under Sec. 66 (3) is incompetent
without previous application under Sec. 66 (2).**

Before an assessee can put in an application to the High Court under sub-sec. (3), it is incumbent upon him to apply to the Commissioner under sub-sec. (2) of Sec. 66. That he can do only if an order in respect of the assessment complained of is made under Sec. 31 or Sec. 32, or if an order under Sec. 33 enhances the assessment made on him or is otherwise prejudicial to him, or if a Board of Referees decides any question relating to his assessment under Sec. 33-A. Where none of these conditions exists, no application under sub-sec. (2) of S. 66 is competent, and consequently sub-s. (3) of S. 66 does not come into play at all: *A I R 1932 Pat 167; A I R 1927 Lah 513 and 2 I T R 339, Rel. on.* [P 864 C 2]

*Norman Edmunds and Kirpa Ram Bajaj
— for Petitioner.*

*S. M. Sikri and J. N. Aggarwal —
for Respondent.*

Order.— This is an application by an assessee under sub-s. (3) of S. 66, Income-tax Act. A preliminary objection has been raised by the respondent that this application is incompetent on the ground that an application under sub-s. (3) of S. 66 can be made to the High Court only if an application under sub-sec. (2) of Sec. 66 is previously made to the Commissioner and that where no such application has been made by an assessee, he cannot move the High Court under sub-s. (3) of S. 66. The material portions of the relevant provisions of law read as follows:

Section 66 (2). Within sixty days of the date on which he is served with notice of an order under S. 31 or S. 32 or of an order under S. 33 enhancing an assessment or otherwise prejudicial to him or of a decision by a Board of Referees under S. 33-A, the assessee in respect of whom the order or decision was passed may, by application require the Commissioner to refer to the High Court any question of law arising out of such order or decision

Section 66 (3). If on any application being made under sub-s. (2) the Commissioner refuses to state the case on the ground that no question of law arises, the assessee may apply to the High Court

It would appear therefore that before an assessee can put in an application to the High Court under sub-s. (3), it is incumbent upon him to apply to the Commissioner under sub-s. (2) of S. 66. That he can do only if an order in respect of the assessment complained of is made under S. 31 or S. 32, or if an order under S. 33 enhances the assessment made on him or is otherwise prejudicial to him, or if a Board of Referees decides any question relating to his assessment under S. 33-A. Where none of these conditions exists, no application under sub-s. (2) of S. 66 is competent, and consequently sub-s. (3) of S. 66 does not come into play at all. In the present case it is admitted on behalf of the assessee that no appeal was made to the Assistant Commissioner, nor was an application under sub-s. (2) of S. 66 made to the Commissioner. All that the assessee did was to make an application to the Commissioner under S. 33 along with sub-s. (1) of S. 66. The Commissioner while rejecting the assessee's application neither enhanced his assessment nor did he make any order prejudicial to him under Sec. 33. Clearly therefore no application under sub-s. (2) of S. 66 could be made to the Commissioner and none was actually made. This being so, the present petition under sub-s. (3) of Section 66 is incompetent. No authority is needed for this obvious proposition of law, but reference may be made to 4 I T C 324,¹ 2 I T C 430² and 2 I T R 339. These judgments, though not exactly in point, support the conclusions arrived at above. We accordingly dismiss this application with costs.

D.S./R.K.

Application dismissed.

1. Panchu Gopal v. Commr. of Income-tax, B & O, (1932) 19 A I R Pat 167=140 I C 672=4 I T C 824.
2. Mahomed Farid Mahomed Shafi v. Commr. of Income-tax, Punjab, (1927) 14 A I R Lah 513=105 I C 167=9 Lah 317=2 I T C 430.

* A. I. R. 1938 Lahore 865

ADDISON AG. C. J. AND
DIN MOHAMMAD J.

Gulzara and others — Defendants —
Appellants.

v.

Qutba and others, Plaintiffs and another,
Defendant — Respondents.

Letters Patent Appeal No. 46 of 1938,
Decided on 12th May 1938, reversing the
decree of Jai Lal J., in S. A. No. 1619 of
1936, D/. 24th January 1938.

* Custom (Punjab)—Succession—Rajputs of
Garhshankar Tehsil, Hoshiarpur District —
Customary law in Hoshiarpur District com-
piled by Mr. Humphreys — Ban imposed by
question 72 not to be extended — Descendants
of appointed heir can succeed to descendants
of natural father.

The ban as contained in question 72 in Customary
Law of Hoshiarpur District as compiled by Mr.
Humphreys cannot be extended to any succession
other than the initial succession, inasmuch as it is
not clearly provided for in the Customary law. As
the appointed heir succeeds to the appointer's
estate he may reasonably be passed over at the
time when the succession to his natural father's
estate opens but as the relationship between the
appointer and the appointee not being the same as
exists between the adopter and the adoptee under
the Hindu law, neither he nor his descendants
lose any right of succession to the descendants of
the natural father. Hence among Rajputs of Garh-
shankar Tehsil in the District of Hoshiarpur, the
descendants of an appointed heir can succeed col-
laterally in the family of the appointee's natural
father : *Case law discussed.*

[P 865 C 1;
P 867 C 2]

D. N. Aggarwal and L. M. Datta —
for Appellants.

Abdul Majid — *for Respondents*
(*Plaintiffs*).

Din Mohammad J.—The only question
involved in this appeal is whether among
Rajputs of Garhshankar Tehsil in the Dis-
trict of Hoshiarpur the descendants of an
appointed heir have no right to succeed
collaterally in the family of the appointee's
natural father. The trial Court held against
the appointee's descendants but on appeal
the District Judge reversed the judgment
of the Court below and found in their
favour. From this decision a second appeal
was preferred to this Court which came for
hearing before Jai Lal J. From the trend
of his judgment, it appears that he was
inclined to affirm the decision of the lower
Appellate Court, but as remarked by him
he was constrained to accept the appeal on
the basis of a judgment of a Division Bench
of this Court reported in A I R 1934 Lah
1938 L/109 & 110

781.¹ The appointee's descendants have
appealed. Both sides agree that question 72
in the Customary Law of the Hoshiarpur
District as compiled by Mr. Humphreys
applies to the facts of this case. We have
therefore to see whether the rule as laid
down there is applicable and, if so, which
party stands to be benefited by it. This
question reads as follows :

Is an adopted son entitled to succeed to his
natural father in case of the latter having no
other lineal male issue ?

The relevant portion of the answer is
couched in the following words :

Generally an adopted son can only succeed to
the estate of his natural father if the latter dies
without lineal male descendants.

To this is appended a long note by the
compiler which however may for the pre-
sent be ignored. Reading the question and
answer together one is forced to the con-
clusion that the scope of the rule laid down
there is very narrow and is confined to the
case of an adopted son succeeding to his
natural father. On the terms of the ques-
tion and answer therefore it cannot be
denied that the plaintiffs' case is not sup-
ported by the Customary law. It was
presumably on this ground that the onus
was placed upon the plaintiffs to establish
that the descendants of the appointee did
not succeed to the property in suit. It is
conceded before us that no evidence has
been adduced by the plaintiffs to support
the position maintained by them and inas-
much as in cases of custom it is for the
plaintiffs to prove definitely what the
custom is upon which they rely, the plain-
tiffs' suit could not be decreed on this
ground alone. The trial Court however
referred to certain authorities of the Punjab
Chief Court as well as of this Court while
decreeing the plaintiffs' suit and it becomes
necessary therefore to examine the state of
law on this subject, although in our view
it would be a mere act of supererogation
as the Courts are not expected to create
custom nor to curtail or extend it. It is to
adjudicate upon it as they find it in the
manuals of the Customary law.

The earliest authority to which we may
refer in this connexion is 37 P R 1910.²
In that case it was held by Ragan J.
that the ordinary rule under the Customary

1. *Kanshi Ram v. Situ*, (1934) 21 A I Lah 781
=156 I C 102=16 Lah 214=37 P R 447.

2. *Jhanda Singh v. Kesar Singh*, (1910) 37 P R
1910=6 I C 712=50 P L R 1910² P W R
1910.

law is that an adopted son does not lose the right of succeeding in his natural family except possibly in the Eastern Punjab, where the appointment of an heir approaches in nature more nearly to the adoption of the Hindu law. In 45 P R 1912³ a Division Bench of the Punjab Chief Court composed of Robertson and Rattigan JJ. gave a decision of which the head-note reads as follows :

Held that the ordinary rule among agricultural tribes in the Punjab is that a person who is appointed as an heir to a third person does not thereby lose his right to succeed to the property of his natural father.

Held also that a corollary to this general rule is, that among many tribes it is recognized that the appointed heir and his lineal descendants have no right to succeed to any share in the family of the natural father as against other sons (and their descendants) of the latter.

Held further that, generally speaking, the tribes recognize a preferential right on the part of the appointed heir to succeed to the property of his natural father, where the only other claimant is the collateral heir of the latter.

Held consequently, that among Hindu Jats of Man got of Mauza Nangal, Tehsil and District Ludhiana, the sons of an appointed heir were entitled to succeed to the ancestral property left by their father's natural father in preference to collaterals, notwithstanding the entry in the Customary Law of the Ludhiana District to the contrary, the entry not being supported by a single instance.

We have given this quotation in extenso as it would appear later that a judgment of this Court holding against the appointee's descendants is based on this judgment. In Lah 362⁴ a Full Bench of this Court composed of Sir Shadi Lal C. J. and Scott-Smith and Harrison JJ. had an occasion to discuss the position of an appointed heir as the appointer and observed that the relationship established between the appointed heir and the appointer is purely a personal one and resembles the *kritrima* fori of adoption under the Hindu law. Such an appointment only affects the parties hereto and the appointed heir does not become the grandson of the appointer's father nor does the appointed heir's son become the grandson of the appointer. Consequently, the son of an appointed heir, has no right of succession to the appointer. In this case although the principal judgment was delivered by Scott-Smith J. Sir Shadi Lal C. J. appended a brief judgment

of his own agreeing with his conclusions. In the course of his judgment, Sir Shadi Lal C. J. after referring to a previous case of his reported in 99 P R 1914⁵ observed :

Customary appointment of an heir does not involve the transplanting of the heir from one family to another. The tie of kinship with the natural family is not dissolved, and the fiction of blood relationship with the members of the new family has no application to the appointed heir. The relationship established between the appointer and the appointee is a purely personal one and does not extend beyond the contracting parties on either side.

Founding his decision on these remarks, as well as referring to 99 P R 1914⁵ and 37 P R 1910² and distinguishing 45 P R 1912,³ Moti Sagar J. in a case reported in A I R 1923 Lah 485⁶ held that in the absence of a special custom among the jats of Hoshiarpur Tahsil, that in the presence of descendants of the appointee's natural father, the descendants of the appointee are excluded from inheritance in his natural father's family, it must be held that the tie of kinship with the natural family was not dissolved and that the descendants of an adopted son can succeed to the estate of the adopted son's natural family in the presence of the descendants in that family. A Letters Patent Appeal was presented against this decision which came for hearing before Sir Shadi Lal C. J. and LeRossignol J.: A I R 1934 Lah 287⁷ decided on 3rd April 1934. The question before Moti Sagar J. was whether the descendants of the deceased's grand father's brother, Ram Dayal, who was appointed an heir by his own uncle were entitled to succeed to a share in the property left by the deceased as against the descendants of his other brothers. The Letters Patent Bench referring to question and answer 72 and relying upon the circumstance that Ram Dayal while inheriting the property of his adoptive father was excluded by his natural brothers from participating in the inheritance of his natural father, came to the conclusion that Ram Dayal's descendants had no right to succeed to a share in the estate of his natural brothers. In support of this conclusion they referred to 45 P R 1912³ and on this basis they allowed the appeal and reversed the decision of Moti

3. *Dasarath v. Chanda Singh*, (1912) 45 P R 1912 = I O 421 = 71 P L R 1912 = 85 P W R 1912.

4. *Mela Singh v. Gurdas*, (1922) 9 A I R Lah 488 = 68 I O 58 = 3 Lah 862 (F B).

5. *Mehra v. Mangal Singh*, (1914) 1 A I R Lah 498 = 27 I O 393 = 99 P R 1914 = 71 P L R 1915.

6. *Ishar v. Hukam Singh*, (1923) 10 A I R Lah 485 = 73 I O 738.

7. *Hukam Singh v. Ishar*, (1934) 21 A I R Lah 287.

Sagar J. We may respectfully observe that neither did question 72 cover the case before the Letters Patent Bench nor did 45 P R 1912³ justify a departure from the principles enunciated by one of the Judges of the Letters Patent Bench in 99 P R 1914⁵ and 3 Lah 362.⁴

The question before the Letters Patent Bench was not whether the appointee excluded the natural brothers, which case alone is dealt with in question 72, but was of a much wider scope. If as laid down in 3 Lah 362⁴ the relationship between the appointer and the appointee is a mere personal relation and no transplantation takes place as contemplated by the Hindu law, it does not stand to reason that the appointed heir should for all practical purposes be treated as having been cut off from his father's family, for it is only on this assumption that his descendants can be excluded from inheriting the property of his natural father's descendants. The ban contained in answer to question 72 is reasonable and based on obvious considerations. The appointee succeeds to the appointer's estate and can thus be justifiably divested of the estate of his natural father so as not to create any friction with his brothers but the same consideration does not apply to the case of his descendants as against the descendants of his brothers.

In 11 Lah 615⁸, which corresponds to A I R 1930 Lah 700,⁹ Sir Shadi Lal C. J. and Abdul Qadir J. had again an occasion to consider the position of an appointed heir. Here too, Sir Shadi Lal C. J. wrote a separate judgment agreeing with the conclusion arrived at by Abdul Qadir J. that a person appointed an heir under the Customary law of the Punjab is not debarred from succeeding collaterally in his natural family in the presence of his natural brothers, although he cannot compete with them in the matter of succession to the estate of his natural father. In A I R 1934 Lah 781¹ the judgment which, as stated above, was reluctantly followed by Jai Lal J., a Division Bench of this Court composed of Tek Chand and Abdul Rashid JJ. among other authorities relied on A I R 1934 Lah 287⁷ and observed that as the adopted son cannot succeed collaterally in the family of his adoptive father, he is allowed to succeed collaterally in the family of his natural father. But an adopted son is not entitled

to succeed to his share in his natural father's property in the presence of his natural brother. There the question was whether the appointed heir could succeed to his own brother having once inherited the appointer's property.

We may say with all respect that we are not prepared to extend the ban as contained in question 72 to any succession other than the initial succession, inasmuch as it is not clearly provided for in the Customary law. In our view as the appointed heir succeeds to the appointer's estate he may reasonably be passed over at the time when the succession to his natural father's estate opens but as laid down in so many authoritative judgments referred to above the relationship between the appointer and the appointee not being the same as exists between the adopter and the adoptee under the Hindu law, neither he nor his descendants lose any right of succession to the descendants of the natural father. It may be that in certain cases under the Customary law a fiction may be introduced, as laid down in 4 P R 1891,⁹ that the property of a man who dies without issue first reverts to the ancestor and then descends; but this principle cannot be so interpreted as to debar the appointee's descendants from claiming inheritance in the family of the appointee's natural father. We accordingly accept this appeal, reverse the judgment of Jai Lal J. and restore that of the lower Appellate Court with the result that the suit of the plaintiffs shall stand dismissed. In view of the conflict of authority however we shall leave the parties to bear their own costs throughout.

B.D./R.K.

Appeal allowed.

9. Gholam Muhammad v. Muhammad Bakhsh, (1891) 4 P R 1891 (F B).

A. I. R. 1938 Lahore 867

ADDISON AG. C. J. AND DIN MOHAMMAD J.

Sheikh Mubarak Ali — Petitioner.

v.

Commissioner of Income-tax Lahore — Respondent.

Civil Ref. No. 7 of 1938, Decided on 27th June 1938, referred by Commissioner of Income-tax, Punjab, N. W. F. and Delhi Provinces, D/- 25th April 1938.

(a) Income-tax Act (1922), S. 23 (4) — Best judgment assessment—What constitutes 'material' stated.

8. Jagat Singh v. Ishar Singh, (1930) 17 A I R Lah 700=125 I C 626=11 Lah 615=31 P L R 538.

The officer is to make an assessment to the best of his judgment against a person who is in default as regards supplying information. He must not act dishonestly, or vindictively or capriciously because he must exercise judgment in the matter. He must make what he honestly believes to be a fair estimate of the proper figures of assessment, and for this purpose he must be able to take into consideration local knowledge and repute in regard to the assessee's circumstances, and his own knowledge of previous returns by and assessments of the assessee, and all other matters which he thinks will assist him in arriving at a fair and proper estimate; and though there must necessarily be guess-work in the matter, it must be honest guess-work: *A I R 1937 P C 133, Foll.; 7 I T C 47, Disting.* [P 868 O 2]

(b) Income-tax Act (1922), Ss. 23 (4) and 34—Best judgment assessment can be reopened under S. 34.

When once a final assessment is arrived at, it cannot be reopened except in the circumstances detailed in S. 34 and S. 35 of the Act and within the time limited by those Sections. This evidently implies that even the "best judgment" assessment can be reopened under S. 34: *A I R 1938 P C 175, Foll.; 1934 I T R 236, Refer.; A I R 1938 Cal 557 (S B), Expl.* [P 869 O 1]

Kirpa Ram — for Petitioner.

J. N. Aggarwal — for Respondent.

Din Mohammad J.—On an application made by the assessee, we issued a mandamus to the Commissioner requiring him to state the case on the following two questions:

(1) Whether there was any material or evidence for the enhancement under S. 34 by increasing sales from Rs. 12,700 to Rs. 40,000?

and

(2) Whether, in the circumstances of the case, a part of the income, profits and gains from the sale of books in the accounting year 1933-34 can be said to have escaped assessment within the meaning of S. 34 at the time of the original assessment for the year 1934-35?

The material facts are these. The assessee is a book-seller and also owns some immovable property. In the return submitted by him for 1934-35, he showed his sales at Rs. 12,699 and charging profit at the rate of 10 per cent. he returned his total income assessable to income-tax from the sale of books at Rs. 1300. To this he added Rupees 546 as rent from house property and debited the total amount with an expenditure of Rs. 2175 thus claiming a loss of Rs. 329. The Income-tax Officer did not challenge the figure of sales but enhanced the rate of profit to 25 per cent. The assessee took an appeal from that order but it was dismissed.

In connexion with the 1935-36 assessment, the Income-tax Officer scrutinized the assessee's accounts more carefully and came to the conclusion that the accounts

could not be depended upon. It transpired that the assessee had purchased immovable property worth Rs. 8000 in his own name on 19th November 1932; again on 1st April 1933, he had purchased immovable property worth Rs. 21,000 in the name of his wife and had further spent Rs. 4000 in renovating his business premises. It was obvious that these acquisitions could not be properly explained in face of the returns previously submitted by the assessee, inasmuch as in 1931-32 he had made a return of Rs. 900 only, in 1932-33 of Rs. 1031 only and in 1933-34 of Rs. 237 only. The Income-tax Officer accordingly issued a notice to the assessee under S. 34 and eventually raised the figure of sales to Rs. 40,000, in which he was supported both by the Assistant Commissioner of Income-tax and the Commissioner.

The question is whether the estimate now arrived at by the income-tax authorities is based on any material. The leading authority on the subject as to what constitutes 'material' in such cases is the latest pronouncement of their Lordships of the Privy Council reported in *I L R 1937 Nag 191*.¹ Lord Russell of Killowen who delivered the judgment of their Lordships observed at pp. 201 and 202:

The Officer is to make an assessment to the best of his judgment against a person who is in default as regards supplying information. He must not act dishonestly, or vindictively or capriciously because he must exercise judgment in the matter. He must make what he honestly believes to be a fair estimate of the proper figure of assessment, and for this purpose he must, their Lordships think, be able to take into consideration local knowledge and repute in regard to the assessee's circumstances, and his own knowledge of previous returns by and assessments of the assessee, and all other matters which he thinks will assist him in arriving at a fair and proper estimate: and though there must necessarily be guess-work in the matter, it must be honest guess-work. In that sense too the assessment must be to some extent arbitrary. Their Lordships think that the Section places the officer in the position of a person whose decision as to amount is final and subject to no appeal; but whose decision if it can be shown to have been arrived at without an honest exercise of judgment, may be revised or reviewed by the Commissioner under the powers conferred upon that Official by S. 38.

In the present case the income-tax authorities not only took into consideration the recent acquisitions made by the assessee but also the fact that since 1931-32 none

1. Commissioner of Income-tax U. P. & O. P. v. Badri Das Ram Ral Shop, (1937) 24 A I R P O 183=167 I O 798=I L R (1937) Nag 191=64 I A 102=31 S L R 284 (P O).

of his returns was ever held to be genuine. In 1931-32, his estimate of Rs. 900 was raised to Rs. 3092, in 1932-33, from Rs. 1031 the estimate was raised to Rs. 3751 and in 1933-34, his estimate of Rs. 237 was raised to Rs. 2110. In the circumstances explained above, we are not in a position to say that the Income-tax Officer who formed the original estimate had no material or had acted "dishonestly or vindictively or capriciously" or that he did not "honestly believe the estimate arrived at by him to be a fair estimate of the proper figure of assessment." If the assessee considers that the estimate is far in excess of the actual income earned by him, the remedy lies in his own hands. He should try to be honest in his dealings with the income-tax authorities and keep accurate accounts of all the business done by him and if the income-tax authorities are satisfied that his accounts are reliable, we are sure that they will never resort to the 'best judgment' assessment in future. Counsel for the assessee relies on 7 I T C 47² in support of his contention that when once an estimate has been made, no second estimate can be made under S. 34, but, even if the observations made in that case were correct, they do not govern the present case, as it proceeds on different facts. We accordingly answer question No. 1 in the affirmative. Question No. 2 need not detain us long. This matter is again concluded by authority. In a recent judgment reported in A I R 1938 P C 175,³ their Lordships of the Privy Council have held :

When once a final assessment is arrived at, it cannot be reopened except in the circumstances detailed in S. 34 and S. 35 of the Act and within the time limited by those Sections.

This evidently implies that even the 'best judgment' assessment can be reopened under S. 34. As to the circumstances in which a second assessment can be made, although the first assessment had become final, reference may be made to 1934 I T R 236.⁴ It is true that the language of S. 125, English Act, is different but the governing principle is the same. In that case the Inspector of Taxes had accepted the contention of the assessee and made no assessment in respect of a certain item of income

and some time later he re-considered the facts and came to the conclusion that the income was taxable. Finlay J. held that the income could be taxed and that the act of the Inspector was not open to any legal objection. Counsel for the assessee has drawn our attention to 6 I T R 265⁵ where it has been held that in deciding whether income had escaped assessment, an Income-tax Officer must not act on suspicion or conjecture and must decide the question upon a fair and reasonable consideration of such information and materials as are available to him. This judgment however does not help the assessee in the least, inasmuch as no principles laid down there have been violated in this case. On the grounds stated above we answer this question too in the affirmative. In the circumstances of the case however we leave the parties to bear their own costs before us.

D.S./R.K. *Answer in the affirmative.*

5. In re Mahaliram Ramjidas, (1938) 25 A I R Cal 557=177 I C 255=6 I T R 265 (SB).

A. I. R. 1938 Lahore 869

ADDISON AND DIN MOHAMMAD JJ.

Registered Corporation named Jamiat Dawat wa Tabligh Islam through Mohammad Abdullah Khan—Defendant — Appellant.

v.

Mohammad Sharif — Plaintiff — Respondent.

First Appeal No. 218 of 1937, Decided on 8th April 1938, from decree of Senior Sub-Judge, Montgomery, D/- 10th March 1937.

(a) Limitation Act (1908), Art. 91 — Person dedicating property for construction of mosque reserving for himself perpetual connexion with it in his capacity as its president — Suit for cancellation of document and for declaration of his right to manage affairs of mosque is governed by Art. 91.

Where a person dedicating certain property for the construction of a mosque, and appointing himself a permanent mutawalli, reserving for himself a perpetual connexion with the mosque in his capacity of its president, brings a suit for avoiding the document and for declaration of his right to manage the affairs of the mosque, such a suit is governed by Art. 91. Such suit when instituted within three years of the time at which he admittedly occupied the office of the President is within time inasmuch as so long as he held the position of the president and had active hand in the management of the affairs of the mosque, no occasion has arisen for him to institute any suit to avoid the document : *AIR 1915 All 212, Disting.* [P 873 C 1, 2]

2. U Lu Nyo v. Commr. of Income-tax Burma, (1933) 7 I T O 47.

3. Commissioner of Income-tax Bombay Presidency & Aden v. Khemchand Ramdas, (1938) 25 A I R P C 175=175 I C 1=32 S L R 549=65 I A 286 (P C).

4. Williams v. Grundy, (1934) I T R 286.

(b) Civil P. C. (1908), S. 92—Suit by person claiming to be trustee of property dedicated for religious purposes, against rival trustee, for declaration that he is trustee and entitled to manage institution as such does not fall under S. 92—Sanction of Collector before institution of suit is not a necessity.

Where a suit is instituted by a person claiming to be a trustee of property dedicated for religious purposes, for a declaration that he is a trustee and is entitled to manage the institution as such but the relief he claimed is in his individual capacity and not in a representative capacity and the suit is against a rival trustee or one who claims to be a trustee, such a suit does not fall under S. 92 (1). No injury to public right or interest is involved; whoever happens to succeed will hold the property as trustee and not in his own right. The dispute between the rival trustees inter se is neither a suit for removal of any trustee nor one for appointing a new trustee nor for vesting any property in a trustee and does not fall under any heads from (d) to (g) or under head (h) of S. 92.

[P 874 C 2]

A suit by a person claiming to be a mutawalli of a certain mosque against a registered corporation which has been managing the mosque, for a declaration that he is the mutawalli of the mosque and as such entitled to manage all the affairs connected with it, does not therefore fall under S. 92, Civil P. C., and does not require the sanction of the Collector required by S. 92 and the institution of the suit in such a form does not amount to a circumvention of law: *A I R 1931 Rang 322*; *19 I C 740*; *A I R 1927 Mad 338*; *A I R 1931 Lah 727* and *A I R 1928 P C 16, Rel. on; Case law discussed.*

[P 874 C 2; P 875 C 1]

(c) Specific Relief Act (1877), S. 42, Proviso—Suit for declaration against registered body managing mosque for declaration that plaintiff is mutawalli and is entitled to manage mosque—Plaintiff admittedly out of possession—Suit for mere declaration does not lie.

Although it may be not necessary to institute a suit for possession in certain cases yet, unless some sort of further relief is obtained, mere declaration will not be of any use to those persons who are out of possession and who on the basis of mere declaratory decree cannot obtain possession.

[P 875 C 2]

Where a person brings a suit against a registered corporation which has been managing a mosque, for a declaration that he is the mutawalli of the mosque and as such entitled to manage all the affairs connected with it, his suit for mere declaration does not lie, when he is admittedly out of possession and both the control and management of the mosque together with the building appertaining thereto vest in the defendant corporation. The grant of a declaratory decree would be useless as the plaintiff will not be able to resume the control and management of the mosque on the basis of that declaration alone and this being so the decree would be infructuous: *33 Mad 452*; *A I R 1931 Rang 322*; *101 P R 1909*; *A I R 1937 Rang 427* and *A I R 1936 Mad 605, Rel. on*; *15 Mad 307*; *A I R 1920 Sind 92* and *A I R 1938 P C 73, Disting.*; *A I R 1938 Oudh 517, Commented upon; Case law discussed.*

[P 876 C 2]

(d) Mahomedan Law—Waqf—Person declaring certain property to be waqf and appointing permanent mutawalli, subsequently

surrendering his right of management in favour of body called Jamiat—He is not empowered to cancel arrangement so made by executing document to that effect.

Where a person declares certain property to be waqf property and appoints himself a permanent mutawalli but subsequently ceases to hold that position by reason of execution of a document under which he surrenders his right and confers the rights of management of the property and the mutawalliship in favour of a body called the Jamiat, he is empowered neither at law nor in equity to revoke the arrangement thus made by executing a document cancelling the previous document and his unilateral act is not sufficient to divest the Jamiat or the registered corporation which subsequently replaces it, of the control and management that it has of the waqf property; so also where such person continues to hold the office of President of the Jamiat, his removal from the office of President is not enough to invalidate the registration of the Jamiat as corporation or to end its being, although it may entitle him to seek some sort of relief from the Civil Courts.

[P 877 C 1, 2]

Shuja-ud-Din and Mahbub Ilahi

— for Appellant.

Indar Dev, Mohammad Yusaf Khan and
Mohammad Amin Khan

— for Respondent.

Din Mohammad J.—The suit out of which this appeal has arisen was instituted on 1st October 1934, by one Mohammad Shariff against a registered corporation working under the style of "Jamiat Dawat wa Tabligh Islam" for a declaration that he was the mutawalli of the Jamia Mosque called "Mohammad Sharif Wali" standing on Khasra Nos. 2793 and 2794 and of the adjoining land measuring 6 sarsahis with no khasra number situate in the town of Montgomery and that as such he was entitled to manage all affairs connected with the mosque and to realise and disburse the income derived from the said property for the benefit of the mosque.

It was alleged by the plaintiff that on an application made by him on 20th September 1921 to the President of the Montgomery Municipal Committee, he was granted a part of the land in suit at a concession rate for the construction of a mosque and the sinking of a well and that he accordingly obtained possession of the land on 8th June 1922 on payment of a sum of Rs. 877-12-6. On 19th September 1922, he again applied to the Deputy Commissioner for another piece of land for the same purpose and he obtained possession of another part of the land on payment of Rs. 954-8-0. The land thus acquired was situate in khasra Nos. 1071, 1072 and 1073 measuring 16 marlas 7 sarsahis in each of the

three numbers and was mutated in his favour on 12th June 1925. At the time of the said mutations the property in suit was declared to be waqf and the plaintiff and his descendants to be the mutawallis thereof. Later, it was discovered that he was in possession of 6 sarsahis in excess of the area acquired by him and he was allowed to retain the excess land on payment of Rs. 40. On 23rd December 1929, he executed a registered document which he called a will by which he made certain provisions for the management of the income of the mosque by a body named "Jamiat Dawat wa Tabligh Islam". On 6th December 1933, he cancelled the said document but the mutation based thereon was refused and he was referred to a regular suit. On 24th May 1934, a registered corporation was set up under the name of 'Jamiat Dawat wa Tabligh Islam' which claimed the management of the mosque as against him. That corporation however was not entitled to interfere with the affairs of the mosque and hence the necessity of the declaration stated above.

The corporation submitted its pleas on 3rd November 1934. It averred inter alia that the property in suit was waqf with the corporation as its trustee and inasmuch as the object of the suit was to remove the corporation from its present position, the suit could not proceed without the sanction of the Collector. It was further contended that the suit was barred both by the Proviso to S. 42, Specific Relief Act, and under the Limitation Act. It was denied that the property was purchased by the plaintiff entirely from his own funds or that the plaintiff and his descendants were declared to be its mutwallis. It was further denied that the document executed on 23rd December 1929 was a will. On the other hand, it was stated that inasmuch as the property was waqf and the corporation had been managing it ever since it had come into existence but the name of the plaintiff was mentioned in the column of ownership in the revenue records, an admission in writing was obtained from the plaintiff to testify to these facts. The mosque came to be known as "Masjid Mohammad Sharif Wali" as the land had been acquired by the Muslim community through the plaintiff, but the entire management of the property in suit rested with the corporation and this fact was conceded by the plaintiff at the time of the mutation that followed the document in question.

The Muslim community being assured of this state of affairs collected a large amount of money and constructed a magnificent building on the site of the old mosque. The old corporation had never ceased to exist and the mere fact that it was registered in 1934 did not bring into existence any new institution in place of the old institution. The plaintiff was neither the founder of the mosque nor the creator of the waqf. He was merely "an honorary mutwalli" and as such not entitled to interfere in the management of the mosque so long as the corporation existed and consequently not entitled to any declaration. The object of the plaintiff was to have the old scheme abrogated and a new scheme sanctioned and this object could not be achieved without undergoing the formalities laid down in the law relating to public trusts.

To these averments a reply was made by the plaintiff on 1st December 1934, traversing all the pleas raised by the corporation and reiterating the position taken up by the plaintiff in the plaint. Issues arising from the technical points raised by the defendant were framed in the first instance and were disposed of by an order dated 28th June 1935. It was held that S. 92 Civil P. C., did not apply and that the suit could proceed without the sanction of the Collector. It was also decided that the suit was within time. On the question of the frame of the suit however it was observed that the plaintiff should either prove that he was in possession of the mosque and the property attached thereto or he should amend the plaint and ask for further relief in the shape of possession, etc. Thereupon the plaintiff examined Mehr Din, P. W. 1, Pandit Bihari Lal, P. W. 2, Imam Din, P. W. 3, Jamal Din, P. W. 4, Bhagwan Das, P. W. 5, Jagat Narain, P. W. 6, Mohammad Ashfaq, P. W. 7, Nazir Ahmad, P. W. 8 and Abdul Rehman, P. W. 9. Mehr Din after stating that he was employed by Mohammad Sharif as a water carrier to supply water for ablutions, admitted that the building operations of the mosque were supervised by Bashir Khan who was the Secretary of the mosque; that the management vested in the Anjuman which was managing it still and that the rent of the houses attached to the mosque was also being realized by the same body. Pandit Bihari Lal stated that the electric connexion of the mosque stood in the name of the Jamia Mosque through Mohammad Sharif. Imam Din stated that for the last

fourteen months he had been paying the rent to the Anjuman and a similar statement was made by Jamal Din, P. W. 4, who further added that it was the Anjuman which was receiving the rent of all the kothas and houses attached to the mosque. It may be mentioned that the terms 'Jamiat' and 'Anjuman' are one and the same. Bhagwan Das, Jagat Narain, Mohammad Ashfaq and Nazir Ahmad gave formal evidence in respect of the rent deeds executed by the various witnesses. Abdul Rahman produced certain revenue excerpts. The defendant corporation also examined Mistri Ghulam Nabi, D. W. 4, Master Mohammad Din, D. W. 5, Mohammad Suleman, D. W. 6, Ghulam Nabi, D. W. 7 and Sheikh Mohammad Sharif, D. W. 8 and they all deposed that the possession of the property was with the Anjuman. On 26th March 1936, the Senior Subordinate Judge relying on 15 Mad 307¹ held that the suit could proceed in the form in which it was instituted. His successor accordingly proceeded with the trial of the suit and after recording the statement of Mohammad Sharif framed the following issues :

1. Were the land under the mosque and under the buildings attached thereto acquired by plaintiff with his own funds and were his property ?

2. Is the property in dispute a religious public trust ?

3. Is plaintiff the mutwalli of the mosque and the property appertaining thereto and if so, what are his powers as such ?

4. When was the waqf in respect of the land under the mosque and the land under the buildings appertaining thereto created ?

5. Was plaintiff competent to execute the document dated 23rd December 1929 ?

6. What is the nature of the document dated 23rd December 1929, and how it affects the present case ?

7. Was plaintiff competent to revoke and cancel the document dated 23rd December 1929 ?

8. If so, was the document dated 23rd December 1929 revoked by the document dated 6th December 1933 ?

9. Is plaintiff estopped from denying the right of the defendant to manage the waqf property ?

Both parties led further evidence in the case and the Senior Subordinate Judge granted the plaintiff a declaration to the effect that he was the mutwalli of the Jamia Mosque and all the property appertaining thereto and was competent to manage and administer all the affairs of the waqf as such. His conclusion on which this decree was based were as follows : (1)

1. *Chinnammal v. Varadarajulu*, (1892) 15 Mad 307.

that the site under the mosque and the other buildings attached thereto was acquired by the plaintiff with his own funds and was his property to start with ; (2) that the property in dispute was a religious waqf and that it could not vest in anybody as trustee, in view of the peculiar nature of a Muslim waqf which implies detention of a thing in the implied ownership of Almighty God ; (3) that the plaintiff was the mutwalli of the mosque and the properties attached to it and that he never divested himself of the powers he possessed as mutwalli ; (4) that the waqf was created on 12th June 1925 ; (5) that the document dated 23rd December 1929 was not a will but a waqfnama by which the plaintiff formally acknowledged and declared the property to be waqf ; (6) that the plaintiff co-opted the Jamiat for help and assistance in the management of the waqf property and that that body which was co-opted ceased to exist as soon as the plaintiff was removed from the office of President and that that portion of the document which related to the scheme of administration was ipso facto revoked ; (7) that the plaintiff was competent to revoke and cancel that part of the document dated 23rd December 1929, which related to the management of the waqf property ; and (8) that the defendant corporation not being the body which was co-opted, the plaintiff was not estopped from proceeding in the manner in which he had done. It is against this decision that the defendant corporation has appealed.

Counsel for the parties have addressed lengthy arguments both on questions of law and fact. On behalf of the appellant it has been urged that the suit could not be instituted in its present form, that the sanction contemplated by S. 92, Civil P. C., was necessary and that in any circumstances the suit was barred by time. On facts it has been contended that the document dated 23rd December 1929, laid down a scheme for the administration of the waqf property and for succession to the office of mutwalli and that the plaintiff was debarred from revoking or cancelling it in 1933, especially as he occupied no such position at that time as would entitle him to exercise that power. It has further been averred that the plaintiff deceived the Muslim public into believing that he had made over the management of the waqf property to the representatives of the community in the shape of 'Jamiat Dawat

wa 'Tabligh Islam' and thus induced them to construct a new mosque by public subscription and that the plaintiff could not, now that the mosque had been completed at a heavy cost, go back upon that document and grab the waqf property once more to further his secular ends. The respondent on the other hand has stressed the fact that he was the founder of the waqf, that as such he was at liberty to make any scheme for its administration that he liked and to unmake it whenever he liked, that he had constituted himself as 'mutwalli' in the first instance, and could continue to be so until his death and that the defendant corporation being a newly constituted body could not oust him from the privileged position that he occupied in relation to the mosque.

We take up the legal issues first. So far as the question of limitation as well as that of the applicability of Sec. 92, Civil P. C., is concerned, we are disposed to think that the judgment of the Court below is not open to objection in any manner. On the point of limitation the most that is contended by the appellant is that Art. 91, Limitation Act, applies to the case and inasmuch as the object of the suit is to secure the cancellation of the document dated 23rd December 1929, the cause of action accrued to the plaintiff on the day that the document was executed. Reliance in this connexion is placed on 29 I C 968,² but in our opinion that authority is distinguishable. It was held there by a Division Bench of the Allahabad High Court that the limitation for a suit for a declaration that a mortgage deed executed by the plaintiff was without valid consideration and ineffectual and that the defendant had no right under it begins to run from the date of the execution of the document. It may be remarked that Richards C. J., who wrote the principal judgment, clearly stated that he was deciding the case on its own facts and circumstances. Even if Art. 91 be held applicable to the case, we are in agreement with the respondent's counsel that so long as the plaintiff held the position of president of the Anjuman and had an active hand in the management of the affairs of the mosque, no occasion had arisen for him to institute any suit to avoid that document. The *terminus a quo* for a suit under Art. 91 is the time "when

the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him." On the perusal of the document in question it appears that the plaintiff had in a way reserved for himself a perpetual connexion with the Anjuman in his capacity as president and as he admittedly occupied that office within three years of 1st October 1934, when the present suit was instituted, we consider that his suit was well within time.

Similarly, we are not impressed by the argument advanced by the appellant's counsel that the suit could not proceed without the sanction contemplated by Sec. 92, Civil P. C. The authorities relied upon in this behalf do not afford much help to the appellant. In 165 I C 158,³ a case from the Sindh Judicial Commissioner's Court, a sewak of a certain temple had instituted a suit on behalf of himself and other sewaks for a declaration that the property in suit was a public charitable property and that neither the defendant nor anyone else was entitled to alienate it. It was further prayed that an injunction be issued restraining the defendant from selling the whole or any portion of it to any person. On these facts it was remarked that the relief claimed fell within Sec. 92, cl. (h), having been instituted against trustees who were intermeddling with the charitable property. It was further observed that the relief in cl. (h) of Sec. 92 indicated a relief which while falling under the Section did not fall under any of the other clauses, namely (a) to (g). In 97 I C 630⁴ the plaintiffs in their representative capacity sued for possession of a school building and site which had been sold by some members of their community to a person of antagonistic religious persuasion. Spencer J. held that if there was a valid creation of trust, the suit in the circumstances could not be brought without the sanction required by S. 92, Civil P. C. In 150 I C 193⁵ Smith J. of the Oudh Chief Court remarked that where the allegation made in a case was that a person was entitled to the office of the trustee of a fund, the allegation brought the relief sought within the purview of Section 92, Civil P. C.

3. *Mul Chand Bassarmal v. Devagir Motigir*, (1936) 23 A I R Sind 179=165 I C 158=30 S L R 104.

4. *Innasimuthu Pillai v. Lutz*, (1926) 13 A I R Mad 1029=97 I C 630.

5. *Mahomed Sadiq Ali Khan v. Kazsm Ali Khan* (1934) 21 A I R Oudh 118=150 I C 193=9 Luck 507=11 O W N 323.

2. *Qasim Beg v. Mahomed Zia Beg*, (1915) 2 A I R All 212=29 I C 968=18 A L J 913.

The respondent on the other hand relied on 9 Rang 459,⁶ 19 I C 740,⁷ 97 I C 480,⁸ A I R 1931 Lah 727⁹ and 55 Cal 519.¹⁰ In 9 Rang 459⁶ Carr J. held that where the plaintiffs claimed that they were the lawfully appointed trustees of certain trust properties and sued the defendants for possession of the trust properties the suit did not fall within Sec. 92, Civil P. C. This judgment was mainly based on a dictum of Woodroffe J. in 33 Cal 789¹¹ and on the observations made by their Lordships of the Privy Council in 55 Cal 519¹⁰ to which we shall advert later. In 19 I C 740,⁷ Wallis J. of the Madras High Court held that the scope of S. 92 (2) is to protect the right of the public and it is not aimed at the infringement of private rights and should not, if possible, be so construed as to deprive individuals whose rights have been infringed of their remedy. In 97 I C 480⁸ Wallace J. reiterated the principle enunciated above and stated that the real test whether Sec. 92, Civil P. C., applies to a suit or not is whether the suit is fundamentally on behalf of the public for the vindication of a public right, or on behalf of a private individual for the vindication of his private rights. In A I R 1931 Lah 727⁹ in a case in which a mahant had brought a suit for possession of certain lands which he alleged belonged to his institution, it was held by a Division Bench of this Court that as the plaintiff was not suing in any representative capacity but was claiming to enforce his personal right as the duly appointed mahant of an institution, S. 92 had no application. In 55 Cal 519¹⁰ their Lordships of the Privy Council traced the history of S. 92 and came to a definite conclusion that the words as to "further and other relief" in head (h) are used in connection with the specified heads (a) to (g) and not in connexion with the words at the beginning of the sub-section. Lord Sinha, who delivered the judgment of their Lordships, remarked :

6. M. S. A. Ganny v. Mahomed Ebrahim, (1931) 18 A I R Rang 322=135 I C 332=9 Rang 459.

7. Venkatarangam Chetty v. Venkatasubbam-mah, (1913) 25 M L J 373=19 I C 740.

8. Alagappa Chettiar v. Arunachalam Chetty, (1927) 14 A I R Mad 388=97 I C 480.

9. Nanak Das v. Kishan Das, (1931) 18 A I R Lah 727=135 I C 509=33 P L R 544.

10. Abdur Rahim v. Abu Mahomed Barkat Ali Shah, (1928) 15 A I R P O 16=108 I C 361=55 Cal 519=55 I A 96 (P C).

11. Budri Das Mukim v. Ohuni Lal, (1906) 33 Cal 789=10 C W N 581.

The reliefs specified in sub-ss. (1) (a) to (h) do not cover any of the reliefs claimed in this suit unless the words 'further or other relief' in Cl. (h) can be held to cover them. It is argued that the words 'such further or other relief as the nature of the case may require' must be taken, not in connexion with the previous Cls. (a) to (g), but in connexion with the nature of the suit, viz. any relief other than (a) to (g), that the case of an alleged breach of an express or constructive trust may require in the circumstances of any particular case. Their Lordships are unable to accept this argument. First, because the words 'further or other relief' must on general principles of construction be taken to mean relief of the same nature as Cls. (a) to (g). Secondly, because such construction would cut down substantive rights which existed prior to the enactment of the Code of 1908, and it is unlikely that in a Code regulating procedure the Legislature intended without express words to abolish or extinguish substantive rights of an important nature which admittedly existed at that time.

At page 530 his Lordship observed :

Their Lordships see no reason to consider that S. 92 was intended to enlarge the scope of Sec. 539 by the addition of any relief or remedy against third parties, i. e. strangers to the trust. They are aware that the Courts in India have differed considerably on the question whether third parties could or should be made parties to a suit under S. 539, but the general current of decisions was to the effect that even if such third parties could properly be made parties under S. 539, no relief could be granted as against them. In that state of the previous law, their Lordships cannot agree that the Legislature intended to include relief against third parties in Cl. (h) under the general words 'further or other relief'.

On a consideration of the authorities referred to above, we are of opinion that this suit does not require any sanction under S. 92, Civil P. C. It is true that the suit has been instituted by a person claiming to be a trustee for a declaration that he is a trustee and is entitled to manage the institution as such, but the relief he claims is in his individual capacity and not in a representative capacity. The suit is against a rival trustee or one who claims to be a trustee. In neither case is an injury to a public right or interest involved. Whoever happens to succeed will hold the trust property as mutwalli and not in his own right. The dispute between the two rival trustees inter se therefore is neither a suit for the removal of any trustee nor for appointing a new trustee, nor for vesting any property in a trustee, nor does it fall under any other head from (d) to (g) and will consequently, in view of the dictum of their Lordships of the Privy Council, not fall under head (h). Counsel for the appellant contends that the plaintiff in bringing the suit in its present form has tried to circumvent the law, but we do not consider

that this is so. We accordingly hold that S. 92, Civil P. C., is no bar to the suit.

The objection of the appellant corporation on the ground of the non-maintainability of the suit in its present form however must prevail. The plaintiff is undoubtedly out of possession and both the control and the management of the mosque together with the buildings appertaining thereto vest in the defendant. In these circumstances, a suit for a mere declaration cannot lie inasmuch as the plaintiff has omitted to seek further relief which he was able to do. The Senior Subordinate Judge found against the defendant on this point mainly relying on 15 Mad 307.¹ But the facts of that case as well as of the other cases now relied upon by the respondent before us are clearly distinguishable. In 15 Mad 307,¹ the ratio decidendi of the judgment appears to us to be this, that most of the lands in suit were in the possession of the tenants, some of whom recognized one claimant as their landlord and some the others. In 63 I C 685,¹² though the head-note says that the Proviso to Sec. 42 is no bar to a suit for a declaration of title to lands in the possession of tenants and lessees, yet a reference to the judgment shows that the position has not been correctly portrayed in the head-note. At p. 687 it is observed:

It would appear in this case that the tenants and lessees have not denied the tenancy but have refused to attorn to either party until the question of ownership as between the claimants is settled.

The state of affairs here is however different. As stated above, even the plaintiff's witnesses have deposed to the effect that they have been paying rent to the defendant corporation for more than a year before the institution of the suit. In A I R 1938 P C 73¹³ their Lordships of the Privy Council remarked:

The Subordinate Judge held that a suit for declaration did not lie, on the ground that the plaintiff was neither in possession nor in control of the management of the school and that the proper form of the suit would have been one for possession and management of the school and not merely a declaration of such right, and that the plaintiff had omitted to seek this further relief. The High Court took the contrary view, on the

ground that the defendants were not in possession or in a position to deliver possession of the properties, and that therefore there was no further relief available to the plaintiffs against the defendants. Their Lordships agree with the High Court in this view; and it may be added that where it is not open to the plaintiff to pray for possession also as against the defendant, injunction is further relief within the meaning of the Proviso.

Firstly, in this case the defendant corporation is managing the property and is in a position to deliver the goods so to say and consequently the principle of law enunciated by their Lordships of the Privy Council does not apply. Secondly, in the case before their Lordships the plaintiff had prayed for a relief by way of injunction while in the case before us no such relief has been asked for. In 9 Luck 170¹⁴ a Division Bench held that a person suing in his personal capacity for a declaration that he is entitled to represent a certain interest is not debarred from obtaining a decree, by reason of the fact that he does not in the same suit ask for possession over the property of the interest which he claims to represent and especially so in a case, where the defendants have not set up any title adverse to that interest, and applying this principle to the case of a mutwalli who had instituted a suit for possession of the waqf property held that the suit was not barred by the provision of S. 42. With all respect we consider that this judgment goes too far. It may not be necessary to institute a suit for possession in certain cases, but it cannot be denied that unless some sort of further relief is obtained, mere declaration will not be of any use to those persons who are out of possession and who on the basis of a mere declaratory decree cannot obtain possession.

The view that we take in this matter is supported by ample authority. In 33 Mad 452,¹⁵ where the trustee of a temple, who had been ousted from possession by his co-trustees, had sued for a declaration that his dismissal from the trusteeship was invalid and for an injunction restraining his co-trustees and the temple committee from interfering with the exercise of his rights as trustee, there being no prayer for consequential relief in the nature of possession against his co-trustees, it was held that the suit was not maintainable. In

12. Ram Ohand Gurdasmal v. Gobind Ram Gurdasmal, (1920) 7 A I R Sind 92=63 I C 685=14 S L R 137.

13. Sunder Singh Mallah Singh Sanatan Dharam High School Trust v. Managing Committee, Sunder Singh Mallah Singh Rajput High School, (1938) 25 A I R P O 73=172 I C 993=I L R (1938) Lah 63=65 I A 106=32 S L R 350 (P C).

14. Mahomed Jafar Hussain v. Mahomed Taqi, (1933) 20 A I R Oudh 517=145 I C 1003=9 Luck 170=10 O W N 1163.

15. Rathnasabapathi Pillai v. Ramaswami Ayyar, (1910) 33 Mad 452=5 I C 630=1910 M W N 112=20 M L J 301.

that case the learned Judges who decided the case remarked that notwithstanding the lands belonging to the temple were in physical possession of tenants, yet the plaintiff's right to receive rents was capable of possession which if disturbed entitled him to bring a suit for possession. In view of A I R 1938 P C 73¹³ and 159 I C 237,¹⁶ which is our own judgment, we may not be prepared to go to the length of saying that injunction is not further relief within the meaning of the Proviso to S. 42, Specific Relief Act, but we are in respectful agreement with the principle laid down in this judgment that if further relief is available, mere declaration cannot be given. In 9 Rang 459,⁶ Carr J. held that the plaintiffs being out of possession cannot merely ask for an injunction restraining the defendants from interfering with the exercise by the plaintiffs of their duties as trustees. Such a suit is barred by the Proviso to S. 42, Specific Relief Act. This judgment was considered in 9 Luck 170¹⁴ and dissented from. But we are of opinion that the principle enunciated in this judgment, so far as it relates to those persons who are entitled to sue for possession, is perfectly sound.

In 101 P R 1909¹⁷ a Division Bench of the Punjab Chief Court held that the fact that the land in dispute is in possession of tenants who hold under the defendants, in no way entitles the plaintiff, who is out of possession, to bring a declaratory suit. In such a case the plaintiff is able to seek further relief than a mere declaration of title within the purview of S. 42, Specific Relief Act. It may be remarked in passing that 15 Mad 307¹ was animadverted upon in this judgment. In 25 Mad 504,¹⁸ in a suit brought by a plaintiff against his brother and other relations for a declaration of invalidity of a will by which certain property had been bequeathed to one of the defendants, it was held by a Division Bench that the suit as lodged was barred, inasmuch as the plaintiff could have sued for partition of his share in what he claimed to be the joint family property. It was further remarked that even though the lands were in the possession of tenants entitled to continue in occupation under subsisting leases, that would be no bar to a

partition of the property among the members of the family. In 16 C W N 838¹⁹ it was observed that Courts in this country should see that plaints, which pray for declaratory decrees only, conform to the terms of S. 42, Specific Relief Act. It was further observed that an injunction is a consequential relief. In A I R 1930 All 600,²⁰ where defendants were in joint possession of the properties in the same manner as the plaintiffs, it was held that a suit for a declaration that the plaintiffs are owners and in possession of those properties and that defendants have no proprietary right in them is incompetent and the plaintiffs are bound to ask for some consequential relief by way of ejectment or injunction. We, accordingly, hold that in the circumstances brought upon the record in this case it was not open to the plaintiff to seek a mere declaration and that the suit as lodged by him is therefore not maintainable.

Further, as observed by Mukerjee J. of the Allahabad High Court in 87 I C 182,²¹ a declaratory decree should not be granted where the grant of a decree would be a useless affair. Supposing the decree of the lower Court was maintained in this case, the plaintiff will not be in a position to resume the control and management of the mosque or the buildings appertaining thereto on the basis of that declaration alone and this being so, the decree will be infructuous. Reference may also be made in this connexion to A I R 1937 Rang 427²² and 59 Mad 1052.²³ Our finding on this matter concludes the appeal, but we consider it necessary to express our opinion on the other matters also which have been raised on appeal and which we consider material to the question already discussed by us in this judgment.

Much stress was laid by the respondent on the fact that he was the founder of the trust and as such he was at liberty to make or unmake any schemes he liked and at any time he liked. In our view this posi-

16. *Alishah v. Fateh Mahomed*, (1935) 22 A I R Lah 657=159 I C 237.

17. *Abdul Gafur v. Mt. Meharunnissa*, (1909) 101 P R 1909=4 I C 856.

18. *Suryanarayana Murti v. Tamanna*, (1902) 25 Mad 504.

19. *Deokali Koer v. Kedar Nath*, (1912) 39 Cal 704=15 I C 427=16 C W N 838.

20. *Mahomed Nazir v. Nasimuddin Ahmad*, (1930) 17 A I R All 600=128 I C 227=1930 A L J 1274.

21. *Lakshmi Chand v. Liladhar*, (1925) 12 A I R All 745=87 I C 182.

22. *Purans v. T. Ammal*, (1937) 24 A I R Rang 427=175 I C 18.

23. *Desu Reddiar v. Srinivasa Reddy*, (1936) 23 A I R Mad 605=167 I C 286=59 Mad 1052=(1937) 1 M L J 41.

tion is untenable. It may be that the respondent purchased the site under the building before 1925 and in 1925 declared it to be waqf along with the structure put upon it and appointed himself a permanent mutwalli of the waqf property. But he ceased to hold this position in 1929 when he executed the document referred to above and he was empowered neither at law nor in equity to revoke the arrangement he had thus made. According to his own showing he surrendered his rights in 1929 and conferred upon the Jamiat the privilege of managing the mosque. The only position assigned to him was that of the President of the Jamiat. He was no doubt described as mutwalli in the mutation that followed the document of 1929, but that was merely to appease his vanity. The actual duties pertaining to the office of mutwalli were discharged by the Jamiat and not by the respondent. In fact it is in this sense that the secretary of the defendant corporation has stated that the respondent was an "honorary mutwalli" meaning thereby that he was a mutwalli in name and not in fact. Subsequent to the execution of this document the old buildings whatever they were, were demolished and new buildings were constructed at a great cost. Subscriptions were collected by the Jamiat on a large scale with the knowledge and the consent of the respondent and it appears that it was on account of the management being in the hands of the Jamiat that the members of the Muslim Community liberally contributed towards the building of the mosque. The construction of the mosque went on for about three years and throughout this period the respondent actually co-operated with the Jamiat in the collection of the subscriptions and in the supervision of the building operations. As soon however as the building was completed and became a lucrative concern, the respondent went back upon his previous agreement and without consulting the Jamiat or other members of the Muslim Community, who by then had acquired a real interest in the institution, executed a registered deed cancelling the previous document. In our opinion he held no such position in 1933 in relation to the mosque as would have entitled him to revoke the document of 1929. He was neither the founder of the trust as it existed then, nor its mutwalli. His unilateral act therefore was not sufficient to divest the Jamiat, or its successor the corporation, of the control

and the management that it had of the waqf property.

It has been further contended before us that the document of 1929 was legally invalid inasmuch as it was a transfer of the office of mutwalli which transfer is not permissible under the Mahomedan law. Here also we do not agree. The respondent cannot blow hot and cold in the same breath. If prior to 1929 he was both the founder and mutwalli of the institution, as founder he could settle any scheme for the management of the institution and the document of 1929 is nothing else but this. It was competent to him therefore to execute that document, surrendering the rights which he possessed as the founder and investing the Jamiat with the mutwalliship of the institution. He however could not cancel the scheme as explained above. Before we close, we may remark that we do not agree with the Subordinate Judge where he holds that the Jamiat ceased to exist when the plaintiff was removed from the office of president and the body then existing was converted into a registered corporation. The respondent's ouster from the office of president may entitle him to seek some sort of relief from the Civil Courts, but it is not enough to invalidate the registration of the Jamiat as corporation or to end its being. In the result we allow the appeal, set aside the judgment and decree of the Court below and dismiss the plaintiff-respondent's suit with costs throughout.

R.M./R.K.

Appeal allowed.

A. I. R. 1938 Lahore 877

DALIP SINGH AND BECKETT JJ.

Ismail and others — Plaintiffs —

Appellants.

v.

Mt. Sukhan and others — Defendants —
Respondents.

Second Appeal No. 1392 of 1934, Decided on 9th May 1935, from decree of Dist. Judge, Lyallpur, D/- 1st June 1934.

Punjab Colonization of Government Land Act (5 of 1912), S. 21 (a)—B who had acquired occupancy tenancy succeeded by F—F dying without heirs prescribed by S. 59, Tenancy Act—M, mother of F, L, grandmother of F, widow of B and K, step-mother of F, mutated as persons originally entitled to tenancy—M remarrying and her share mutated equally between K and L—Death of K—Collaterals of B claiming to be entitled to succeed to K's share—Collector following decision of Commissioner

purporting to sell proprietary rights to collaterals — Decision of Commissioner reversed — Proprietary rights acquired by *L* — Suit by collaterals that they were heirs of *K* — S. 21 (a) held did not apply — Invalid sale could not be ground for supporting collateral's claim to oust person in possession.

One *B* acquired occupancy tenancy rights under the Government Colonization of Land Act and was succeeded by *F*. *F* died and under S. 59, Tenancy Act, there were no heirs of *F* who were entitled to succeed to the occupancy tenancy and the occupancy tenancy would have lapsed to the Crown. As a matter of fact however, *M*, mother of *F* and *L*, grandmother of *F* and widow of *B* deceased, put in a petition claiming that they, along with *K*, step-mother of *F*, were originally entitled to succeed to the tenancy. The Assistant Colonization Officer accepted the position that these persons were the heirs and mutation was accordingly sanctioned. *M* remarried and in consequence of this remarriage, her share in the occupancy rights was mutated equally in the names of *K* and *L*. Then *K* died and the collaterals of *B* claimed that they were entitled to succeed to her share in the occupancy rights. The claim was resisted by *L*, who succeeded before the Collector but, on appeal, the Commissioner reversed that decision holding that the collaterals were entitled. Following this decision the Collector purported to sell the proprietary rights in the land to the collaterals. But possession was not given. The matter was taken before the Financial Commissioner and he reversed the decision of the Commissioner and held that *L* was entitled to succeed to the share of *K*. Thereupon the Collector cancelled or purported to cancel the sale of the proprietary rights to the collaterals and the proprietary rights were acquired by *L*. The collaterals then brought a suit claiming that they were heirs of *K* :

Held that assuming that as there was no heir to the occupancy rights of *F* therefore a grant to these ladies must be taken to be a fresh grant to them, it was impossible to make any presumption either that *B* did render service or that, if he did render such service, that there was any presumption that the grant was made to the females concerned because of those services. Hence S. 21 (a) did not apply. [P 879 C 2]

Held further that there was no force in the contention that the collaterals became the heirs of *K* or *L*. The enumeration of heirs in the *riwajiam* was not exhaustive and, in any event, even if the Court were to fall back on the personal law, the grandmother was an heir under the Mahomedan law. [P 880 C 1]

Held also that as no possession passed under the sale, a sale which was not valid could not be held to be a ground for supporting the collateral's claim to oust a person in possession from the land. [P 880 C 1]

J. N. Aggarwal, R. C. Manchanda and S. L. Puri — *for Appellants*.

Shamair Chand and Qabul Chand, and Dewan Ram Lal, Govt. Advocate — *for Respondents 1, 2 and 3 respectively*.

Dalip Singh J.—The facts of this appeal are as follows: One Bhula acquired occupancy tenancy rights under the Govern-

ment Colonization of Land Act and was succeeded by his son Nathu. Nathu died and was succeeded by his son Fateh Muhammad. Fateh Muhammad died in 1908 and, under 14 P R 1908,¹ the rule of succession applicable was S. 59, Tenancy Act. Under that Section there were no heirs of Fateh Muhammad who were entitled to succeed to the occupancy tenancy and the occupancy tenancy would have lapsed to the Crown, the guarantor, presumably. As a matter of fact however, Mt. Bhano, mother of Fateh Muhammad and Mt. Lado, grandmother of Fateh Muhammad and widow of Bhula deceased, put in a petition claiming that they, along with Mt. Imam Khatun, step-mother of Fateh Muhammad, were originally entitled to succeed to the tenancy. The mutation was put up before the Tahsildar who stated the facts and referred the matter for decision to the Assistant Colonization Officer recommending that the three ladies be jointly entered as occupancy tenants in place of the deceased Fateh Muhammad. The Assistant Colonization Officer appears to have accepted the position that these persons were the heirs and mutation was accordingly sanctioned. In 1908, Mt. Bhano remarried and, in consequence of this remarriage, her share in the occupancy rights was mutated equally in the names of Mt. Imam Khatun and Mt. Lado. Then Mt. Imam Khatun died and the present plaintiffs, the collaterals of Bhula, claimed that they were entitled to succeed to her share in the occupancy rights. The claim was resisted by Mt. Lado. Mt. Lado succeeded before the Collector but on appeal the Commissioner reversed that decision holding that the collaterals were entitled. Following this decision the Collector purported to sell the proprietary rights in the land to the collaterals. The matter was taken before the Financial Commissioner and he reversed the decision of the Commissioner and held that Mt. Lado was entitled to succeed to the share of Mt. Imam Khatun. Thereupon the Collector cancelled or purported to cancel the sale of the proprietary rights to the plaintiffs-collaterals and the proprietary rights were acquired by Mt. Lado. The plaintiffs-collaterals then brought the present suit claiming that they were the heirs of Mt. Imam Khatun.

Pending the suit Mt. Lado died and her daughters were appointed her legal repre-

¹1. *Sahibzada v. Jawaya*, (1908) 14 P R 1908=24 P W R 1908=107 P L R 1908.

sentatives. Peculiar questions therefore arise in this case which have led to varying decisions. The trial Court appears to have held that S. 21 (b), Government Colonization of Land Act, applied and therefore the heirs of Bhula, who, according to it was the original tenant, had to be sought for. Upon the question in the *riwajiam* of the enumeration of heirs it held that the enumeration was exhaustive and that as the grandmother was not mentioned as an heir in the *riwajiam* therefore Mt. Lado had no right to succeed to the occupancy tenancy rights of Fateh Muhammad. So far as the second question was concerned, about the order of the Collector cancelling the sale in favour of the plaintiffs collaterals upon the decision of the Financial Commissioner, which upset the decision of the Commissioner, it held that the Collector had no power to do so and the conveyance in favour of the plaintiffs was absolute and therefore on this ground all the plaintiffs were entitled to succeed. The Secretary of State, who was impleaded by the plaintiffs had only claimed costs but these were disallowed by the trial Court.

On appeal the learned District Judge also held that S. 21 (b) applied, but, upon the question of the Customary law and the heirs, he held that the answer in the *riwajiam* was not exhaustive and that it did not displace the ordinary rule of succession by which a grandmother would succeed either as such or as widow of the male holder by rights of representation. On the question of the sale he held that the Collector had no power to sell the land to the collaterals and that, in any event, it was not open to the Court under S. 36 to challenge the acts of the Collector, and that, whether the Collector could or could not resell the rights of Mt. Lado, he had done so and it was not open to the Court to question it. The defendants, according to him, could not be ousted because the grant by the Collector was in their favour. He therefore held that the daughters of Mt. Lado were heirs and that Mt. Lado herself was an heir to the occupancy rights of Bhula which had descended to Fateh Muhammad. He therefore accepted the appeal and dismissed the plaintiffs' suit. The plaintiffs were further ordered to pay the costs in the appeal to the Secretary of State.

The plaintiffs have come in second appeal and the learned counsel have contended first of all that Sec. 21 (a) gives the rule of

succession in the case. His argument is that, upon the death of Fateh Muhammad, there was no heir under the law at all. If therefore Mt. Bhano, Mt. Imam Khatun and Mt. Lado succeed they succeed in their own right and must be taken to have got a fresh grant from the Collector. They must therefore be taken to be females to whom the tenancy was first allotted and therefore their successor is to be nominated by the Collector either from the issue of such tenant (who are non-existent) or from the male agnates of the person on account of whose services the tenancy was allotted to them. It appears to me that this contention is without force. Assuming for a moment that it is correct that as there was no heir to the occupancy rights of Fateh Muhammad and that therefore a grant to these ladies must be taken to be a fresh grant to them—a point on which I offer no opinion—it yet remains to be seen how the plaintiffs can claim any right to succeed to the ladies. As a matter of fact they have not been nominated by the Collector. But it seems to me that the point goes much deeper. The Collector is only empowered to nominate from the male agnates of the person on account of whose services the tenancy was allotted to the females. There is nothing whatsoever to show in the first place that Bhula had rendered any services at all and the learned counsel has not been able to show that land cannot be granted in the colonies except to persons who have rendered services. Secondly, it by no means follows that the grant to the ladies was on account of services rendered by Bhula. It is perfectly clear as a matter of fact that the grant was made because the Assistant Colonization Officer considered that they were the heirs of the deceased Fateh Muhammad. It is a well-known fact that succession to such tenancies prior to 14 P R 1908¹ was governed by the ordinary rule of customary succession and it was not till 14 P R 1908¹ appeared that it was realized that the law applicable was to be found in Sec. 59, Punjab Tenancy Act. It seems to me impossible therefore to make any presumption either that Bhula did render service or that, if he did render such service, that there is any presumption that the grant was made to the females concerned because of those services. It follows from the above that Sec. 21 (a) does not apply and, in any case, by no means helps the plaintiffs in the case. It was for the plaintiffs to establish that they

had a title which had been ignored and I fail to see why when they have failed to do so they should be given a further chance of proving it or of trying to persuade the Collector that they should be nominated.

The learned counsel next argued, that if S. 21 (b) was held to apply, then the interpretation of the riwajiam by the learned District Judge was incorrect. In the first place, there is no certificate, but no doubt the rulings support the proposition that, in the case of an interpretation of a riwajiam, no certificate is necessary. I express no opinion on this point. But, on the merits, it appears to me that there is no force in the contention that the plaintiffs became the heirs of Mt. Imam Khatun or Mt. Lado. It is obvious to my mind that the enumeration of heirs in the riwajiam is not exhaustive and, in any event, even if we were to fall back on the personal law, the grandmother was conceded by the learned counsel to be an heir under the Mahomedan law and therefore this point is without force also.

The last contention was that, owing to the sale by the Collector of the proprietary rights, an absolute estate passed to the plaintiffs of which they could not be divested by any subsequent decision of the Financial Commissioner or any action of the Collector. I do not think this contention has any force because the Collector clearly purported to act under the rules by which he is empowered to convey proprietary rights to an occupancy tenant on the payment of certain sums and under certain conditions. At best, under the argument of the learned counsel, the plaintiffs are not shown to have been such tenants. It is further doubtful to my mind whether there was any completed sale at all. But, in any event, as no possession passed under the sale, a sale which was not valid cannot be held to be a ground for supporting the plaintiffs' claim to oust a person in possession from the land. I would therefore dismiss

the appeal of the plaintiffs. In the circumstances I would leave the parties to bear their own costs. The costs of the Secretary of State which were given him by the District Judge were challenged in ground 4 of the appeal before us. Not a word was said about them in the opening arguments nor in reply to the learned Government Advocate who appeared on behalf of the Secretary of State. The Secretary of State is therefore entitled to his costs in this appeal and the plaintiffs will pay those costs. These costs are assessed at Rs. 32.

I should like to point out before closing this judgment that the wording of S. 21 (a) and S. 21 (b) is far from clear and has led to many difficulties of interpretation. Even in the present case, it is not clear that either S. 21 (a) or S. 21 (b) would apply to either of the respective parties, and so it would appear as if there was no heir at all to Mt. Imam Khatun and there might have been no heir at all to Mt. Lado, if she had not acquired proprietary rights. Sec. 21 (b) speaks of an original tenant which, by definition, must be a male and therefore does not cover the case of a female presumably. S. 21 (a) is limited to the case of a female who is the first allottee and who had received the tenancy on account of services rendered by some other person or on account of her own right. At least there is nothing to show that a female cannot acquire tenancy in her own right. But when we come to determine the heir of such a female the heirs are limited to her issue or to the male agnates of a person on account of whose services the tenancy was allotted to her. If then she has acquired the tenancy in her own right and has no issue, it would appear that she had no heirs. I am not aware if this situation was contemplated. It is however a matter for the Legislature to consider.

Beckett J.—I agree.

D.S./R.K.

Appeal dismissed.

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Dated 20.11.80 E.N.D.

